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Seeking Convergence?
A Comparative Analysis of the Jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union on Seeking Asylum

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Zurich, 7 December 2021
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Abbreviations

AG	Advocate General (CJ)
CEAS	Common European Asylum System
CDDH	Steering Committee for Human Rights Council of Europe
CJ, Luxembourg Court – Court of Justice	
CJEU	Court of Justice of the European Union
CML Rev	Common Market Law Review
CoE	Council of Europe
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
EASO	European Asylum Support Office
EC	European Communities
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECommHR	European Commission of Human Rights
ECRE	European Council on Refugees and Exiles
ECtHR, Strasbourg Court – European Court of Human Rights	
EJIL	European Journal of International Law
EJML	European Journal of Migration and Law
ETS	European Treaty Series
EU	European Union
EuConstLR	European Constitutional Law Review
FRA	European Union Agency for Fundamental Rights
GC	Grand Chamber
ICJ	International Court of Justice
ICommJ	International Commission of Jurists
IJRL	International Journal of Refugee Law
LGBTI	Lesbian, Gay, Bisexual, Transgender or Transsexual and Intersex
OJ	Official Journal of the European Union
PACE	Parliamentary Assembly of the Council of Europe
RSQ	Refugee Survey Quarterly
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCCR	United Nations Conciliation Commission for Palestine
UNHCR	United Nations High Commissioner for Refugees

UNRWA	United Nations Relief and Works Agency for Palestine Refugees
U.N.T.S.	United Nations Treaty Series

Legal Acts

CAT — Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85, ratified by 171 states (Status 10 June 2021), entered into force 26 June 1987.

CJ Rules of Procedure – Rules of Procedure of the Court of Justice, 25 September 2012, OJ L 265/9, as amended, in force since 1 November 2012.

CJ Statute — Protocol (No 3) of the TFEU on the Statute of the Court of Justice of the European Union, OJ C 202/210 (consolidated version).

Dublin Convention – Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, 15 June 1990, 2144 U.N.T.S. 435, 97/C 254/01, ratified by 15 States (Status 10 June 2021), in force from 1 September 1997 to 16 March 2003.

Dublin II Regulation – 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, 18 February 2003, OJ L 50/1, in force from 17 March 2003 to 18 July 2013.

Dublin III Regulation – Regulation (EU) No 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 26 June 2013, OJ L 180/31, entered into force 19 July 2013.

ECHR — Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221, ETS no. 005, ratified by 47 States (Status 10 June 2021), entered into force 3 September 1953.

ECtHR Rules of Court – Rules of Court of the European Court of Human Rights, adopted 18 September 1959, as amended.

EU Charter — Charter of Fundamental Rights of the European Union, proclaimed 7 December 2000, signed 12 December 2007, OJ C 326/391, entered into force 1 December 2009.

EURODAC Regulation – Regulation (EU) No 603/2013 of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application

of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, 26 June 2013, OJ L 180/1, entered into force 19 July 2013.

Geneva Convention – See 1951 Refugee Convention.

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Protocol no. 7 Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedom, 22 November 1984, ETS no. 117, ratified by 44 States (Status 10 June 2021), entered into force 1 November 1988.

Protocol no. 11 Protocol no. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, 11 May 1994, ETS no. 155, ratified by 47 States (Status 10 June 2021), entered into force 1 November 1998.

Protocol no. 12 Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 2000, ETS no. 177, ratified by 20 States (Status 10 June 2021), entered into force 1 April 2005.

Protocol no. 15 Protocol no. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, 24 June 2013, CETS no. 213, ratified by 47 States (Status 10 June 2021), entry into force 1 August 2021.

Return Directive – 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, 16 December 2008, OJ L 348/98, entered into force 13 January 2009.

TEC Treaty establishing the European Community (previously Treaty establishing the European Economic Community, renamed by Treaty of Maastricht), 25 March 1957, OJ C 325/33 (consolidated version), entered into force 1 January 1958.

Temporary Protection Directive – Council Directive 2001/55/EC 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, 20 July 2001, OJ L 212/12, entered into force 7 August 2001.

TEU, Treaty of Maastricht – Treaty on European Union, 7 February 1992, OJ C 326/13, entered into force 1 November 1993.

TFEU Treaty on the Functioning of the European Union (previously TEC, renamed by Treaty of Lisbon), 25 March 1957, OJ C 326/47 (consolidated version), entered into force 1 January 1958.

Treaty of Amsterdam – Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, 2 October 1997, OJ C 340/1, entered into force 1 May 1999.

Treaty of Lisbon – Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007, OJ C 306/1, entered into force 1 December 2009.

1951 Refugee Convention – Convention relating to the status of refugees, 28 July 1951, 189 U.N.T.S. 150, ratified by 146 States (Status 10 June 2021), entered into force 22 April 1954.

1967 Protocol Protocol relating to the status of refugees, 31 January 1967, 606 U.N.T.S. 267, ratified by 147 States (Status 10 June 2021), entered into force 4 October 1967.

2003 Reception Directive – Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers, 27 January 2003, OJ L 31/18, in force from 6 February 2003 to 20 July 2015.

2004 Qualification Directive – 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, 29 April 2004, OJ L 304/12, in force from 20 October 2004 to 21 December 2013.

2005 Procedures Directive – Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and

withdrawing refugee status, 1 December 2005, OJ L 326/13, in force from 2 January 2006 to 20 July 2015.

2011 Qualification Directive – Directive 2011/95/EU of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 13 December 2011, OJ L 337/9, entered into force 22 December 2013.

2013 Procedures Directive – Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast), 26 June 2013, OJ L 180/60, entered into force 19 July 2013 and 21 July 2015.

2013 Reception Directive – Directive 2013/33/EU of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), 26 June 2013, OJ L 180/96, entered into force 19 July 2013 and 21 July 2015.

Chapter 1
Introduction

I. European Courts and Asylum Seekers

Neither the ECtHR nor the CJ was established with asylum seekers in mind. In fact, initially, the Luxembourg Court was not inclined to adjudicate on human rights, either. However, nowadays, both courts increasingly decide on human rights of asylum seekers, setting the standard for their protection within Europe.

The Strasbourg Court was the first one to adjudicate on asylum-related matters. The *Soering v. the United Kingdom* case of 1989 marks the beginnings of the court's case-law regarding the principle of non-refoulement. In this case, for the first time, the ECtHR found a violation of Article 3 of the ECHR in the context of extradition.[1] Soon, the principle was considered applicable to rejected asylum seekers who had been expelled to their countries of origin. The *Cruz Varas and Others v. Sweden* and *Vilvarajah and Others v. the United Kingdom* cases of 1991 laid down the foundations for the court's contemporary asylum jurisprudence.[2] It did not take long for asylum seekers to complain before the Strasbourg Court on other violations of their rights. They invoked detention in breach of Articles 3 and 5 of the ECHR, the lack of effective remedies in asylum and return proceedings in violation of Article 13 of the ECHR, degrading and inhuman living conditions against Article 3 of the ECHR and collective expulsions breaching Article 4 of the Protocol no. 4. As the violations of asylum seekers' rights occurring in practice are manifold, the ECtHR's asylum case-law is abundant and pertains to diverse factual and legal contexts.

The CJ gained its limited jurisdiction in regard to visas, asylum, immigration and other policies related to free movement of persons in 1999. Despite this, it gave its first preliminary ruling concerning asylum seekers only in 2009[3]—twenty years after the Soering judgment of the Strasbourg Court. The

1 ECtHR (Plenary), *Soering v. the United Kingdom*, no. 14038/88 (1989).

2 ECtHR (Plenary), *Cruz Varas and Others v. Sweden*, no. 15576/89 (1991); ECtHR, *Vilvarajah and Others v. the United Kingdom*, nos. 13163/87 etc. (1991).

3 CJ, case C-19/08 *Petrosian and Others* (2009).

same year, the limitations to the Luxembourg Court's jurisdiction were abolished. After the modest beginnings, the number of preliminary references in the field of asylum has increased. By the end of 2020 the CJ had rendered seventy-two judgments concerning the CEAS and thirty rulings regarding the Return Directive that may be applicable to prospective and rejected asylum seekers. The secondary asylum and immigration law has been also scrutinized by the Luxembourg Court outside of the preliminary ruling procedure: in response to actions for annulment[4] or actions concerning a failure to fulfil obligations under the EU law[5].

Due to their growing involvement in the field of asylum, both the ECtHR and CJ are more and more often perceived as regional asylum courts.[6] However, neither of them is in fact a judicial authority that specializes in asylum matters. No separate procedural rules have been ever established in this regard before either court. Asylum cases are considered within their general jurisdiction, only as far as the ECHR or EU law allows.[7] Moreover, the Strasbourg and Luxembourg Courts were not proclaimed as supervisors of the application and interpretation of the 1951 Refugee Convention and the 1967 Protocol that continue to be the centrepieces of refugee law. Nevertheless, both courts managed to achieve—each in its own particular way—a prominent role as guarantors of asylum seekers' rights in Europe.

II. Different Courts, Similar Questions

Both the ECtHR and CJ may be described as 'European asylum courts', but their differences should not be disregarded. The Strasbourg Court was established to ensure the observance of the ECHR and its Protocols by the Contracting Parties[8]—currently 47 states. The court's jurisdiction extends 'to all matters concerning the interpretation and application' of those acts.[9] It may be approached by states themselves (inter-state cases under Article 33 of the ECHR), but most of its workload results from individual applications. Pursuant

4 See e.g. CJ (GC), case C-133/06 *Parliament v Council* (2008).

5 See e.g. CJ (GC), case C-808/18 *Commission v Hungary* (2020).

6 See Gilbert (2004), 983; Taylor (2014) 'The CJEU…', 77; Bossuyt (2012), 203; de Baere (2013), 107; Drywood (2014), 1095; Lambert (2014), 206; Velluti (2014), 77; Costello (2015) *The Human Rights…*, 174. Cf. Myjer (2013), 419; Morano-Foadi (2015), 120-121.

7 For the limitations, see e.g. CJ (GC), case C-638/16 PPU *X and X* (2017); ECtHR (GC), *M.N. and Others v. Belgium,* no. 3599/18, dec. (2020).

8 Article 19 of the ECHR.

9 Article 32 of the ECHR.

to Article 34 of the ECHR, 'any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto', including asylum seekers whose rights were breached, may submit the application to the ECtHR.[10] Not only can the court find a violation in this regard, but it may also award just satisfaction and indicate general and/or individual measures. Final judgments of the Strasbourg Court are binding for the state that was a party in a respective case.[11] However, seeing the ECtHR as a judicial body that only delivers individual justice would be short-sighted.[12] Its judgments and decisions carry influence that goes beyond the borders of a respondent state. Nowadays, the court 'functions as an authoritative oracle of rights jurisprudence for all of Europe; supervises State compliance with the ECHR, (...) and seeks general solutions to general problems with which it is confronted'.[13]

The CJ is a part of the CJEU which is a judicial institution of the EU (which today consists of twenty-seven Member States) ensuring 'that in the interpretation and application of' the TEU and the TFEU 'the law is observed'.[14] The CJ rules on direct actions that seek *inter alia* the annulment of an EU act or a declaration that a Member State has failed to fulfil its obligations under EU law and also it decides on appeals against decisions made by the General Court.[15] However, predominantly it adjudicates on preliminary references submitted to the court under Article 267 of the TFEU. The preliminary ruling procedure aims at safeguarding legal unity within the EU. Any court or tribunal of a Member State may (or—in specified circumstances—must) request the CJ to give a ruling on the interpretation of the Treaties or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the EU, if a decision on that question is necessary to enable the court or tribunal to give judgment. The CJ's response is binding on a referring court and other courts that decide in the same dispute.[16] The preliminary rulings are said to have *erga omnes* effect as well.[17]

10 The court has also a jurisdiction under Articles 46 and 47 of the ECHR.

11 Articles 41 and 46 of the ECHR. See also ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), §209.

12 Keller and Stone Sweet (2008), 703.

13 Ibid.

14 Articles 13 and 19(1) of the TEU.

15 For the jurisdiction of the CJEU, see Articles 258-279 of the TFEU.

16 See e.g. Lenaerts, Maselis and Gutman (2014), 243; Barents (2016), 453; Broberg and Fenger (2018), 1008.

17 See e.g. Lenaerts, Maselis and Gutman (2014), 244-246; Broberg (2015), 10-11; Barents (2016), 453; Rosas (2016), 188.

The Luxembourg Court is not a human rights court.[18] It does not deal exclusively with human rights and fundamental freedoms as the ECtHR does. Most of the cases considered by the CJ do not concern the interpretation of the rights guaranteed in the EU Charter or ECHR.[19] In principle, the Luxembourg Court cannot be directly approached by individuals,[20] including asylum seekers. It is not competent to decide that the fundamental rights of the concerned person were breached, grant just satisfaction and order specific measures that put an end to the situation that gave rise to a violation in the individual case. Those tasks are left to domestic courts and tribunals. However, the CJ may significantly affect decisions given on a national level by providing domestic authorities with the binding interpretation of the EU law.[21]

Despite those differences, the two courts share some common features. In particular, all Member States of the EU are parties to the ECHR,[22] so the legal framework that the Strasbourg and Luxembourg Courts consider overlaps. For its part the ECtHR often examines whether the application of national laws that implement secondary law, or of the EU law itself, is compatible with the ECHR. In certain circumstances compliance with these laws is decisive for finding a violation of the ECHR.[23] Meanwhile, the CJ is challenged with questions that seek the correct understanding of the EU law in the face of the requirements arising from the ECHR. Moreover, it must apply the EU Charter, which was inspired by and is to be interpreted in accordance with the ECHR and the respective case-law of the Strasbourg Court.[24]

Taking that into account, it is not surprising that the courts often deal with similar questions, also in the area of asylum. The ECtHR and CJ—side by side—examine who is protected from refoulement, when and how asylum seekers can be detained, in what conditions they should be living and what remedies they should have access to. Even the factual circumstances considered by the courts are sometimes parallel, as confirmed by the cases of *M.S.S.*

18 See e.g. Rosas (2005), 167; Costello (2012) 'Human Rights…', 269; Douglas-Scott (2015), 44; Morano-Foadi (2015), 124; Krommendijk (2015), 827; Groussot, Arold Lorenz and Petursson (2016), 19. Cf. Halleskov Storgaard (2015), 211-212.

19 See e.g. FRA (2018), 51, where it is stated that in the period of 2010-2017 the EU Charter was referred to in 11% of all references.

20 Cf. Articles 263 and 265 of the TFEU.

21 See also Broberg and Fenger (2018), 1008.

22 Since 1990s ratifying the ECHR has been a prerequisite for the EU membership, see e.g. Keller and Stone Sweet (2008), 681.

23 See e.g. Article 5 of the ECHR stating that arrest or detention must be lawful and in accordance with a procedure prescribed by law.

24 See 'Explanations Relating to the Charter of Fundamental Rights' (2007). See also Scheeck (2011), 171-172.

v. Belgium and Greece and *N.S. and M.E.* (both concerning transfers of asylum seekers to Greece under the Dublin II Regulation), *Ilias and Ahmed v. Hungary* and *FMS and Others* (both regarding the situation of asylum seekers in the Röszke transit zone at the Hungarian-Serbian border) or *X and X* and *M.N. and Others v. Belgium* (both pertaining to the Belgium's refusal to issue humanitarian visas to asylum seekers at the Belgian embassy in Beirut).[25] Moreover, some asylum seekers brought their cases before both courts.[26]

The asylum jurisprudence of the two courts is thus closely intertwined. The Strasbourg and Luxembourg Courts adjudicate on the cases that have parallel factual and legal background. It is then not incongruous to expect that the two courts would answer similar questions similarly, taking a coherent stand on the scope of asylum seekers' rights in Europe.

III. Similar Answers? Convergence as a Goal

In January 2018, at the ceremony marking the opening of the judicial year of the Strasbourg Court, the President of the CJEU, Koen Lenaerts, gave a speech describing the relationship between the two courts. In his view, the ECHR, as interpreted by the ECtHR, plays a 'highly influential role (…) in the EU legal order', but the EU Charter has also already affected the jurisprudence of the Strasbourg Court.[27] President Lenaerts stressed in particular that

> (w)hilst it is true that, on occasion, our two Courts may adopt divergent approaches on a particular question, I am convinced that, as a matter of principle, both of our Courts *strive to achieve convergence* (…).[28]

What is immediately clear from this statement is that the jurisprudence of the Luxembourg and Strasbourg Courts is not fully coherent, but both courts act to bring their views closer. However, the specific words used by President Lenaerts reveal much more than they might seem to at first sight. Striving implies trying very hard to accomplish a certain desirable goal, especially for a long time or against difficulties. Thus, the above-mentioned statement may

25 ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011); CJ (GC), joined cases C-411/10 and C-493/10 *N.S.* and *M.E.* (2011); ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019); CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020); CJ (GC), case C-638/16 PPU *X and X* (2017); ECtHR (GC), *M.N. and Others v. Belgium, no. 3599/18*, dec. (2020).

26 CJ (GC), case C-357/09 PPU *Kadzoev* (2009); ECtHR, *Said Shamilovich Kadzoev v. Bulgaria*, no. 56437/07, dec. (2013).

27 Lenaerts (2018), 23.

28 Ibid., 34 (emphasis added).

be read as invoking that achieving similarity between the courts' case-law is not an easy task: it demands time, effort and persistence.

The asylum case selected by President Lenaerts[29] to illustrate that the two courts 'strive to achieve convergence'–*C.K. and Others*–is in fact a perfect example confirming that the coherency of the views of the Strasbourg and Luxembourg Courts is sought for, but it is sometimes very difficult to accomplish. The case concerned the transfer of the ill asylum seeker from Slovenia to Croatia under the Dublin III Regulation. The CJ decided, relying heavily on the ECtHR's case-law, that Article 4 of the EU Charter

> must be interpreted as meaning that even where there are no substantial grounds for believing that there are systemic flaws in the Member State responsible for examining the application for asylum, the transfer of an asylum seeker within the framework of the Dublin III Regulation can take place only in conditions which exclude the possibility that that transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment, within the meaning of that article.[30]

Thus, Dublin transfers are barred in any situation where the asylum seekers concerned may suffer–in connection with that removal–inhuman or degrading treatment in violation of Article 4 of the EU Charter (and Article 3 of the ECHR, which has the same wording, meaning and scope[31]).

The *C.K. and Others* judgment has been interpreted as finally bringing to an end the dispute between the Strasbourg and Luxembourg Courts concerning the 'systemic deficiencies' criterion introduced by the CJ in 2011. In the *N.S. and M.E.* case, the latter court stated that a Dublin transfer must be precluded when a hosting state 'cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers' in a state responsible under the Dublin II Regulation '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'.[32] Overall, that ruling was greatly inspired by the ECtHR's judgment given a few months earlier in the case of *M.S.S. v. Belgium and Greece*.[33] However, it was contended that the Strasbourg Court did not establish the

29 The speech did not consider the relationship between the Strasbourg and Luxembourg Courts in the particular area of asylum, but Lenaerts twice referred there to asylum cases: *C.K. and Others* and *Al Chodor and Others* [see Lenaerts (2018), 29, 34].

30 CJ, case C-578/16 PPU *C. K. and Others* (2017), para 96.

31 'Explanations Relating to the Charter of Fundamental Rights' (2007), 18.

32 CJ (GC), joined cases C-411/10 and C-493/10 *N.S. and M.E.* (2011), para 94.

33 ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011).

'systemic deficiencies' requirement in this case. Despite this, the CJ maintained its position in the cases of *Puid* and *Abdullahi*.[34] In 2014, in the *Tarakhel v. Switzerland* case, the ECtHR confirmed that Dublin transfers are precluded not only when systemic deficiencies in the asylum system are recognized in a state responsible under the Dublin Regulation; individual circumstances must also be taken into account.[35] Only in 2017, in the aforementioned case of *C.K. and Others*, did the Luxembourg Court align its views with the Strasbourg Court's approach.

The conclusions by President Lenaerts on the overall consonant relation between the two courts are supported by many years of interactions and collaborations that the ECtHR and CJ have already been engaged in. Since the end of the 1990s, regular joint meetings of the courts have been organized where the subjects of common interest have been discussed.[36] In 2008, Jean-Paul Costa, at the time President of the Strasbourg Court, emphasized that 'there is a clear need for a coherent and effective system of human rights protection in Europe', which requires close cooperation between the ECtHR and CJ. He noticed that the convergence between the ECHR and EU law 'has been gradually emerging' and the two courts 'are ready to cooperate in order to ensure consistency of fundamental rights protection in their respective domains'. In his view, the courts 'do more than co-operate'—they 'cross-fertilize' their jurisprudence.[37] The entry into force of the EU Charter in 2009 undoubtedly prompted the cooperation of the two courts.[38] In 2011, the presidents of the Strasbourg and Luxembourg Courts issued a joint communication in which they stated

> (i)t is (...) important to ensure that there is the greatest coherence between the Convention and the Charter insofar as the Charter contains rights which correspond to those guaranteed by the Convention. Article 52(3) of the Charter provides moreover that, in that case, the meaning and scope of the rights under the Convention and the Charter are to be the same. In that connection, a "parallel interpretation" of the two instruments could prove useful.[39]

34 CJ (GC), case C-4/11 *Puid* (2013), paras 30-31; CJ (GC), case C-394/12 *Abdullahi* (2013), para 60.

35 ECtHR (GC), *Tarakhel v. Switzerland*, no. 29217/12 (2014), §104.

36 See e.g. Douglas-Scott (2006), 655; Costa (2008), 10; Scheeck (2011), 168; Krommendijk (2015), 822-823. Cf. Callewaert (2018), 1691-1692, noting that these meetings are 'entirely informal and non-committal, producing only uncertain, non-binding results'.

37 Costa (2008), 1, 10. See also Scheeck (2011), 169.

38 See also Lenaerts (2018), 33, where he stated that the EU Charter 'invites cooperation with Strasbourg'.

39 ECtHR and CJ (2011).

Presidents Costa and Skouris emphasized that the ECtHR and CJ 'are determined to continue their dialogue on these questions which are of considerable importance for the quality and coherence of the case-law on the protection of fundamental rights in Europe'.[40] According to President Lenaerts, this dialogue is nowadays based on a comity, mutual respect and influence.[41] However, the relation between the two courts has not always been as straightforward as it is today.

IV. Comity, Mutual Respect and Influence

The courts' jurisdictions did not always overlap. At its very beginnings, the CJ refused to adjudicate on human rights.[42] Only in the *Stauder* case of 1969 did the court admit that fundamental rights are 'enshrined in the general principles of Community law and protected by the Court'.[43] Five years later, the Luxembourg Court for the first time shyly mentioned the ECHR in one of its rulings. It emphasized that 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law'.[44] In the *Johnston* case, the CJ invoked Articles 6 and 13 of the ECHR and specified that 'the principles on which that Convention is based must be taken into consideration in Community law'.[45] As of 1989,[46] the court has emphasized a 'special significance' of the ECHR.[47] The case-law of the Strasbourg Court began to be referred to in the CJ's jurisprudence.[48] Over time, the ECHR achieved the status of the external human rights instrument that is most often invoked in the case-law of the Luxembourg

40 Ibid.

41 Lenaerts (2018), 23, 34.

42 See e.g. Rosas (2005), 164.

43 CJ, case C-29/69 *Stauder* (1969), para 7.

44 CJ, case C-4/73 *Nold KG* (1974), paras 12-13. See also CJ, case C-36/75 *Rutili* (1975), para 32, where the CJ for the first time referred to the specific provisions of the ECHR.

45 CJ, case C-222/84 *Johnston* (1986), para 18.

46 See e.g. Rosas (2005), 169 fn 26; Halleskov Storgaard (2015), 216; Lenaerts (2018), 27.

47 See e.g. CJ, Opinion 2/94 (1996), para 33.

48 See Rosas (2005), 169 fn 28, stating that in three judgments of 1989 the CJ noticed the lack of relevant case-law of the ECtHR and in 1996 it referred to the individual judgment of the Strasbourg Court [CJ, case C-13/94 *P v S* (1996), para 16]. See also Lawson (1994), 235; Douglas-Scott (2006), 650-651; Scheeck (2011), 173; de Witte (2011), 24; Halleskov Storgaard (2015), 216-217.

Court.[49] The AGs are even more inclined to refer to the ECHR and ECtHR's jurisprudence than is the court itself.[50]

Since the 1990s, the importance of the ECHR has been specifically recognized in EU law.[51] Pursuant to the Maastricht Treaty, the Union was obliged to respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law.[52] In 2000, the EU Charter was proclaimed. According to its preamble, it confirms the rights as they result from the ECHR and the ECtHR's jurisprudence.[53] Articles 52(3) and 53 of the EU Charter regulate its relation with the ECHR. Under the Lisbon Treaty, Article 6 of the TEU was amended to incorporate the EU Charter into the EU legal order and enable the EU's accession to the ECHR.[54] The EU Charter is now formally recognized by the Union and has the same legal value as the Treaties. However, in 2014 the CJ concluded that the agreement on the accession of the EU to the ECHR is not compatible with the EU law.[55]

While the negotiations concerning accession have been stalled for many years,[56] the EU Charter has gained a more and more prominent role in the jurisprudence of the Luxembourg Court. The number of references to the ECHR and the ECtHR's jurisprudence has dropped, as the CJ seems to prefer to rely on the EU Charter and its own case-law.[57] A 'move towards an autonomous

49 See e.g. Douglas-Scott (2006), 650; Scheeck (2011), 174-175; de Witte (2011), 25; Krommendijk (2015), 812. See also de Búrca (2013), 173-174.

50 See e.g. Douglas-Scott (2006), 647; de Búrca (2013), 175; Krommendijk (2015), 818.

51 As a result of *inter alia* 'the "diplomatic intrusion" of the ECtHR into European affairs and its diplomatic and juridical dialogue', as stated by Scheeck (2011), 165.

52 See Article F(2) of the original text of the TEU. Cf. Article 6(3) of the TEU, which has a changed wording since the Treaty of Lisbon.

53 Lenaerts (2018), 27, stated that: 'With the entry into full legal force of the Charter, I am tempted to say that the Convention has now "a *very* special significance" in the EU legal order'.

54 The need for the accession was noticed by the Community institutions as long ago as 1979 [Lawson (1994), 219].

55 CJ (Full Court), Opinion 2/13 (2014). President of the ECtHR, Dean Spielmann, commented that it was 'a great disappointment' and that 'the onus will be on the Strasbourg Court to do what it can in cases before it to protect citizens from the negative effects of' the Opinion 2/13 [Spielmann (2015), 6]. See also CJ, Opinion 2/94 (1996), where the CJ decided that, under the Community law applicable at the time, the Community had no competence to accede to the ECHR.

56 The negotiations were resumed in 2020, but the actual accession is not expected to happen soon [see e.g. Callewaert (2018), 1686-1687].

57 See e.g. de Búrca (2013), 175-176; Douglas-Scott (2015), 42-43; Rosas (2015), 14-15; Krommendijk (2015), 813, 818, 823, 833; Groussot, Arold Lorenz and Petursson (2016), 14-16; Molnár (2019), 455-456.

interpretation of the EU fundamental rights'[58] is currently apparent, though it may be seen as conflicting with Article 52(3) of the EU Charter[59]. Under this provision,

> (i)n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Hence, the ECHR constitutes a minimum level of protection required in the EU. The Luxembourg Court cannot disregard the Convention and the case-law of the Strasbourg Court when the 'corresponding' rights provided for in the EU Charter are being considered.[60] Articles 4, 6, 7 and 19 of the EU Charter, which are particularly important for asylum seekers, undoubtedly have the same meaning and scope as the rights expressed in Articles 3, 5 and 8 of the ECHR and Article 4 of the Protocol no. 4.[61] Moreover, Article 47 is partly based on Article 13 of the ECHR and partly corresponds to Article 6 of the ECHR.[62] Thus, the ECHR as well as the jurisprudence of the Strasbourg Court must be taken into account by the CJ when it decides on human rights of asylum seekers.

No provision similar to Article 52(3) of the EU Charter is to be found in the ECHR and the Protocols thereto. The ECtHR is not required to guarantee that the rights under the ECHR have the same scope and meaning as the corresponding ones arising from the EU Charter. No general obligation is imposed on the Strasbourg Court to take into account the EU law (and the EU Charter in particular) or the CJ's jurisprudence.[63] However, the ECtHR does take them into consideration in practice. It reiterates that

58 Groussot, Arold Lorenz and Petursson (2016), 9.

59 See e.g. de Witte (2011), 34; Halleskov Storgaard (2015), 238-239; Groussot, Arold Lorenz and Petursson (2016), 15. See also Peers and Prechal (2014), 1496.

60 See e.g. CJ, case C-578/16 PPU *C.K. and Others* (2017), paras 67-68. See also Rosas (2005), 170-171; Timmermans (2011), 152; Lenaerts (2018), 26; Frese and Olsen (2019), 435.

61 'Explanations Relating to the Charter of Fundamental Rights' (2007), 33-34.

62 Ibid., 29-30. Cf. CJ, case C-348/16 *Sacko* (2017), para 39, where the court stated with regard to Article 47 of the EU Charter that 'the first and second paragraphs of that article correspond to Article 6(1) and Article 13 of the' ECHR.

63 However, the compliance with the EU law may be in certain circumstances decisive for finding a violation of the ECHR, e.g. under Article 5 of the ECHR stating that arrest or detention must be lawful and in accordance with a procedure prescribed by law. For more on EU law as the 'law of the land' in the ECtHR's case-law, see Van de Heyning and Lawson (2011), 42-45.

> the Convention and its Protocols cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law of which they form part. Account should be taken, as indicated in Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, of "any relevant rules of international law applicable in the relations between the parties", and in particular the rules concerning the international protection of human rights (...).[64]

The EU Charter has been invoked in this context.[65] Moreover, the court highlights the ECHR's character as 'a living instrument which must be interpreted in the light of present-day conditions'.[66] The Strasbourg Court keeps an eye on 'prevailing ideas, standards, values' in Europe and 'where there is a European consensus' on particular matters. In this regard, the case-law of the Luxembourg Court provides a valuable insight.[67]

The ECtHR regularly mentions the CJ's jurisprudence,[68] but less frequently than the Luxembourg Court refers to the case-law of the Strasbourg Court.[69] The latter court predominantly invokes the EU law and respective case-law of the CJ only in the 'relevant law' part of a judgment. It much less often refers to it in the operative part. The jurisprudence of the Luxembourg Court also appears in the accounts of the parties, third party observations and separate opinions of the ECtHR's judges—in particular when a revision of the case-law is expected.[70] The Strasbourg Court's hesitance to rely on the CJ's jurisprudence in the assessment of the case is said to result from the insufficient number of cases on human rights decided by the Luxembourg Court; the overlapping, but differing, jurisdiction *ratione loci;* and the fear of losing the status of the 'European senior human rights court'.[71]

64 ECtHR, *A.M. v. the Netherlands*, no. 29094/09 (2016), §77. See also ECtHR (GC), *Saadi v. the United Kingdom*, no. 13229/03 (2008), §62; ECtHR, *S.H.H. v. the United Kingdom*, no. 60367/10 (2013), §94.

65 See e.g. joint partly dissenting opinion of judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä in ECtHR (GC), *Saadi v. the United Kingdom*, no. 13229/03 (2008). See also Schabas (2017), 39.

66 See e.g. ECtHR (GC), *Mamatkulov and Askarov v. Turkey*, nos. 46827/99 and 46951/99 (2005), §121.

67 Douglas-Scott (2006), 653. See also Halleskov Storgaard (2015), 219; Lenaerts (2018), 33.

68 See e.g. Rosas (2005), 171-172; Douglas-Scott (2006), 640-641; Scheeck (2011), 178; Halleskov Storgaard (2015), 219.

69 Douglas-Scott (2006), 644.

70 Van de Heyning and Lawson (2011), 41-42. See also Frese and Olsen (2019), 449.

71 Douglas-Scott (2006), 643-644; Van de Heyning and Lawson (2011), 46-47.

Nevertheless, in the *Bosphorus v. Ireland* case, the Strasbourg Court concluded that the protection of fundamental rights in the EU can be considered 'equivalent' (thus, comparable, not identical) to that of the ECHR system. It relied on the jurisprudential developments before the CJ that had been more and more inclined to incorporate the ECHR and the ECtHR's case-law in its rulings, the following amendments to the Treaties and the adoption of the EU Charter (although it was not yet binding at the time). As 'the effectiveness of such substantive guarantees of fundamental rights depends on the mechanisms of control in place to ensure their observance', the jurisdiction of the Luxembourg Court was closely scrutinized. With regard to direct actions, the Strasbourg Court concluded that they 'constitute important control of compliance with Community norms to the indirect benefit of individuals'. The preliminary ruling procedure was considered a mean for the CJ to maintain 'its control on the application by national courts of Community law, including its fundamental rights guarantees'. The ECtHR noticed that the answer to preliminary questions 'will often be determinative of the domestic proceedings'.[72] Overall, the mechanisms of control offered by the Luxembourg Court were considered sufficient to ensure protection of fundamental rights in the EU. Thus, there is a presumption of compliance with the ECHR when the Member States of the EU implement legal obligations flowing from the EU law. It can be rebutted only when the protection of fundamental rights is manifestly deficient in practice.[73]

The *Bosphorus* judgment was considered to show a deferential approach of the ECtHR towards the CJ.[74] A similar attitude was recognized in some judgments regarding the right to a fair trial. For instance, in the case of *Coëme and Others v. Belgium*, the Strasbourg Court stated that 'in certain circumstances, refusal by a domestic court trying a case at final instance' to request a preliminary ruling 'might infringe the principle of fair trial, as set forth in Article 6 § 1 of the Convention, in particular where such refusal appears arbitrary'.[75] In the case of *Pafitis and Others v. Greece*, the Strasbourg Court decided not to take into account the duration of the preliminary ruling procedure before the CJ in its assessment of the length of the proceedings in question, because it

72 ECtHR (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, no. 45036/98 (2005), §§159-165. See also ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §338.

73 ECtHR (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, no. 45036/98 (2005), §§156, 165-166. Interestingly, the case was also adjudicated on by the CJ, see CJ, case C-84/95 *Bosphorus* (1996).

74 Douglas-Scott (2006), 638-639; Costello (2012) 'Human Rights…', 264; Lock (2015), 197.

75 ECtHR, *Coëme and Others v. Belgium*, nos. 32492/96 etc. (2000), §114.

'would adversely affect the system instituted by Article 177 of the EEC Treaty and work against the aim pursued in substance in that Article'[76] (now Article 267 of the TFEU).

This brief overview of the relation between the courts and legal systems already shows that the ECtHR and CJ acknowledge each other's existence and the overlapping legal frameworks they operate in. They consider, mention and follow the jurisprudence of their counterpart.[77] The courts abstain from initiating open conflicts with each other[78] and seek informal pathways to enable cooperation[79]. Taking that into account, it seems justified to conclude that the courts' dialogue on human rights is based on comity, mutual respect and influence.[80] However, the relationship between the two courts has been also described in less positive terms, e.g. as complicated[81] or awkward[82]. In particular, the Strasbourg and Luxembourg Courts were criticized for insufficient, incorrect or disorderly referrals to each other's case-law. No transparent method seems to be applied in this regard.[83] The courts' dialogue is sometimes unintelligible and raises doubts as to the coherence of their views.

The discussion between the ECtHR and the CJ on human rights of asylum seekers started only twelve years ago. The *Elgafaji* ruling of 2009 marks the beginnings of this discourse.[84] The case concerned the interpretation of Article 15(c) of the 2004 Qualification Directive and its relation with Article 3 of the ECHR. The *NA. v. the United Kingdom* judgment of the Strasbourg Court[85]

76 ECtHR, *Pafitis and Others v. Greece*, no. 20323/92 (1998), §95.

77 See e.g. Lock (2015), 169-172, 212-215. Cf. Frese and Olsen (2019), 457, concluding that the courts' dialogue through cross-references is still 'surprisingly sparse'.

78 See e.g. Lawson (1994), 229; Douglas-Scott (2006), 664; de Witte (2011), 25; Lock (2015), 176-177, 197, 212; Krommendijk (2015), 820.

79 For instance, through annual meetings of judges, see e.g. Douglas-Scott (2006), 655; Costa (2008), 10; Scheeck (2011), 168; Timmermans (2011), 153; Krommendijk (2015), 822-823; Callewaert (2018), 1691-1692.

80 Lenaerts (2018), 23, 34. See also Rosas (2005), 170; Van de Heyning and Lawson (2011), 37-38; Timmermans (2011), 152-153.

81 Groussot, Arold Lorenz and Petursson (2016), 10.

82 Douglas-Scott (2006), 632, see also 665, where she concluded that the relationship between the courts was 'symbiotic, incremental and even messy and unpredictable'.

83 See e.g. Douglas-Scott (2006), 651-652, 655-660; de Witte (2011), 25; Halleskov Storgaard (2015), 238-240; Krommendijk (2015), 816-817; Groussot, Arold Lorenz and Petursson (2016), 12-14.

84 CJ (GC), case C-465/07 ***Elgafaji*** (2009). One month earlier, the CJ issued its first asylum judgment [CJ, case C-19/08 ***Petrosian and Others*** (2009)], concerning the application of the Dublin II Regulation, although it was a rather technical–and not human rights-oriented–ruling.

85 ECtHR, *NA. v. the United Kingdom*, no. 25904/07 (2008).

was mentioned in this regard. The *Elgafaji* case was soon followed by the *Kadzoev* judgment concerning immigration detention where—conversely—the CJ remained silent on the requirements arising from Article 5 of the ECHR and the respective ECtHR case-law.[86] The asylum jurisprudence of the Luxembourg Court was first mentioned by the Strasbourg Court in the landmark *M.S.S. v. Belgium and Greece* judgment of 2011.[87] In the part of the ruling where the relevant international and European law was indicated, the court briefly referred to the CJ's *Elgafaji* and *Salahadin Abdulla* cases.[88] The same year, in the *Auad v. Bulgaria* case, the ECtHR went a step further: it mentioned and explained the *Kadzoev* ruling (the views of both the AG and the court) in the 'relevant law' section and referred to it in the operative part, emphasizing the similarity of the views of the two courts.[89] The cross-references to each other's asylum jurisprudence have continued ever since.[90]

The aim of this study is to establish how the relation between the Strasbourg and Luxembourg Courts has evolved in the area of asylum. It is determined whether the ECtHR and the CJ have managed to establish a clear and coherent standard of asylum seekers' protection in Europe, as well as whether they strived to converge their asylum jurisprudence and how they influenced each other in this particular area. In 2006, Douglas-Scott rightly noticed that 'the story of human rights in the EU is largely the story of interaction between the Luxembourg and Strasbourg courts'.[91] Keeping asylum seekers' rights in focus, this study seeks to ascertain whether that conclusion still holds true today.

86 CJ (GC), case C-357/09 PPU *Kadzoev* (2009). See, critically on this lack of reference, de Witte (2011), 32. See also Krommendijk (2015), 829, stating that the ECtHR's case-law was considered by the CJ in the *Kadzoev* case, but not quoted.

87 However, see ECtHR, *NA. v. the United Kingdom*, no. 25904/07 (2008), §52, where the ECtHR noticed that the preliminary questions in the *Elgafaji* case had been asked.

88 ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §86.

89 ECtHR, *Auad v. Bulgaria*, no. 46390/10 (2011), §§49–51, 128.

90 Frese and Olsen, in their study concerning judgments given by both courts in a period of 2009–2016, concluded that judicial dialogue between the ECtHR and CJ, understood as cross-references and citations between their case-law, emerged in two specific areas of law: criminal justice as well as asylum and immigration [Frese and Olsen (2019), 458, see also 450–451, 456].

91 Douglas-Scott (2006), 630.

V. Objectives, Scope, Structure and Relevance of the Study

1. Objectives and Scope

This study offers a comparative analysis of the asylum jurisprudence of the Strasbourg and Luxembourg Courts. It has three main objectives. First, it aims at giving a comprehensive overview of the ECtHR's and CJ's asylum case-law within the selected areas of interest.[92] Second, it traces the main convergences and divergences in the respective jurisprudence. Third, it seeks to determine whether and how the courts 'strive to achieve convergence', as indicated by President Lenaerts,[93] in the specific field of asylum.

The analysis conducted in this study focuses on the individual applications procedure before the Strasbourg Court and the preliminary ruling procedure before the Luxembourg Court. It covers both judgments and decisions of the Strasbourg Court given pursuant to (what is now) Article 34 of the ECHR and it extends to judgments and orders issued by the CJ within the jurisdiction established under Article 267 of the TFEU or its predecessors. Accordingly, inter-state cases adjudicated by the Strasbourg Court pursuant to Article 33 of the ECHR and direct actions brought before the Luxembourg Court are only occasionally taken into account, in order to complement the main analysis.[94] Moreover, some of the ECommHR's decisions are mentioned to show the continuity of the interpretation of human rights and the sources of an inspiration for the ECtHR.[95]

The rights of asylum seekers are considered by the Strasbourg and Luxembourg Courts predominantly within individual complaints procedure and preliminary ruling proceedings, respectively. They were never at the centre of an inter-state case brought before the ECtHR; no advisory opinions were issued in this regard. The secondary asylum law (and other rules concerning asylum seekers in the EU) was to some extent examined by the CJ in response to direct actions that sought the annulment of an EU act or a declaration that a Member State had failed to fulfil its obligations under EU law.[96] Nevertheless,

92 See these Chapter and Title, point 1.2.

93 Lenaerts (2018), 34.

94 See e.g. ECtHR (GC), *Georgia v. Russia (I),* no. 13255/07 (2014); CJ, case C-416/17 *Commission v French Republic* (2018).

95 See Dembour (2015), 224, stating that 'Current Strasbourg case law often remains rooted in decisions of the erstwhile Commission which have long been forgotten'.

96 See for the actions for annulment: CJ (GC), case C-133/06 *Parliament v Council* (2008); CJ (GC), joined cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council* (2017); and for the actions concerning a failure of a Member State to fulfil obligations:

it was done sparsely[97] and the judgments given focused on the EU's competences and the obligations of the Member States arising from the EU law rather than on human rights of asylum seekers. Preliminary rulings concerning asylum seekers are much more numerous and exhaustive in this regard. Moreover, they often have a parallel factual or legal background to individual complaints submitted to the Strasbourg Court.[98]

In this study, mostly asylum case-law of both courts—as defined below—is examined and compared. However, some non-asylum judgments, decisions and orders are also analysed where appropriate, in particular when they are invoked by the courts in asylum cases[99] or may be found applicable in subsequent cases regarding asylum seekers[100]. Hence, in total, 351 judgments and decisions of the ECtHR and 162 judgments and orders of the CJ given by the end of 2020 were examined in this study.[101]

1.1 Selected Asylum Cases

In general, within this study, a case has been identified as an 'asylum case' when it concerned presumptive, present or rejected asylum seekers.[102] Such a broad qualification was needed to allow a comprehensive analysis of the rights of persons seeking protection that did not disregard the diverse and complex factual and legal scenarios that asylum seekers often face in practice.

A case decided by the Strasbourg Court was qualified as an 'asylum case' when it pertained to violations of the applicant's rights that resulted from or

CJ, case C-256/08 *Commission v United Kingdom* (2009); CJ, case C-431/10 *Commission v Ireland* (2011); CJ, joined cases C-715/17, C-718/17 and C-719/17 *Commission v Poland and Others* (2020); CJ (GC), case C-808/18 *Commission v Hungary* (2020).

97 See also Thym (2019), 172-173, stating that 'the relative insignificance of infringement proceedings in the field of migration is remarkable'.

98 See also this Chapter, Title II.

99 See e.g. CJ, case C-528/15 *Al Chodor and Others* (2017), para 38, referring to ECtHR (GC), *Del Río Prada v. Spain,* no. 42750/09 (2013), regarding the detention of a Spanish citizen; ECtHR (Plenary), *Soering v. the United Kingdom*, no. 14038/88 (1989), which is not an asylum case, but it was referred to in an abundant number of judgments and decisions regarding asylum seekers.

100 See e.g. ECtHR, *Silver and Others v. the United Kingdom,* nos. 5947/72 etc. (1983), §116; ECtHR, *Khan v. the United Kingdom*, no. 35394/97 (2000), §§44-47, in regard to the examination of an independence of a non-judicial authority within the meaning of Article 13 of the ECHR.

101 In addition, one judgment of 2021 was analysed: ECtHR, *D.A. and Others v. Poland*, no. 51246/17 (2021), but only with regard to interim measures that had been indicated in 2017.

102 Accordingly, cases concerning rights of recognized refugees were not qualified as 'asylum' ones. The study focuses on the rights of persons who seek protection rather than those who have already found it.

were to some extent connected with the fact that this person was seeking (or intended to seek) protection against refoulement in a Contracting State. Most of the examined cases concerned rejected asylum seekers who had been or could have been removed to another country. In regard to detention, a case was identified as an 'asylum case' when an asylum seeker was detained during or in connection with the asylum-related proceedings (i.e. within the asylum, Dublin, expulsion or extradition procedure or prior to the removal). Accordingly, out of 351 judgments and decisions of the ECtHR considered in this study, 284 were identified as asylum cases (81%).

A case decided by the Luxembourg Court was recognized in this study as an 'asylum case' when it was examined within preliminary ruling proceedings and considered the validity or interpretation of the instruments creating the CEAS, i.e. the Dublin III Regulation, the 2011 Qualification Directive, the 2013 Procedures Directive, the 2013 Reception Directive or their predecessors.[103] Despite the fact that the Return Directive is not perceived as a part of the CEAS, it may be fully applicable to prospective and rejected asylum seekers.[104] In consequence, the CJ's judgments and orders regarding the validity or interpretation of the Return Directive are considered, for the purposes of this study, to have been issued in 'asylum cases' as well. Accordingly, out of 163 judgments and orders of the Luxembourg Court 109 were qualified as constituting its asylum jurisprudence (66.9%).

While all asylum judgments of the Luxembourg Court given by the end of 2020 were examined for the purposes of this study, not all asylum cases of the Strasbourg Court were taken into account. The asylum jurisprudence of the ECtHR is vast and abundant, but the violations of asylum seekers' rights invoked before the court and its responses are often similar and repetitive. Thus, analysing every single asylum judgment and decision given by the Strasbourg Court was considered unnecessary for the determination of the standard of protection offered by this court to asylum seekers. Accordingly, this study covers all groundbreaking asylum cases decided by the Grand Chamber and numerous judgments and decisions given by other formations of the court, that were perceived as most relevant. The importance of the particular cases was determined on the basis of the attention that they have received in the ECtHR's jurisprudence itself (for instance through reoccurring cross-references) as well as in the scholarship and practice.

103 The Dublin II Regulation, the 2004 Qualification Directive, the 2005 Procedures Directive, the 2003 Reception Directive.

104 See in particular Recital 9 in the preamble to the Directive.

1.2 Selected Areas of Interest

The analysis in this study is limited to three areas of interest: protection against refoulement, detention and remedies. Those are the areas in which asylum seekers seem to be encountering the greatest difficulties with having their rights respected in practice, as those subject matters most often occur in asylum cases adjudicated by both European asylum courts.

Within 191 asylum judgments of the Strasbourg Court decided on the merits analysed in this study,[105] applicants most often invoked a violation of Article 3 of the ECHR resulting from their enforced or forthcoming removal (128 cases, 67%). Second most often, they complained under Article 5 of the ECHR on their detention (98 cases, 51.3%). Next, they claimed that their right to an effective remedy guaranteed in Article 13 of the ECHR was breached (92 cases, 48.1%). Moreover, in 46 judgments asylum seekers complained about conditions of their detention (24%). In 42 cases (21.9%) they invoked Article 8 of the ECHR (a right to family and private life) and in 40 cases Article 2 of the ECHR (a right to life) was mentioned (20.9%). Asylum seekers relied in their applications on other provisions of the ECHR and the Protocols thereto as well (e.g. Articles 6 and 14 of the ECHR, Article 4 of the Protocol no. 4 and Article 1 of the Protocol no. 7), albeit more rarely.[106]

In asylum cases, the ECtHR most often found a violation of Article 5 of the ECHR (86 out of 191 cases, 45%). In 72 cases it concluded that a removal of an asylum seeker did or would result in a treatment contrary to Article 3 (37.6%). In 43 cases the right to an effective remedy was considered breached (22.5%), while in 28 cases Article 3 was found to be violated due to detention conditions (14.6%). A right to life and a right to private and family life was breached very rarely. Thus, it is clear that the prohibition of torture or inhuman or degrading treatment or punishment provided for in Article 3, the right to liberty and security pursuant to Article 5 and the right to an effective remedy guaranteed

105 In fact, 197 asylum judgments decided on the merits were considered in this study. However, in cases *of F.G. v. Sweden*, *Ilias and Ahmed v. Hungary*, ***Mamatkulov and Askarov v. Turkey*** and *N.D. and N.T. v. Spain* both the judgments of the Chamber and the Grand Chamber were examined. For the statistical purposes, they were counted once and violations were determined as decided by the Grand Chamber. Moreover, the cases of *M.E. v. Sweden* and *W.H. v. Sweden*, where the Chamber had decided on the merits, but the Grand Chamber decided to strike the case from its list of cases, were also not taken into account in the statistics.

106 See also Buchinger and Steinkellner (2010), 424, who claimed that Articles 3 and 8 of the ECHR were most often invoked by immigrants and asylum seekers in the ECtHR despite the fact that asylum procedures may entail violations of other provisions of the ECHR as well.

in Article 13 are most often invoked by asylum seekers before the Strasbourg Court and subsequently found to have been violated.

Article 2 of the ECHR is invoked by asylum seekers quite frequently, but most often it is mentioned in one breath with Article 3. In fact, in asylum cases, the ECtHR often emphasizes that the issues raised under Articles 2 and 3 of the ECHR are indissociable and examines them together.[107] It either finds a violation of both provisions (albeit rarely in practice[108]) or decides that neither of them has been breached[109]. The court may also decide that it is 'more appropriate to deal with the complaint under Article 2 in the context of its examination of the related complaint under Article 3'[110] or even that the application should be examined from the standpoint of Article 3 of the Convention alone[111]. Taking that into account, the analysis in this study concentrates on Article 3 of the ECHR, but the right to life of asylum seekers is also taken into consideration where appropriate.

A violation of Article 8 of the ECHR is indicated by asylum seekers in two contexts. First, they state that Article 8 was or would be violated on account of their removal as they have already established a family life in a hosting country.[112] However, those complaints do not result from and are not connected with the fact that the applicant was or is seeking asylum, thus, they are not examined in the study. Second, Article 8 is mentioned in a detention context,[113] next to Articles 3 and 5.

Occasionally, asylum seekers invoke the right to a fair trial (Article 6 of the ECHR) in their applications (19 cases, 10%). However, the Strasbourg Court

107 See e.g. ECtHR, *F.H. v. Sweden,* no. 32621/06 (2009), §72; ECtHR, K.A.B. *v. Sweden,* no. 886/11 (2013), §67.

108 See e.g. ECtHR, *Bader and Kanbor v. Sweden,* no. 13284/04 (2005), §48; ECtHR (GC), *F.G. v. Sweden,* no. 43611/11 (2016), §158; ECtHR, *S.K. v. Russia,* no. 52722/15 (2017), §63; ECtHR, *O.D. v. Bulgaria,* no. 34016/18 (2019), §56.

109 See e.g. ECtHR, *F.H. v. Sweden,* no. 32621/06 (2009), §105; ECtHR, *T.K.H. v. Sweden,* no. 1231/11 (2013), §52; ECtHR, *Tatar v. Switzerland,* no. 65692/12 (2015), §54.

110 ECtHR, *Said v. the Netherlands,* no. 2345/02 (2005), §37. See also ECtHR, *NA. v. the United Kingdom,* no. 25904/07 (2008), §95. In both judgments the court found a violation of Article 3 of the ECHR and concluded that 'no separate issue arises under Article 2 of the Convention'. See also ECtHR, *H. and B. v. the United Kingdom,* nos. 70073/10 and 44539/11 (2013), §64, and ECtHR, *Yoh-Ekale Mwanje v. Belgium,* no. 10486/10 (2011), §§85-86. In the latter case, the court found no violation of Article 3 and afterwards concluded: 'Having regard to that conclusion and the circumstances of the case, the Court considers that there is no need to examine the applicant's complaint under Article 2'.

111 See e.g. ECtHR, *Charahili v. Turkey,* no. 46605/07 (2010), §51.

112 See e.g. ECtHR, *Aoulmi v. France,* no. 50278/99 (2006), §§68-91. See also McAdam (2007), 154-155.

113 See e.g. ECtHR, *Mublilanzila Mayeka and Kaniki Mitunga v. Belgium,* no. 13178/03 (2006), §§72-91.

refuses to apply this provision in relation to asylum and immigration cases as 'decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6§1'.[114] Thus, asylum seekers' complaints in this regard are most often considered inadmissible.[115]

In the preliminary ruling procedure before the CJ, national courts most often referred to Article 47 of the EU Charter (a right to an effective remedy and to a fair trial, 17 out of 102 asylum cases, 16.6%).[116] Next, they mentioned Articles 4 (the prohibition of torture or inhuman or degrading treatment or punishment, 11 cases, 10.7%), 18 (a right to asylum, 10 cases, 9.8%), 19(2) (the principle of non-refoulement, 8 cases, 7.8%), 41 (a right to good administration, 5 cases, 4.9%), 6 (a right to liberty and security, 4 cases, 3.9%), 7 (a respect for private and family life, 4 cases, 3.9%) and 1 (a respect for human dignity, 4 cases, 3.9%). Meanwhile, in the reasoning of its asylum judgments the Luxembourg Court most often invoked Articles 47 (28 cases, 27.4%), 18 (17 cases, 16.6%), 4 (16 cases, 15.6%), 19(2) (14 cases, 13.7%), 1 (10 cases, 9.8%), 6 (7 cases, 6.8%), 7 (7 cases, 6.8%) and 41 (6 cases, 5.8%) of the EU Charter.

It is also interesting to examine whether the referring courts and the CJ relied on the ECHR and the case-law of the ECtHR in their preliminary references and rulings.[117] Domestic courts mentioned the provisions of the Convention in 15 cases (14.7%), most often Article 3,[118] but Articles 5, 6, 8, 9 and 13 also gained some attention. The Luxembourg Court decided to include the ECHR in the reasoning of its judgments in 28 asylum cases (27.4%), most often by referring to Articles 3 (12 cases) and 13 (6 cases). Article 5 of the ECHR was mentioned in 3 cases.

The above-mentioned statistics offer some insight into the subject matter of asylum cases adjudicated before the CJ. The referring courts and the Luxembourg Court most often referred to the rights to an effective remedy and to a fair trial (Article 47 of the EU Charter and Article 13 of the ECHR, occasionally in conjunction with the right to good administration, Article 41 of the EU Charter). The right to asylum (Article 18 of the EU Charter) was also frequently mentioned as was the prohibition of torture or inhuman or degrading

114 ECtHR (GC), *Maaouia v. France*, no. 39652/98 (2000), §40.

115 Cf. ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09 (2012).

116 The scope of reliance on the particular provisions of the EU Charter or ECHR by national courts has been determined on the basis of the CJ's description of the preliminary references provided for in 102 asylum preliminary rulings considered in this study.

117 For more see Chapter 7, Title III, point 1.2.

118 In seven cases, see e.g. CJ, case C-578/16 PPU *C.K. and Others* (2017), para 46.

treatment or punishment and the principle of non-refoulement [Articles 4 and 19(2) of the EU Charter and Article 3 of the ECHR]. Lastly, the analysed case-law concerned the right to liberty and security and to private and family life (Articles 6 and 7 of the EU Charter and Articles 5 and 8 of the ECHR). Respect for human dignity (Article 1 of the EU Charter) was also quite often invoked in diverse factual and legal contexts.

However, those data give only a partial picture. The EU Charter was relied on in 34 preliminary questions referred to the CJ in asylum cases (33.3%)[119] and the Luxembourg Court included its provisions in the reasoning of 69 asylum rulings (67.6%)[120]. Despite this, some asylum cases did concern fundamental rights, but neither the EU Charter nor the ECHR was mentioned there; they were decided solely on a basis of the secondary asylum law. Hence, in order to determine the subject matter of all asylum judgments given by the Luxembourg Court, statistical information about the merits of preliminary rulings was also gathered for the purposes of this study. The CJ most often provided national courts with the interpretation of the EU law regarding the qualification for international protection and the principle of non-refoulement (33 cases, 32.3%), remedies available to asylum seekers (31 cases, 30.4%) and detention of foreigners (20 cases, 19.6%).

Hence, it must be concluded that the two courts adjudicate predominantly on similar asylum-related issues:

— protection against refoulement (Article 3 of the ECHR as well as Articles 4 and 19(2) of the EU Charter),
— detention of asylum seekers (Article 5 of the ECHR and Article 6 of the EU Charter) and
— remedies in asylum-related proceedings (Article 13 of the ECHR, Article 47(1) of the EU Charter).

Accordingly, the ECtHR's and CJ's asylum case-law concerning protection, detention and remedies has been selected for the comprehensive examination in this study.

119 This number is very high in comparison to general statistics. According to the FRA, in the period of 2010–2017 'the Charter was mentioned in 11% of all references. Over the years, the percentage of references mentioning the Charter ranged from 6% in 2010 to 17% in 2012' [FRA (2018), 51]. The high scope of reliance on the EU Charter in asylum preliminary references proves that rights of asylum seekers are considered to be fundamental rights by referring courts. For the reliance on the EU Charter in asylum cases decided by national authorities, see FRA (2019), 45.

120 With a different scope of analysis: from general mention that the Charter is applicable in the case to the extended examination of the specific provisions of the Charter. For differing roles that the EU Charter may play in the CJ's case-law, see Rosas (2015), 13.

2. Structure

Chapters 2 and 3 serve as the introduction to the comparative analysis of the asylum case-law provided for in chapters 4-6. They offer an insight into the role of the ECtHR and CJ as the European asylum courts.

Chapter 2 explains why, when and how the Strasbourg and Luxembourg Courts started to engage in asylum matters in Europe. Firstly, the supervisory mechanisms provided for in the 1951 Refugee Convention and the 1967 Protocol are described and assessed. Their deficiencies prompted the ECtHR and CJ to adjudicate on the human rights of asylum seekers. Secondly, the chapter depicts the beginnings of the courts' jurisdiction and jurisprudence concerning asylum seekers. Finally, the dissimilar relationship of the two courts with international refugee law is examined, enabling understanding of the courts' role in the supervision of the 1951 Refugee Convention and the Protocol thereto.

Chapter 3 pertains to procedural issues. As the comprehensive analysis of the proceedings before both courts is beyond the scope of this study, the chapter concentrates on those aspects of the procedure that particularly affect asylum seekers or are especially important from their perspective: the access to the court, the urgency of the proceedings and the courts' sources of information. The chapter aims at determining to what extent the Strasbourg and Luxembourg Courts take into consideration the unusual situation of asylum seekers and the special character of asylum cases while they are applying their procedural rules.

In chapters 4-6, the asylum jurisprudence concerning three selected areas of interest–protection, detention and remedies–is examined and juxtaposed in order to determine whether the rights of asylum seekers are interpreted in a convergent manner by the Strasbourg and Luxembourg Courts.

Chapter 4 focuses on the principle of non-refoulement arising from Article 3 of the ECHR, Articles 4 and 19(2) of the EU Charter and secondary asylum law. It first depicts when a protection against refoulement must be granted according to each court in particular circumstances of asylum claims based on religion, sexual orientation, general situation of violence, health and living conditions. Second, it examines some of the measures applied by states to deter asylum seekers and deny them protection: refusing humanitarian visas, shifting responsibility for asylum seekers to other states or entities, and excluding some persons from protection due to their criminal activity or national security considerations.

Chapter 5 concerns immigration detention and focuses on the jurisprudence as regards Article 5 of the ECHR, Article 6 of the EU Charter and the specific rules arising from secondary asylum law. It scrutinizes the requirements

that detention of asylum seekers must satisfy to be in compliance with the ECHR and EU law, in particular its lawfulness, proportionality and necessity, permissible grounds, duration and conditions, as well as procedural safeguards.

Chapter 6 pertains to remedies in asylum-related proceedings. Hence, the case-law regarding Article 13 of the ECHR and Article 47(1) of the EU Charter together with secondary asylum law are examined in this chapter. The three requirements arising from the right to an effective remedy are given attention: the criteria of a prompt response, an independent and rigorous scrutiny and a suspensive effect.

Deriving them from the analysis conducted in chapters 4–6, chapter 7 provides concluding observations on the scope of the convergence achieved by the ECtHR and CJ in their asylum jurisprudence. Next, it explains the methods used by both courts to gain the coherency of their views in asylum cases. In particular, their employment of direct, indirect and implicit cross-references to each other's case-law is scrutinized. Lastly, the chapter answers the question of whether the convergence of the asylum jurisprudence of the Strasbourg and Luxembourg Courts is really needed.

3. State of the Art

Rights of asylum seekers have aroused increased interest in the academic literature in recent years. Various comprehensive studies concerning the international and EU law applicable to asylum seekers staying in Europe have been published, but the asylum jurisprudence of the ECtHR and CJ was not their primary focus.[121] The asylum case-law of the two courts was also given some attention in the broader comparative analyses concerning the areas of interest selected for the examination in this study.[122] While the asylum judgments and decisions of the Strasbourg Court have been exhaustively compared and contrasted with the jurisprudence of other human rights institutions,[123] the

121 See e.g. Boeles *et al.* (2014); Peers, Steve; Moreno-Lax, Violeta; Garlick, Madeline; Guild, Elspeth (eds) (2015) *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition, Volume 3: EU Asylum Law* (Brill Nijhoff); Cherubini, Francesco (2015) *Asylum Law in the European Union* (Routledge); Hailbronner, Kay, and Thym, Daniel (eds) (2016) *EU Immigration and Asylum Law: A Commentary* (2nd edition, C.H. Beck).

122 See e.g. Reneman (2014) *EU Asylum Procedures*... and Baldinger (2015), where the standards arising from the right to an effective remedy under different legal instruments (*inter alia* the ECHR, EU law, CAT, 1951 Refugee Convention) were compared.

123 See e.g. Dembour (2015), comparing the jurisprudence of the ECtHR and Inter-American Court of Human Rights in the fields of migration and asylum; Hamdan (2016) and de Weck (2017), both juxtaposing the refoulement cases of the ECtHR and the UN Committee against Torture.

comparative studies that concentrate on the case-law of the ECtHR and CJ in the field of asylum are in fact rare. They either are of limited scope or do not encompass the recent cases—especially those of the Luxembourg Court, whose asylum jurisprudence has significantly grown since the 2015 refugee crisis.[124]

The task of comparing and contrasting the courts' asylum case-law was most frequently taken up in the context of the particular judgments issued by one of the courts. For instance, the cases of *M.S.S. v. Belgium and Greece* and *N.S. and M.E.* (and their successors) provoked especially great number of comments in the legal scholarship.[125] Some comparative studies focusing on the specific subject matters are also available. For instance, Cathryn Costello scrutinized the jurisprudence of both courts in regard to immigration detention, Sílvia Morgades-Gil examined the courts' approach to the right to an effective remedy in Dublin proceedings and Andrea Mrazova juxtaposed the requirements to substantiate asylum claims based on sexual orientation arising from the case-law of the Strasbourg and Luxembourg Courts.[126]

Among the studies that offer broader insight into the courts' asylum case-law, the 2014 article of Francesca Ippolito and Samantha Velluti titled 'The Relationship Between the CJEU and the ECtHR: The Case of Asylum'[127] and the following article 'Migration and Human Rights: The European Approach' of Sonia Morano-Foadi must be highlighted. The authors provided comparative analyses of the courts' asylum case-law, exploring the differences between their approach and their mutual influence. However, at the time of writing of both articles the CJ's asylum jurisprudence was still rather scanty; thus, the articles cover only a limited number of issues. Another approach to the comparative analysis of the asylum jurisprudence of the two courts was taken in the 2019 study *Demanding Rights: Europe's Supranational Courts and the Dilemma of Migrant Vulnerability*. Moritz Baumgärtel evaluated there the effectiveness of the eight key judgments given before 2015 by the ECtHR and CJ.

One study deserves particular attention. The jurisprudence of the Strasbourg and Luxembourg Courts concerning asylum seekers and migrants is

124 Since 2016 the CJ has given 59 asylum rulings. Those judgments constitute 57.8% of the asylum case-law of the court (out of 102 asylum judgments examined in this study).

125 See e.g. Costello (2012) 'Courting Access…'; Lenart (2012); Battjes and Brouwer (2015); Lübbe (2015); Morgades-Gil (2015); Vicini (2015); Vedsted-Hansen (2016) 'Reception Conditions…'; Pergantis (2019).

126 Costello (2012) 'Human Rights…' (examining also the case-law of the UN Human Rights Committee); Morgades-Gil (2017) 'The Right…'; Mrazova (2019).

127 Velluti further examined the role of the Strasbourg and Luxembourg Courts in regard to the protection of asylum seekers' rights in Chapter 4 of her 2014 book *Reforming the Common European Asylum System: Legislative Developments and Judicial Activism of the European Courts*.

excelently juxtaposed in Cathryn Costello's 2015 monograph, *The Human Rights of Migrants and Refugees in European Law*. The work concentrates on four 'substantive flashpoints' where—according to the author—protection under the EU law and the ECHR overlaps: family life, defining protection, access to protection and immigration detention. Costello sought to determine the standards arising from the respective case-law and showed the interactions of the two courts in the field of migration and asylum. While the scope of the present study is similar, significant differences may be also identified. First, the study at hand concentrates on asylum seekers, not on a broader category of 'admission seekers' as put forth by Costello; thus it seeks to offer a more detailed analysis of the asylum case-law of both courts. Secondly, the right to an effective remedy, rather than the right to a family life, is explored here. Thirdly, the work at hand covers the most recent jurisprudence—up to the end of 2020—including the cases decided after the refugee crisis of 2015. Lastly, it has different objectives than Costello had in her monograph. Costello stressed in her book that 'the central question addressed is how the EU has incorporated and transformed human rights norms concerning admission-seekers, focusing in particular on those of the ECHR and international refugee law. A process of mutual influence is revealed. While the main concern is to identify when and why it is appropriate for EU standards to exceed the Strasbourg minimum, EU law may in turn influence Strasbourg developments'.[128] Thus, her primary aim was not to exhaustively recognize and analyse the convergences and divergences in the courts' case-law within the selected areas of interest, as the primary aim is in this study. Moreover, in Costello's monograph the mutual influence of the two courts was 'revealed' but was not explored in detail. In contrast, the relationship between two European asylum courts is scrutinized in the present study.

VI. Key Terms

Within this study, the term 'asylum seeker' is understood broadly, as any person who seeks protection against refoulement in a hosting state, irrespective of the reasons that led him or her to flee from a country of origin. Presumptive or prospective asylum seekers are persons who intend to apply for this protection. Rejected asylum seekers are those who asked for protection but were refused.

As this study focuses on the rights of asylum seekers, not of recognized refugees (or beneficiaries of international protection, as defined in the EU

128 Costello (2015) *The Human Rights...*, 12.

law[129]), the term 'refugee' is used only occasionally and predominantly in regard to international refugee law. The term 'asylum seeker' was not mentioned in the 1951 Refugee Convention or the Protocol thereto; international refugee law expressly pertains only to 'refugees'.

The term 'foreigner' is employed to invoke any person that is not a citizen of a hosting state. It includes asylum seekers, but also migrants who do or do not hold a residence permit.[130] A 'third-country national' is understood as a person that is not an EU citizen.[131]

In general statements concerning asylum seekers, masculine third-person, singular personal pronouns ('he') are used in order to ensure clarity of the argument. However, when the examined case concerned a woman, the fact is expressly indicated.

The principle of non-refoulement is invoked throughout the study with a broad meaning that takes into account different sources that this principle stems from. In particular, pursuant to Article 33(1) of the 1951 Refugee Convention, a refugee cannot be expelled or returned '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 ECtHR reiterates that an expulsion, extradition or any other removal to a state where substantial grounds have been shown for believing that the person concerned would face a real risk of being subjected to treatment contrary to Article 3 of the ECHR, is prohibited.[132] Article 4 of the EU Charter has the identical wording, meaning and scope as Article 3 of the ECHR.[133] Additionally, the principle of non-refoulement has been outright inscribed into the EU Charter. Pursuant to Article 19(2), no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

In its case-law regarding the principle of non-refoulement, the Strasbourg Court predominantly uses the terms 'expulsion' (or 'deportation') or 'extradition', while under the EU law the term 'return' is employed.[134] In this study, the differentiation is maintained, but the 'expulsion', 'deportation' and 'return' are considered to be parallel terms. The term 'transfer' is used

129 See Article 2(b) of the 2011 Qualification Directive.

130 'Residence permit' as defined in Article 2(m) of the 2011 Qualification Directive.

131 See also Article 3(1) of the Return Directive and Article 2(a) of the Dublin III Regulation.

132 See e.g. ECtHR (GC), *F.G. v. Sweden,* no. 43611/11 (2016), §111.

133 'Explanations Relating to the Charter of Fundamental Rights' (2007), 18.

134 For a definition of 'return', see Article 3(3) of the Return Directive.

only in the context given by the Dublin Regulations. Expulsions, deportations, extraditions, returns and transfers are all understood within this study as 'removals'.[135]

'Asylum-related proceedings' are understood as proceedings regarding removals (in particular expulsions and Dublin transfers) and refugee status determination; thus, they include return, Dublin and asylum proceedings.

International refugee law encompasses the 1951 Refugee Convention and the 1967 Protocol thereto. Secondary asylum law (also EU asylum law) is understood here as including: the 2004 and 2011 Qualification Directives, the 2005 and 2013 Procedures Directives, the 2003 and 2013 Reception Directive and the Dublin II and III Regulations.[136]

Lastly, the Strasbourg and Luxembourg Courts are described in this study as 'European asylum courts'. This denomination appeals to the increasing asylum case-load of both courts. It is also meant to signify the special role as guarantors of asylum seekers' rights in Europe that the ECtHR and CJ have gained in recent years.

135 Cf. Article 3(5) of the Return Directive.

136 The CEAS includes also the Temporary Protection Directive and the EURODAC Regulation, but those legal acts were not considered by the CJ beyond occasional mentions, thus they are not examined in this study.

Chapter 2
International Refugee Law and the Emergence of the European Asylum Courts

I. Introduction

The ECHR and EU law as interpreted by the ECtHR and CJ are the main focus of this study, but international refugee law should not be lost from sight. The 1951 Refugee Convention and the 1967 Protocol are the key instruments of contemporary refugee law. They determine who a refugee is and what rights belong to him. They are widely recognized around the world, having 146 and 147 Contracting Parties respectively. In Europe, most of the Member States of the CoE[137] and all of the Member States of the EU are their parties. Thus, the majority of asylum cases considered by the Strasbourg and Luxembourg Courts are somehow intertwined with international refugee law. The legal frameworks stemming from the 1951 Refugee Convention, ECHR and EU law are overlapping. In particular, the principle of non-refoulement–a centrepiece of the global refugee protection regime–originates from international refugee law, but it was further developed under Article 3 of the ECHR and Articles 4 and 19(2) of the EU Charter. Moreover, the deficiencies of the supervisory mechanism established under the 1951 Refugee Convention and the Protocol thereto prompted asylum seekers to seek protection, and national authorities to seek guidance, outside of the international refugee law framework. In Europe, the ECtHR and CJ had to come into play. Nowadays, the Strasbourg and Luxembourg Courts are increasingly perceived as the European asylum courts[138] that not only shape human rights of asylum seekers but also contribute to the common understanding of refugee law in Europe and beyond.

137 Except Andorra and San Marino.

138 See Gilbert (2004), 983; Taylor (2014) 'The CJEU…', 77; Bossuyt (2012), 203; de Baere (2013), 107; Drywood (2014), 1095; Lambert (2014), 206; Velluti (2014), 77; Costello (2015) *The Human Rights…*, 174. Cf. Myjer (2013), 419; Morano-Foadi (2015), 120–121.

In this chapter, it is explained why, when and how the ECtHR and CJ started to engage in asylum matters in Europe. Firstly, the supervisory mechanisms provided for in the 1951 Refugee Convention and the 1967 Protocol are described and assessed. No international asylum court was ever established, leaving a clear gap in the refugee protection regime and urging the Strasbourg and Luxembourg Courts to step in. Secondly, the chapter depicts the beginnings of the two courts' jurisdiction and jurisprudence concerning asylum seekers. Neither of them was created with asylum seekers in mind; thus it took some time before they adjudicated on their first asylum cases. The dissimilar relationship of the ECtHR and CJ with international refugee law is examined as well, enabling understanding of the courts' role in the supervision of the 1951 Refugee Convention and the Protocol thereto.

II. Supervision under International Refugee Law

The 1951 Refugee Convention was one of the first human rights treaties adopted by the UN.[139] On the one hand, its early adoption shows how important refugee protection was at that time on an international level. On the other hand, it greatly influenced the monitoring system of the 1951 Refugee Convention. In the early 1950s, the idea of interstate accountability in cases of human rights violations was too innovative to be accepted globally.[140] Soon that changed; however, at that point the supervisory mechanism of international refugee law was already formed and states lacked the political will to strengthen it, despite its obvious flaws. In consequence, the monitoring system offered by the 1951 Refugee Convention and the 1967 Protocol is traditional and rudimentary, especially compared to the human rights protection regime which has since been shaped.[141] In particular, asylum seekers and refugees do not have a right of individual complaint to an international judicial or quasi-judicial authority in the event of the violation of their rights under those treaties. Moreover, no international court or tribunal provides for an authoritative and binding interpretation of the 1951 Refugee Convention and the 1967 Protocol which would ensure uniformity in its application among the Contracting States.

The application of the 1951 Refugee Convention and the Protocol thereto is monitored by two institutions: the UNHCR and the ICJ. In this subchapter, firstly, the UNHCR's supervisory role is analysed (1). Secondly, the ICJ's settling

139 Hathaway (2001), 5.

140 Ibid.

141 Chetail (2014), 62.

function is briefly looked into (2). Finally, the reasons for the lack of a comprehensive judicial or quasi-judicial monitoring system within the international refugee regime are scrutinized (3).

1. The UNHCR

Among other roles, the UNHCR has a responsibility to supervise the application of the provisions of the 1951 Refugee Convention and the 1967 Protocol. The Contracting States should co-operate with the UNHCR in the exercise of its functions and, in particular, they should facilitate its monitoring duty.[142] States generally accept the UNHCR's protection role (including the supervisory one) and do not perceive its activities as interference into their internal affairs.[143] The UNHCR's responsibility to supervise international refugee law is thus considered 'straightforward, well established, and uncontested'.[144]

Nevertheless, the UNHCR's performance of its supervisory functions has been subject to criticism for many years. First of all, the UNHCR's powers are unsatisfactory. It can only advise, persuade, encourage; it cannot enforce compliance with international refugee law.[145] Moreover, the UNHCR's independence and objectivity are contested. To perform its humanitarian operations, the UNHCR must collaborate with governments that it should be supervising.[146] Furthermore, its involvement in the operational work in some cases means that it should be monitoring its own actions.[147] It is also often claimed that the UNHCR's humanitarian functions eclipse the organization's protection role.[148] Moreover, the system by which the UNHCR is financed undermines trust in its supervisory activities, as it depends on voluntary donations of the same states whose actions it should be monitoring.[149] The

142 Article 35(1) of the 1951 Refugee Convention and Article II(1) of the 1967 Protocol. The UNHCR's supervisory role is also reflected in numerous resolutions of the UN General Assembly and in the UNHCR Statute [UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, U.N. GAOR, 5th Sess., Supp. No. 20, at 46, U.N. Doc. A/RES/428(V) (Vol. I) (1950), paragraph 8(a)].

143 See e.g. Kälin (2003), 623.

144 Simeon (2013) 'Monitoring…', 315.

145 See e.g. Lewis (2012), 96–98; Simeon (2013) 'Monitoring…', 315; Arakaki (2013), 290–291. See also Chetail (2019), 392, pointing out that–under public international law–many functions perceived by the UNHCR as 'supervisory' are rather advisory. Cf. Venzke (2012), 88, noticing that the UNHCR 'has successfully built up an aura of moral authority'.

146 See e.g. Kälin (2003), 634; Barutciski (2013), 67; Chetail (2014), 65.

147 See e.g. Hathaway (2001), 7.

148 See e.g. Hathaway (2001), 2; Aleinikoff (2014), 404; Loescher (2014), 216. See also Chetail (2019), 371-372.

149 See e.g. Kälin (2003), 634; Venzke (2012), 89, 105; Simeon (2013) 'Monitoring…', 339-340; Loescher (2014), 219-222; Chetail (2019), 379-381, 390. Cf. Barutciski (2013), 68-69.

final point of criticism is that the UNHCR's reports remain confidential. Hence, its activities are perceived as lacking efficiency as well as independence, objectivity[150] and transparency, which are expected and needed from a supervisory body.[151]

Despite this, it should not be overlooked that asylum seekers and refugees can lodge individual complaints with the UNHCR. Taking up individual cases was immediately recognized by states as a part of the UNHCR's mandate.[152] It has, at a minimum, an advisory or consultative role in national asylum procedures, and it is entitled to intervene and make submissions in individual cases to administrative and judicial bodies responsible for a refugee status determination.[153] However, the UNHCR acts rather as a 'supporter or advocate of refugees'[154] than as a decision maker[155]. It was not established to deliver individual justice. Its interventions concerning particular asylum seekers are not legally binding.[156] Moreover, it is not entitled to decide on redress in the case of a violation of international refugee law.

The UNHCR mandate also covers activities aiming to reinforce the uniform interpretation and application of international refugee law within the Contracting States.[157] It is entitled to request information about the law and practice concerning the 1951 Refugee Convention, although the states' reporting obligations provided for in Article 35(2) of this treaty are not formally regularized, but limited to *ad hoc* inquiries.[158] The UNHCR issues statements and guidelines in order to facilitate the uniform understanding of international

150 This view was not shared by the ECtHR, see e.g. ECtHR, *K.R.S. v. the United Kingdom*, no. 32733/08, dec. (2008), where the court stated that it 'notes the concerns expressed by the UNCHR whose independence, reliability and objectivity are, in its view, beyond doubt'. For the strong position of the UNHCR before the ECtHR, see also Chapter 3, Title IV, point 1.2(c).

151 See e.g. Kälin (2003), 652.

152 Ibid., 623. See also Grahl-Madsen (1997), 150.

153 See e.g. Kälin (2003), 623-624; Lewis (2012), 46-47, 150-151; Türk (2013), 50-51. See also Article 29(1)(c) of the 2013 Procedures Directive.

154 Kälin (2003), 628.

155 Although in practice in some countries UNHCR's representatives act as decision makers [Türk (2002), 14-15; Lewis (2012), 46-47; Venzke (2012), 81; Garlick (2015) 'International Protection…', 114]. However, this is a sovereign decision of a particular state to entrust the UNHCR with such function, not a mandate of the High Commissioner's Office stemming from international law.

156 Although those *amicues curiae* and other submissions to courts should be 'regarded as authoritative statements whose disregard requires justification' [Kälin (2003), 627].

157 See also Arakaki (2013), 290-291; North and Chia (2013), 225.

158 See e.g. Kälin (2003), 625; Edwards (2013), 168; Chetail (2019), 389-391. For the states' reluctance to provide the UNHCR with requested data, see Lewis (2012), 45.

refugee law. They are not legally binding, but they are perceived as having some authoritative character.[159] Moreover, the UNHCR participates in a legislative process, intervenes in individual asylum cases (on a national level but also before international and regional courts as the ECtHR or the CJ[160]), conducts trainings for public authorities and performs other advocacy activities. States have to respect and accept those actions, but the UNHCR has no power to issue binding views on the interpretation and application of the 1951 Refugee Convention and the Protocol thereto. In practice its opinions are sometimes ignored or even openly resisted by states.[161]

Overall, the monitoring system of the 1951 Refugee Convention and the 1967 Protocol, which in practice is based only on the UNHCR's supervisory role, is regarded as too weak and insufficient. Calls have been made for its revision for many years, albeit to no avail.[162]

2. The ICJ

The drafters of the 1951 Refugee Convention foresaw that the interpretation and application of the treaty may differ between the Contracting States. Such disputes shall be–under Article 38 of this treaty as well as Article IV of the 1967 Protocol–referred to the ICJ at the request of any one of its parties.

Even though the interpretation and application of international refugee law vary around the world, none of Contracting States has ever decided to settle such dispute before the ICJ[163] and most probably this will not change in the future. It is unreasonable to expect states to entangle themselves into a lengthy, elaborate and costly adversarial procedure, when there is no tangible gain in sight.[164] The UNHCR could be more interested in initiating such

159 See e.g. Kälin (2003), 625-627; Venzke (2012), 117-119; Türk (2013), 52-53; O'Nions (2014), 43; Garlick (2015) 'International Protection…', 113; Chetail (2019), 385. For the states practice, see also North and Chia (2013), 225-227.

160 See e.g. Lewis (2012), 150-151; Loescher (2014), 217. For the overview of the interventions before the CJ, see Garlick (2015) 'International Protection…', 115-130. See also Chapter 3, Title IV, points 1.2(c) and 2.4.

161 See also Wilsher (2011), 131-138, describing the UNHCR's futile struggle to counteract detention of asylum seekers. He also noticed that the UNHCR began to have less influence in this regard with the development of the EU asylum policy.

162 Chetail (2019), 387, claimed that '(t)he supervisory function of UNHCR is by far the weakest side of its mandate'. For the proposals on the system's revision, see Hathaway (2001); Kälin (2003); North and Chia (2013); Simeon (2013) 'Monitoring…'.

163 See e.g. Kälin (2003), 653; North and Chia (2013), 233; Chetail (2014), 63; Costello (2015) *The Human Rights…*, 175; Gilbert (2016), 625.

164 North and Chia (2013), 233. See also Lewis (2012), 97.

proceedings, but it has no power to do so.[165] Under Article 35 of the 1951 Refugee Convention, it can only ask one Contracting State to intervene in the ICJ in case of an incompatible application of international refugee law by another state,[166] but this solution is inefficient and unlikely to be used in practice. As a result, neither Article 38 of the 1951 Refugee Convention nor Article IV of the 1967 Protocol has ever been put into effect and the ICJ has not been given a chance to interpret international refugee law.

3. Lack of International Asylum Court

The monitoring mechanism stemming from international refugee law consists of the UNHCR's (weak) supervisory role and the ICJ's (unused) competence to settle disputes on the interpretation and application of the 1951 Refugee Convention and the 1967 Protocol. From the current perspective, 70 years after the adoption of the Convention, such a monitoring system has to be considered insufficient. However, it must have been seen as adequate in the early 1950s. Then, the idea of interstate accountability in cases of human rights violations 'was new, potentially threatening, and not truly accepted by states'.[167] Accordingly, states were not willing to create a powerful monitoring mechanism under the 1951 Refugee Convention.[168] The UNHCR was not meant to be a strong watchdog-type body,[169] but a minor, low-budget and provisional organization[170]. From this perspective, the limits to the UNHCR's supervisory functions do not come as a surprise. Moreover, in general, the 1951 Refugee Convention was adopted with a limited intent as well. The treaty focusses on states' responsibilities rather than on asylum seekers' and refugees' rights. Until 1967, it was restricted geographically[171] and temporarily, so initially it was not intended to be universal.

While the timing of the 1951 Refugee Convention's adoption clearly explains the lack of a strong supervisory mechanism in international refugee

165 Contrary to some states' opinions expressed during the drafting process, see UNHCR (1990), 269. The UNHCR can only ask the ICJ for an advisory opinion pursuant to Article 65 of the ICJ Statute [see Lewis (2012), 96].

166 See e.g. Grahl-Madsen (1997), 150; Kälin (2003), 653.

167 Hathaway (2001), 5.

168 See e.g. UNHCR (1990), 254-255. See also Kälin (2003), 617, claiming that the states' unwillingness to be too burdened with duties towards the UNHCR led to the exclusion of Article 35 of the 1951 Refugee Convention from the list of provisions to which no reservations may be made, as provided for in Article 42.

169 Barutciski (2013), 72.

170 Loescher (2014), 216. See also Venzke (2012), 94-95; Tsourdi (2017), 105-106.

171 In fact, it remains limited geographically in regard to some states.

law at that time, it does not answer the question of why there is still no comprehensive system for the interstate oversight of this treaty. The Contracting States can create a new monitoring body or entrust this role to the existing one, which would not be as entangled in controversy as the UNHCR. Article 35 of the 1951 Refugee Convention does not create an exclusive competence for the UNHCR to supervise this treaty.[172] States could have enhanced the supervision of international refugee law in 1967, when they decided to lift the geographical and temporal limitations and when the idea of interstate accountability was not so controversial anymore, or at any time since then. Yet, despite the heated debate ongoing since the 1990s concerning the necessity for a revision in this regard, nothing has changed.

The answer to the question of why there is no international asylum judicial or quasi-judicial body that could consider individual complaints and ensure uniform understanding of the 1951 Refugee Convention worldwide is cruel, but simple. The Contracting States do not want to enhance the existing supervisory mechanism and it has not changed since the 1950s. This continuous lack of political will results from the fact that the refugee protection is closely intertwined with territorial sovereignty.[173] States are not willing to reduce their powers in the field of asylum in favour of a new, international monitoring body.[174] Now as domestic migration and asylum policies are getting even more restrictive, it is unlikely that this attitude will change in the near future.

Those clear gaps in the refugee protection based on the 1951 Refugee Convention gave other institutions much room to manoeuvre. The weaknesses of the UNHCR's supervisory function, in particular the insufficiency of its actions in individual cases, have urged asylum seekers and refugees to bring their claims to those regional and international bodies which could more effectively protect their rights, including the ECtHR.[175] Meanwhile, the creation of the CEAS and the entrusting of the CJ with the respective jurisdiction may be seen as a response to the UNHCR's inability to ensure the harmonized application and interpretation of international refugee law. The Strasbourg and Luxembourg Courts filled in–to some extent–the gaps that international refugee law had produced in this regard. In time, they became important players in the field of refugee law, even though neither of them was created with asylum seekers in mind.

172 Hathaway (2001), 3-4.

173 Barutciski (2013), 66.

174 Juss (2013), 42.

175 See e.g. Edwards (2013), 174; de Weck (2017), 8.

III. The ECtHR as the European Asylum Court

The ECHR was not designed to protect rights of asylum seekers in particular. It does not guarantee a right to asylum and it does not explicitly provide for the principle of non-refoulement. The Strasbourg Court was never intended to be a regional asylum court, either. Despite this, nowadays the ECtHR's role as a guarantor of human rights of asylum seekers is unquestionable. It has filled some of the void left by the insufficient supervisory mechanism stemming from the 1951 Refugee Convention and the Protocol thereto.[176] Importantly, asylum seekers now have access to individual justice on not only a national but also a regional level. Moreover, the ECHR and the ECtHR's jurisprudence complement international refugee law and affect its interpretation by the Contracting States.

This subchapter commences with a brief analysis of the asylum seekers' position within the ECHR system (1). Next, the beginnings of the ECtHR's jurisdiction and jurisprudence concerning asylum seekers are discussed (2.1). Subsequently, the increasing number of requests for interim measures as well as applications to the Strasbourg Court in the field of asylum are investigated (2.2). Lastly, the court's approach to international refugee law is scrutinized (3).

1. The ECHR and Asylum Seekers

The ECHR was adopted on 4 November 1950 and entered into force on 3 September 1953. It was not aimed at the protection of asylum seekers in particular, but of everyone within the jurisdiction of the Contracting Parties. Accordingly, the ECHR applies regardless of a person's nationality and status.[177] It is immaterial if a victim of the human rights violation is staying legally or illegally in a responding state[178] or if he is residing (in the legal sense of this word) inside or outside the concerned country[179]. Hence, asylum seekers are protected under the ECHR irrespective of their nationality, status or place of stay.

Most of the provisions of the ECHR and the Protocols thereto do not differentiate between nationals and foreigners. However, Article 5(1)(f) of the ECHR concerns immigration detention, Article 16 of the ECHR deals with restrictions on aliens' political activity, Article 4 of the Protocol no. 4 establishes the

176 For more see this Chapter, Title II.

177 See Article 1 of the ECHR and ECommHR, *Austria v. Italy*, no. 788/60, dec. (1961).

178 ECtHR, *Mublilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03 (2006), §55.

179 See e.g. Clayton (2014), 192; Lemmens (2018), 11. Cf. ECtHR (GC), *M.N. and Others v. Belgium*, no. 3599/18, dec. (2020), §§110-126. For more on this case, see Chapter 4, Title III, point 1.

prohibition of collective expulsion, Article 1 of the Protocol no. 7 introduces procedural safeguards in expulsion proceedings and Article 1 of the Protocol no. 12 pertains to discrimination.[180] None of those provisions focusses particularly on asylum seekers; they concern all non-nationals in general.

The ECHR was not especially designed for the protection of asylum seekers (or foreigners in general). Under well-established international law, states have the right to decide who enters and resides on their territory. The ECHR and the Protocols do not guarantee foreigners' right to stay in a Contracting Party or a right not to be expelled or extradited. Moreover, a right to asylum was not inscribed in the ECHR or the Protocols thereto, in contrast to the UN Universal Declaration of Human Rights, which otherwise inspired the drafters of the Convention. A right to asylum was knowingly omitted from the ECHR.[181] It was not added later on despite attempts made by the PACE[182] and the Committee of Ministers of the CoE[183]. Moreover, the principle of non-refoulement is not explicitly expressed in the ECHR and nothing indicates that its drafters predicted deriving it from Article 3 of the ECHR.[184]

Despite this, shortly after its adoption, the ECHR began to be treated as a tool for asylum seekers' protection. As early as the 1960s, the ECommHR discerned that Article 3 of the ECHR could entail protection against refoulement.[185] In 1965, the PACE stated that this provision 'binds Contracting Parties not to return refugees to a country where their life or freedom would be threatened' and this interpretation is 'sanctioned by several courts in the Contracting States and, above all, by the European Commission of Human

180 See Rainey, Wicks and Ovey (2017), 7–8, noticing that the inclusion into the Protocols of those 'migration rights' was seen as controversial and some states were reluctant to ratify them. The Protocol no. 4 was ratified by 43 states, the Protocol no. 7 was ratified by 44 states and the Protocol no. 12 was ratified by only 20 states (as of 26 January 2021).

181 The adoption of the ECHR was supposed to be a first step in a collective enforcement of the rights guaranteed under the Universal Declaration (as stated in the Preamble). As a result, the drafters decided to include in the ECHR only those rights on which the Contracting Parties could easily agree as regards their formulation and the supervisory mechanism of their implementation [Lemmens (2018), 4]. The right to asylum and the principle of non-refoulement did not meet those requirements.

182 The PACE already in 1961 proposed incorporation into the ECHR the right to seek and enjoy asylum as well as the principle of non-refoulement [PACE (1961)]. Those proposals have been repeated since then in different forms, without success [see e.g. PACE (1994)].

183 Committee of Ministers of the CoE (1967), para. 1–2, encouraging Member States to respect the principle of non-refoulement and 'act in particularly liberal and humanitarian spirit' in relation to asylum seekers.

184 De Weck (2017), 17.

185 See e.g. ECommHR, *X v. Federal Republic of Germany,* no. 4162/69, dec. (1969). See also Alleweldt (1993), 361 fn 5, who claimed that the ECommHR allowed for the application of Article 3 of the ECHR to removals for the first time in 1961. See also Weissbrodt and Hortreiter (1999), 28; Dembour (2015), 200; de Weck (2017), 18.

Rights'.[186] It was not until 1989, though, that the principle of non-refoulement derived from the ECHR was applied by the ECtHR in practice to protect rights of the specified foreigner. Since then, the protection against refoulement arising from the ECHR has no longer been just a theoretical possibility.[187]

2. Asylum Jurisprudence

Just as the ECHR was not drafted to be an instrument of asylum seekers' protection in particular, so the Strasbourg Court was never intended to be a regional asylum court. It has gradually grown into this role, responding to the rising need for a human rights perspective in times of more and more restrictive asylum and immigration policies in Europe and filling the gap created by the lack of the asylum international court rooted in the 1951 Refugee Convention or the Protocol thereto. This section aims at elucidating when and how the ECtHR's jurisdiction and jurisprudence concerning asylum seekers began (2.1) as well as why the asylum workload of the court is constantly rising (2.2).

2.1 Jurisdiction and First Asylum Cases

The ECtHR's jurisdiction extends to all matters concerning the interpretation and application of the ECHR and the Protocols thereto.[188] Despite the fact that at the beginning of the ECHR's operation (since 1959) its jurisdiction was limited,[189] asylum matters as a whole were never excluded from the court's jurisdiction.

Nevertheless, it was not until 1989 that the Strasbourg Court applied Article 3 of the ECHR in the refoulement context. The *Soering v. the United Kingdom* judgment is considered 'one of the most important cases that the Court has decided'.[190] It initiated the ECtHR's groundbreaking jurisprudence on the principle of non-refoulement derived from Article 3 of the ECHR and it is cited in many subsequent judgments and decisions of the Strasbourg Court. In this extradition case the court stated that

186 PACE (1965).

187 Before the *Soering* judgment was given, the ECommHR never found a violation of Article 3 of the ECHR in the context of refoulement [de Weck (2017), 18]. Only in 1994, for the first time, the ECommHR decided that Article 3 of the ECHR was breached due to the applicant's deportation, but the case did not consider an asylum seeker [see ECtHR, *Nasri v. France*, no. 19465/92 (1995), §30, and Dembour (2015), 202].

188 Article 32(1) of the the ECHR; Article 45 of the original text of the ECHR.

189 Until 1998, the Strasbourg Court's jurisdiction was optional for Contracting Parties (Article 46 of the original text of the ECHR) and individuals did not have a right to complain directly to the ECtHR (Article 25 of the original text of the ECHR).

190 Harris et al. (2018), 247.

> (i)t would *hardly be compatible with the underlying values of the Convention,* that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be *contrary to the spirit and intendment of the Article,* and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article (art. 3).[191]

Thus, the *Soering* case laid down the general rule that Article 3 of the ECHR may be found to be violated in the case of a foreigner's removal to a country where he may be tortured or suffer inhuman or degrading treatment or punishment.

Soon after, this approach was reiterated in the ECtHR's asylum case-law. In 1991, in the *Cruz Varas and Others v. Sweden* as well as in the *Vilvarajah and Others v. the United Kingdom* judgments, the Strasbourg Court confirmed that the protection against refoulement inherent to Article 3 of the ECHR applies not only in cases concerning extraditions, but also to expulsions of rejected asylum seekers.[192] It explicitly stated that

> expulsion by a Contracting State of an asylum seeker may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he was returned.[193]

In 1996, when for the first time the ECtHR found that the asylum seeker's expulsion would violate Article 3 of the ECHR, the court's jurisprudence concerning the principle of non-refoulement was already considered well-established.[194]

191 ECtHR (Plenary), *Soering v. the United Kingdom*, no. 14038/88 (1989), §88 (emphasis added).

192 ECtHR (Plenary), *Cruz Varas and Others v. Sweden*, no. 15576/89 (1991), §70.

193 ECtHR, *Vilvarajah and Others v. the United Kingdom*, nos. 13163/87 etc. (1991), §103.

194 ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §74.

After quite modest beginnings,[195] the jurisprudence of the Strasbourg Court concerning the principle of non-refoulement blossomed[196]. Soon, the ECtHR had to stand up to the challenge of adjudicating on other asylum issues, such as immigration detention,[197] effective remedies in asylum-related proceedings,[198] access to a territory and protection[199] as well as reception of asylum seekers[200]. Currently, the number of asylum cases decided by the Strasbourg Court has reached the hundreds.[201]

The ECtHR is also dealing with a substantial number of requests for interim measures in asylum and immigration cases.[202] The mounting popularity of these measures led to the widespread concern that the Strasbourg Court was becoming 'an over flooded immigration court'[203]. The alarming rise in the number of those requests[204] prompted the President of the ECtHR to issue a statement in 2011, explaining that the Strasbourg Court should not be seen as an appeal body against national asylum or immigration decisions and interim measures in such cases should be granted only exceptionally.[205] Afterwards, the number of requests decreased but it remained high.[206] Some commentators emphasized that the current situation is only 'the tip of the iceberg in terms of the number of requests which could be made', but are not because of asylum seekers' hindered access to the court.[207]

195 Only 24 judgments on refoulement until 2007 [de Weck (2017), 21]. See also Dembour (2015), 234-235, referring to 13 asylum cases considered by the ECtHR in the period of 1989-2000.

196 De Weck (2017), 21, stating that as of February 2016, the Strasbourg Court adjudicated on the merits in 215 cases concerning the refoulement and found a violation in 125 of them.

197 See e.g. ECtHR, *Amuur v. France*, no. 19776/92 (1996), §§37-54. For more see Chapter V.

198 See e.g. ECtHR, *Vilvarajah and Others v. the United Kingdom*, nos. 13163/87 etc. (1991), §§117-127. For more see Chapter 6.

199 See e.g. ECtHR, *Jabari v. Turkey*, no. 40035/98 (2000), §§40-42.

200 See e.g. ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §§249-264. For more see Chapter 4, Title II, point 5.

201 284 asylum cases were analysed for the purposes of this study. For more see Chapter 1, Title V, points 1.1 and 1.2.

202 Rule 39 of the Rules of Court. For more see Chapter 3, Title III, point 1.1.

203 Zupančič (2011).

204 In 2006 the Strasbourg Court received 112 such requests, while in 2010—4,786.

205 ECtHR (2011). For the critique, see Dembour (2015), 435-436, assessing the statement as 'troubling' and dissuading legal representatives from applying for interim protection before the ECtHR.

206 For the period of 2015-2020, see ECtHR (2018) 'Rule 39…' and ECtHR (2021) 'Rule 39…'. For years 2011-2014, see de Weck (2017), 73-74.

207 PACE (2010) 'Preventing harm…', 11. For more on the access to the ECtHR for asylum seekers, see Chapter 3, Title II.

2.2 Increasing Asylum Workload

Asylum jurisprudence of the Strasbourg Court has grown considerably since its *Soering / Cruz Varas* beginnings.[208] Nowadays, asylum cases are considered by the court on a regular basis. Asylum seekers seem to be more and more inclined to seek protection and redress before the ECtHR. The reasons for this phenomenon can be grouped into three categories: those concerning the Strasbourg Court itself, those regarding asylum seekers and those concerning the Contracting Parties.

Firstly, the increasing asylum workload fits into the general trend recognized in the ECtHR's operation. The number of applications submitted to the court has risen significantly since the 1990s.[209] This is caused, *inter alia,* by the gradual growth in importance of the ECHR's system. As the number of influential decisions and judgments of the court has increased, the public and legal professionals have started to consider the ECHR a substantial and advantageous instrument of the protection of human rights in Europe.[210] Moreover, the circle of respondent states has widened significantly since 1959 when the Strasbourg Court started operating. Until 1998, the ECtHR's jurisdiction was optional.[211] At the beginning, only eight states accepted its jurisdiction. In 1989, when the *Soering* judgment was issued, the number of respondent states reached twenty-one. Currently, the jurisdiction of the Strasbourg Court encompasses forty-seven Member States of the CoE. Furthermore, the ECtHR's role was initially significantly limited, not only as a result of the mere partial acceptance of its jurisdiction among the Contracting Parties, but also because individuals could not approach the court directly and their right to individual petition to the ECommHR was optional for the Contracting States.[212] Only in 1998 did individuals gain a full standing before the Strasbourg Court[213] and they have begun exercising it extensively.

208 For more see these Chapter and Title, point 2.1.

209 In 1989, when the *Soering* judgment was issued, the ECommHR registered in total 1,445 applications and the Strasbourg Court adjudicated on merits only in 24 cases [Bates (2010), 393]. In 1999, the ECtHR received 8,400 applications, but in 2013 the number of applications reached 65,800. Since then, the volume of applications has decreased, but never dropped under 40,000 applications a year.

210 Bates (2010), 393-394.

211 Article 46 of the original text of the ECHR.

212 Articles 25 and 44 of the original text of the ECHR. Few cases were anticipated to reach the ECtHR back then [Bates (2011), 37].

213 On the basis of the Protocol no. 11.

Secondly, it should not be overlooked that the number of asylum seekers accessing and staying in the Contracting Parties has increased since the 1990s. Moreover, the proliferating jurisprudence of the ECtHR on the principle of non-refoulement as well as other issues concerning asylum seekers (*inter alia* immigration detention, reception, access to protection, effective remedies) not only provides lawyers with arguments in national asylum and return proceedings, but also encourages them to present their clients' cases to the Strasbourg Court when everything else fails. The application to the ECtHR is increasingly considered a 'final bid for asylum'[214]. In particular, a request for an interim measure is seen as a 'sheet-anchor' (if not a 'lifesaver') when the asylum seeker faces an imminent expulsion and no effective national remedies are made available to him. Despite the low recognition rate of those requests and increasing (albeit still rare) incompliance with the indicated provisional measures on the part of states, they remain a powerful and effective mechanism of preventing harm to asylum seekers, especially since they came to be considered binding.[215]

Finally, European countries' changing attitude towards migration and asylum cannot be omitted. It has transformed greatly since the 1950s when the ECHR and the 1951 Refugee Convention were adopted. In recent years, the European countries have tightened their national asylum and migration policies, mainly due to security concerns, but also in order to deal with the overburdening of national asylum systems. Respective regulations have been tightened; deficiencies in national asylum and expulsion procedures have not been remedied. Hence, more removals are being enforced and fewer persons are being granted protection.[216] As asylum seekers can count less and less often on receiving a proper treatment and exhaustive assessment of their claims on the national level, they are compelled to seek protection elsewhere, including in the Strasbourg Court.[217] The ECtHR, as the 'conscience of Europe', has to stand up to the challenge of providing a human rights response to more restrictive measures exercised towards asylum seekers by states that are increasingly reluctant to abide by their obligations arising from not only the ECHR but also the 1951 Refugee Convention.

214 Harris et al. (2018), 146.

215 ECtHR (GC), *Mamatkulov and Askarov v. Turkey,* nos. 46827/99 and 46951/99 (2005), §128. For more on interim measures, see Chapter 3, Title III, point 1.1.

216 PACE (2010) 'Preventing harm…', 1.

217 In regard to interim measures, see e.g. Garry (2001), 418; Papadouli and Hansen (2012), 69.

3. Relation with International Refugee Law

The ECHR and the 1951 Refugee Convention were both opened to signature in the early 1950s and they both were—each in its own particular way—a response to the atrocities of the Second World War and the emerging reality of the Cold War. Although the historical background of the treaties is similar, the aims of their adoption and ways of achieving those goals are distinct. The ECHR's objective is to secure the effective recognition and observance of the rights proclaimed in the Universal Declaration of Human Rights. For this purpose, a special two-tiered supervisory mechanism was created, consisting of the ECommHR and the ECtHR (since 1998 only the Strasbourg Court). The reasons for the adoption of the 1951 Refugee Convention were more pragmatic. At the end of the 1940s, several hundred thousand persons were still displaced in Europe. Dealing with this problem required intensified international cooperation as well as the revision and consolidation of the previous agreements concerning refugees. In contrast to the ECHR, international refugee law does not provide for an effective judicial or quasi-judicial supervisory mechanism.[218]

Almost all Contracting Parties to the ECHR ratified the 1951 Refugee Convention (the exceptions were Andorra and San Marino). As a result, asylum cases considered by the Strasbourg Court are unavoidably intertwined with international refugee law. Nevertheless, it is not the ECtHR's role to assess whether a removal of an asylum seeker violated the 1951 Refugee Convention. This view, already expressed in the 1960s,[219] is unequivocally stated by the Strasbourg Court. It stresses that

> (i)n cases concerning the expulsion of asylum-seekers, the Court does not itself examine the actual asylum applications or verify how the States honour their obligations under the Geneva Convention relating to the status of refugees. Its main concern is whether effective guarantees exist that protect the applicant against arbitrary refoulement, be it direct or indirect, to the country from which he or she has fled.[220]

The ECtHR is then entitled to consider a case of an alleged breach of international refugee law by a state only if and as far as it also entails a violation of the ECHR. It cannot find that the 1951 Refugee Convention was breached and

218 For more see this Chapter, Title II. See also Forowicz (2010), 238, pointing out that it is the most important difference between the ECHR and international refugee law.

219 See e.g. ECommHR, *X v. the Federal Republic of Germany,* no. 4162/69, dec. (1969). See also Vermeulen (2006), 433.

220 ECtHR (GC), *F.G. v. Sweden*, no. 43611/11 (2016), §117. Cf. Bossuyt (2020), 321, claiming that the ECtHR does not follow this rule in its asylum case-law.

afford a just satisfaction on this basis. Moreover, it has no jurisdiction to interpret international refugee law or power to enforce it.

However, the Strasbourg Court does not overlook the 1951 Refugee Convention and the 1967 Protocol, and it is conscious of the interplay between those treaties and the ECHR.[221] The court acknowledges the existence of international refugee law and its binding nature in the responding states by referring to them in the 'relevant law' part of its judgments.[222] Moreover, the ECtHR avails itself of the 1951 Refugee Convention as a reference point in the operative part of its judgments, for instance when it explains the scope of the principle of non-refoulement derived from Article 3 of the ECHR.[223]

Both treaties provide for the principle of non-refoulement (under Article 33(1) of the 1951 Refugee Convention and Article 3 of the ECHR[224]). The Strasbourg Court held that the existence of the explicitly expressed principle of non-refoulement in other international instruments, including international refugee law, does not preclude deriving it from Article 3 of the ECHR.[225] Predominantly, if a person is a refugee in the sense of Article 1(A)(2) of the 1951 Refugee Convention, he is protected against refoulement not only under this treaty but also pursuant to Article 3 of the ECHR.[226] However, it is possible, that a person does not owe a well-founded fear of being persecuted for reasons mentioned in international refugee law, but he still cannot be expelled or extradited, because his removal would violate Article 3 of the ECHR. Therefore, the protection against refoulement provided for in the ECHR is often regarded by scholars and judges[227] and the ECtHR

221 For a comprehensive analysis of the ECtHR's references to the 1951 Refugee Convention, see Forowicz (2010), 234-277, 280-282. She noticed that the Strasbourg Court had been mentioning international refugee law, albeit infrequently and inconsistently, more in its case-law concerning Article 3 of the ECHR than Articles 5 and 8 and predominantly in cases that had been intertwined with the 1951 Refugee Convention from their domestic beginnings.

222 See e.g. ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §54-56; ECtHR (GC), *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15 (2020), §62.

223 See e.g. ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §80; ECtHR (GC), *Saadi v. Italy*, no. 37201/06 (2008), §138. See also ECtHR (GC), *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15 (2020), §171, where the court emphasized 'the link between the scope of Article 4 of Protocol No. 4 as defined by the Grand Chamber, and that of the Geneva Convention and of the principle of non-refoulement'.

224 Some other provisions may also come into play in the refoulement context. For more see Chapter 4.

225 ECtHR (Plenary), *Soering v. the United Kingdom*, no. 14038/88 (1989), §86.

226 See e.g. Vermeulen (2006), 438-439.

227 See e.g. Vermeulen (2006), 439; McAdam (2007), 136; Mole and Meredith (2010), 34; Forowicz (2010), 236-238; Sicilianos (2015), 6. For the relation between human rights law in general and the 1951 Refugee Convention as regards the principle of non-refoulement, see Chetail (2014), 36-37.

itself[228] as broader than the one offered by Article 33(1) of the 1951 Refugee Convention.[229] It is absolute, not restricted to a limited number of grounds for persecution (under international refugee law these are only race, religion, nationality, membership of a particular social group or political opinion) and not restrained by exclusion clauses and exceptions such as those provided for in Article 1(F) or Article 33(2) of the 1951 Refugee Convention.[230] It is applied irrespectively of the place of stay of a victim of the human rights violation, whilst Article 1(A)(2) of the 1951 Refugee Convention requires that a person stay outside the country of his nationality or habitual residence in order to be a refugee. The principle of non-refoulement derived from Article 3 of the ECHR is applicable irrespectively of whether a person is a refugee in the sense of international refugee law or not.

However, the view that the protection against refoulement offered by the ECHR is broader than the protection inherent to the 1951 Refugee Convention is disputed. Costello pointed out that this assumption is not always true, especially in the case of religious and sexual minorities where international refugee law may be in fact 'more protective' than the ECHR.[231] Meanwhile, de Weck claimed that the protection against refoulement under Article 3 of the ECHR is both broader and narrower than the principle of non-refoulement inherent to international refugee law. She allowed for the possibility that a person may be protected under Article 33(1) of the 1951 Refugee Convention, but not pursuant to Article 3 of the ECHR. In her opinion, some acts of persecution simply do not amount to torture or inhuman or degrading treatment or punishment in the sense of the ECHR.[232] Such an interpretation is consistent with the approach of the ECommHR already expressed in the 1960s that some forms of persecution do not reach the high level of severity required by

228 See e.g. ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §80; ECtHR, *Tatar v. Switzerland*, no. 65692/12 (2015), §40. See also Forowicz (2010), 241-242.

229 This is not surprising taking into account that as early as during the drafting of the 1951 Refugee Convention it was already clear that it was not designed to include every refugee or every situation of a forced migration [Chetail (2014), 24-25].

230 For the exclusion clauses, see Chapter 4, Title III, point 3.

231 Costello (2016), 208, see also 181, 198. For more on the protection against refoulement of those minorities, see Chapter 4, Title II, points 1 and 2. See also Forowicz (2010), 238; Motz (2015), 185-186.

232 De Weck indicates two situations when a refugee would be protected against refoulement under Article 33(1) of the 1951 Refugee Convention, but not pursuant to Article 3 of the ECHR: a detention for political reasons and a cumulative violation of different human rights constituting persecution, but not amounting to torture or inhuman or degrading treatment or punishment [de Weck (2017), 47]. See also Meyerstein (2005), 1538-1539.

Article 3 of the ECHR.[233] According to the critics of this view, it results from a wrong assumption that persecution equates to torture or inhuman or degrading treatment or punishment. Meanwhile, some acts of persecution cannot in fact be regarded as torture or inhuman or degrading treatment or punishment in the sense of Article 3 of the ECHR, but if the person concerned is expelled and the persecution takes place, 'there is a real risk that he will also be subject to (additional) harsh treatment that falls within the scope of Article 3' of the ECHR.[234]

It is clear that the protection against refoulement arising from the ECHR and that from the 1951 Refugee Convention are overlapping. According to a more traditional view, the principle of non-refoulement inherent to the ECHR complements the protection offered by the 1951 Refugee Convention and the Protocol thereto.[235] In fact, the ECHR's supplementing of international refugee law is not limited to the principle of non-refoulement. It equips asylum seekers with a set of additional rights, not guaranteed under the 1951 Refugee Convention, but applicable to all people within the jurisdiction of the Contracting Parties (e.g. a right to liberty and security, a right to an effective remedy[236]). In the literature, a more progressive point of view can be found, too. Some commentators argue that human rights law is currently a primary, not a secondary, source of refugee law.[237]

Unquestionably, the ECHR and the ECtHR's jurisprudence are being considered increasingly significant when international refugee law is interpreted and applied on a national level.[238] Harvey stressed that the case-law of the Strasbourg Court regarding Article 3 of the ECHR gave a boost to 'the development of the international norm of non-refoulement'.[239] Moreover, the definition of a refugee under the 1951 Refugee Convention is currently 'informed

233 Vermeulen (2006), 434. See e.g. ECommHR, *X v. the Federal Republic of Germany,* no. 4162/69, dec. (1969) and ECommHR, *X v. the Federal Republic of Germany,* no. 4314/69, dec. (1970).

234 Vermeulen (2006), 438.

235 'The term "complementary protection" describes States' protection obligations arising from international legal instruments and custom that complement–or supplement– the 1951 Refugee Convention. It is, in effect, a shorthand term for the widened scope of non-refoulement under international law' [Goodwin-Gill and McAdam (2007), 285]. For the comprehensive analysis of the concept of complementary protection, see McAdam (2007).

236 For more on those rights, see Chapters 5 and 6. Cf. Forowicz (2010), 249, who concluded that the 1951 Refugee Convention with the accompanying soft-law 'seems to adopt an approach to detention similar to that reflected in the ECHR and the ECtHR case law'.

237 See e.g. Chetail (2014), 22.

238 Cf. Meyerstein (2005), 1541, claiming that the ECtHR was not 'capable of making substantive changes to the way Member States must interpret the Refugee Convention'.

239 Harvey (2014), 176.

and understood in the context of the international human rights standards', which was regarded as 'one of the most significant developments in refugee law jurisprudence'.[240] The Member States of the EU are explicitly obliged pursuant to the secondary asylum law[241] to consider human rights enshrined in the ECHR in the interpretation of the notion of persecution within the meaning of Article 1(A) of the 1951 Refugee Convention. Hence, it must be concluded that the ECtHR may not have the power to interpret international refugee law, but the responding states (at least within the EU) should read and apply it with the ECHR in mind.

The increasingly widespread endorsement of the idea that the 1951 Refugee Convention should be understood in the light of human rights standards seems to result from the absence of a specialized treaty body that would deliver the authoritative interpretation of international refugee law. States need a 'tangible reference point' in interpreting the 1951 Refugee Convention, and human rights law provides it.[242] This need for a more uniform understanding of refugee law induced the Member States of the EU to create the CEAS and equip the CJ with jurisdiction in this regard.

IV. The CJ as the European Asylum Court

At the very beginning, the EC was not designed to deal with asylum seekers or even human rights in general. The European asylum and immigration policy was established as a side effect of the abolition of internal borders. In the mid-1980s states acknowledged that they needed to cooperate more intensively in order to control migration flows within the territory without physical borders. Since then, the EU competences in the field of asylum and immigration have been progressively amplified. The EU asylum and immigration law evolved into a complex system affecting almost every area of the asylum seeker's stay in the Member States. The CJ's jurisdiction in this regard was established and subsequently expanded. By the end of 2020, the Luxembourg Court was repeatedly called upon to provide the interpretation of all instruments creating the CEAS. In particular, it guided domestic courts on the relation between the EU asylum and immigration law and the ECHR as well as international refugee law. However, the scope of the CJ's jurisdiction as regards the 1951 Refugee Convention and the 1967 Protocol is debatable.

240 Foster (2007), 27.

241 Article 9(1)(a) of the 2011 Qualification Directive.

242 Burson and Cantor (2016), 7.

In this subchapter, firstly, the development of the EU asylum policy and law is described (1). Secondly, the beginnings and expansion of the jurisdiction and jurisprudence of the Luxembourg Court concerning asylum seekers are discussed (2.1–2.2). Thirdly, the increasing number of requests for a preliminary ruling in the field of asylum is investigated (2.3). Lastly, the court's approach towards international refugee law is scrutinized (3).

1. EU Law and Asylum Seekers

The origins of the EC, the predecessor of the EU, date back to the 1950s, as do the 1951 Refugee Convention and the ECHR. However, none of the founding treaties of the EC referred to refugees, asylum seekers or even human rights. The EC were intended to be a strictly economic cooperation between states. As a result, initially, the intergovernmental cooperation between states in the field of asylum took place outside of the EC framework (although with some exceptions[243]). The first major step introducing the enhanced, but still beyond the ambit of the EC, collaboration of some European states in this regard was the adoption in 1990 of two mechanisms for determining what state was responsible for examining an application for asylum[244] which marks the origins of the EU 'Dublin system'.

In the 1990s, the interstate cooperation concerning asylum seekers and refugees was gradually absorbed into the EC/EU framework. In 1992, the Treaty of Maastricht described asylum policy as a matter of common interest.[245] However, asylum policy was then placed in the ambit of the third pillar, so the EU institutions had limited powers in this field and the policy was realized by the intergovernmental decision-making. Nevertheless, the alterations introduced by the Treaty of Maastricht have to be considered a milestone on a road leading to the formation of the EU asylum law. It provided procedures

243 Until the 1990s, the EC instruments exceptionally referred to refugees and asylum seekers. For instance, the Council Regulation 3/1958 on social security for migrant workers extended its benefits to refugees [Cherubini (2015), 130]. In the 1980s, some non-binding resolutions were adopted by the EC concerning restrictions to access to asylum [Hathaway (1993), 729; Florczak and Domagała (2013), 154]. In 1989 the European Council adopted the document mentioning the creation of a common asylum policy within the EC based on the 1951 Refugee Convention [European Council (1989), part III.B].

244 The Dublin Convention and the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 19 June 1990, OJ L *239/19,* entered into force 26 March 1995, Title II, Chapter 7.

245 Article K.1(1) of the original text of the TEU.

and mechanisms for earlier ongoing, but uncoordinated and limited, dialogue between states concerning asylum matters.[246]

The 'communitarisation' of asylum policy (although only partial) became a fact with the adoption of the Treaty of Amsterdam.[247] Asylum policy was transferred to the first pillar, enabling the issuance of a binding legislation in this regard within the EU framework. The Council was tasked with the adoption of the specified measures on asylum that would set minimum standards as regards reception of asylum seekers, recognition as refugees, asylum procedures and temporary protection for displaced persons.[248] Moreover, the Council was bound to adopt the EU legislation on the determination of a state responsible for the consideration of an application for asylum,[249] as the Dublin Convention was still only an interstate agreement concluded outside the ambit of the EU.

The Amsterdam Treaty was a great step towards the creation of the common European asylum policy, but not a definitive one. In 1999 during the Tampere Council meeting the decision was made to form the CEAS.[250] The aim of creating common binding policies on asylum was 'an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity'.[251] The Tampere conclusions are considered a landmark in the development of the EU asylum policy.[252] However, the vision provided there soon turned out to be too broad and bold. The outcomes of the first phase of the asylum policy harmonization were definitely more restrictive than had been stipulated in the Tampere conclusions, and occasionally even contradictory to its goals due to the persistent political reluctance to the creation of a comprehensive common policy in this area.[253] Instruments adopted in the first phase of the CEAS[254] were criticized for focussing only on minimum standards, being incompatible with international law

246 O'Keeffe (1999), 271-272.

247 See e.g. Florczak and Domagała (2013), 155; Cherubini (2015), 143-144.

248 Article 63(1)(b-d) and (2)(a) of the TEC.

249 Article 63(1)(a) of the TEC.

250 European Council (1999), para 13.

251 Ibid., para 4.

252 Espinoza and Moraes (2012), 158. See also Battjes (2006), 30.

253 See e.g. Espinoza and Moraes (2012), 162-164; Carrera (2012), 233-234; Boeles et al. (2014), 249.

254 The Temporary Protection Directive; the 2003 Reception Directive; the Dublin II Regulation; the 2004 Qualification Directive; the 2005 Procedures Directive.

and leaving too broad margin of discretion to the Member States that resulted in the divergent national asylum law and practice.[255]

The EU asylum law as it is today was adopted after the entry into force of the Treaty of Lisbon, which 'definitively communitarised' the asylum policy.[256] Under Article 78(1) of the TFEU, bringing the 'Tampere spirit into the body of Treaties'[257]:

> The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

The policy is no longer to be focused on minimum standards, but on uniform status and common procedures. The EU institutions gained new powers in the field of asylum (especially the European Parliament and the CJ). Moreover, the Treaty of Lisbon vested the EU Charter the same legal value as the Treaties. Article 18 concerning a right to asylum and Article 19 providing for the prohibition of collective expulsions and the principle of non-refoulement became legally binding in the EU.

The current EU asylum law[258] refers to most important matters which may concern asylum seekers staying in the Member States. It regulates their access to the EU territory, their reception and detention, the rules of recognition as a refugee and the asylum procedure as well as determining the country responsible for examination of an asylum application. It provides for a form of protection complementary to that of the 1951 Refugee Convention (subsidiary protection). If an asylum seeker's application is rejected, the EU law determines rules for his return.[259] In general, the respective EU law is regarded as 'a comprehensive and almost all-encompassing migration law system'[260] and 'one of the most advanced regional refugee protection regimes in the world'[261]. However, there is still a long way to go to the attainment of a truly common

255 See e.g. Chetail (2016), 14-16.

256 Cherubini (2015), 159.

257 Carrera (2012), 245.

258 See, in particular, the Dublin III Regulation; the 2011 Qualification Directive; the 2013 Procedures Directive; the 2013 Reception Directive.

259 See the Return Directive.

260 Boeles et al. (2014), 37.

261 Lambert (2014), 204.

system of asylum law within Europe.[262] The full harmonization of asylum policy within the Member States has not been accomplished yet. In this regard, the Luxembourg Court may prove to be of great assistance.

2. Asylum Jurisprudence

Like the ECtHR, the CJ was never intended to be a regional asylum court. Even though its origins date back to 1952, the Luxembourg Court obtained jurisdiction as regards asylum matters only in 1999 and gave the first preliminary ruling pertaining to the secondary asylum law no earlier than in 2009. Currently, after twelve years of adjudication in this regard, the CJ's asylum jurisprudence amounts to 102 preliminary rulings. This section firstly aims at elucidating when and how the jurisdiction of the Luxembourg Court encompassed asylum matters (2.1). Next, the first asylum cases adjudicated by the court are briefly discussed (2.2). Lastly, the question of why the CJ's asylum workload is rising is answered (2.3).

2.1 Jurisdiction

The expansion of the CJ's jurisdiction in the field of asylum was tightly intertwined with the development of the EU asylum policy. During the period of intergovernmental cooperation in this area (both before and after the Treaty of Maastricht), when the EU asylum policy was just initially being shaped, the Luxembourg Court had no jurisdiction in asylum matters.[263] One of the main reasons for the criticism of the Schengen and Dublin Conventions, as well as the relevant provisions of the EU primary law, was their lack of adequate judicial supervision.[264] The partial 'communitarisation' of asylum policy under the Treaty of Amsterdam affected the CJ's powers, introducing it into the matters of asylum seekers staying in the Member States. However, it was the Treaty of Lisbon that enabled the Luxembourg Court to adjudicate in an unlimited manner on the EU asylum and immigration law. As a result, two stages of the court's jurisdiction may be differentiated: the stage of limited jurisdiction in the years 1999–2009 and the stage of full competence, since 2009.

262 See e.g. Chetail (2016), 35; Costello and Mouzourakis (2017), 263, 278.

263 However, under Article K.3(2)(c) of the original text of the TEU, a convention concerning asylum policy could have been drawn up by the Council and recommended for adoption to the Member States. The CJ could be granted the jurisdiction to interpret the convention's provisions and to rule on any disputes regarding its application. No such convention was ever adopted [Noll (2000), 133 fn 355]. One unsuccessful attempt was made to adopt a convention concerning fingerprinting of asylum seekers (with the CJ's jurisdiction eventually provided for) [Guild and Peers (2002), 273].

264 See e.g. O'Keeffe (1999), 283; Noll and Vedsted-Hansen (1999), 372.

In the first stage, in the period marked by the entry into force of the Treaty of Amsterdam (1999) and the entry into force of the Treaty of Lisbon (2009), the CJ's jurisdiction as regards visas, asylum, immigration and other policies related to free movement of persons was limited. National courts or tribunals had to request the Luxembourg Court to give a preliminary ruling on the interpretation of the Treaty provisions on asylum or on the validity or interpretation of secondary EU asylum or immigration law, but only if the question was 'raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law'.[265] The limitation of the CJ's powers to questions referred by domestic courts of last instance resulted from the Member States' persisting reluctance to give away their sovereignty in this field[266] and the apprehension that the Luxembourg Court would be flooded with asylum and immigration cases[267]. The efficiency of this limitation seems to be confirmed by the small number of asylum cases brought before the CJ before 2009 (although that also resulted from the tardy adoption and transposition of the respective secondary law[268]). In order to balance restrictions to the Luxembourg Court's jurisdiction and support the uniform application of the Treaty in this regard,[269] the Treaty of Amsterdam additionally empowered the Council, the Commission and any Member State to request the CJ to give a ruling concerning interpretation of the EU asylum law[270].

The changes concerning the court's jurisdiction introduced by the Treaty of Amsterdam were assessed diversely. On the one hand, the progress was appreciated.[271] Some scholars even concluded that with the adoption of this

265 Article 68(1) of the TEC. However, there was a lack of clarity in the TEC (a court or tribunal shall request a preliminary ruling 'if it considers that a decision on the question is necessary to enable it to give judgment') as well as in the CJ's jurisprudence as to whether the highest national courts and tribunals were obliged to refer such questions to the CJ or they had some discretion [for differing scholarly opinions and judgments of the CJ in this regard, see Cherubini (2015), 148].

266 See e.g. Arnull (2006), 132, who stated that limiting the number of references may be perceived as facilitating defence of national interests.

267 See e.g. Arnull (1999), 116; Guild and Peers (2002), 281; Battjes (2006), 572; Garlick (2010), 52. Concerns about the overburdening of the court successfully–for some time–restrained the further attempts to abolish limitations on the CJ's jurisdiction imposed by the Treaty of Amsterdam [Peers (2007), 89, 103].

268 Time-limits for the transposition: the 2003 Reception Directive–6 February 2005; the 2004 Qualification Directive–10 October 2006; the 2005 Procedures Directive–1 December 2007; the Return Directive–24 December 2010.

269 Cherubini (2015), 151.

270 Article 68(3) of the TEC.

271 See e.g. Kaunert and Léonard (2011), 12.

treaty the EU 'established the first international refugee tribunal'[272]. On the other hand, the limitations to the Luxembourg Court's jurisdiction were criticized, as *inter alia* being unjustified,[273] restricting access to justice[274], causing a pointless prolongation of national proceedings,[275] seriously jeopardizing the uniform interpretation of EU asylum law,[276] precluding the effective enforcement and judicial control of validity of adopted measures[277] or being questionable in terms of human rights standards[278].

The Treaty of Lisbon was aimed at remedying those weaknesses. It entered into force in 2009 and opened a new stage in the CJ's jurisdiction. The limitations introduced by the Treaty of Amsterdam were abolished. Since then, lower national courts and tribunals have been able to refer questions for a preliminary ruling concerning asylum and immigration. The role of the Luxembourg Court in the field of asylum has been strengthened and the judicial control within the EU has been expanded.[279]

2.2 First Asylum Cases

In the first stage of its asylum jurisdiction the CJ dealt mainly with actions under Article 226 of the TEC for the failure of the Member States to fulfil their obligations concerning a transposition of the secondary asylum law within a prescribed period.[280] The Luxembourg Court was also challenged with the application for annulment under Article 230 of the TEC regarding the 2005 Procedures Directive.[281] Moreover, before the entry into force of the Treaty of Lisbon, the court received six preliminary references concerning asylum seekers.

In 2009, the CJ ruled for the first time on the preliminary questions regarding the EU asylum law. In the *Petrosian and Others* case, the referring

272 Gilbert (2004), 983.

273 Guild and Peers did not support the anticipation that the CJ would be deluged with preliminary references unless the limitation [Guild and Peers (2002), 289]. Cf. Arnull (1999), 116, who considered these apprehensions justified.

274 Tridimas (2003), 14.

275 Proceedings before the court of last resort may be initiated only in order to refer a question to the CJ, as noticed by Arnull (2006), 132; Battjes (2006), 572. See also Lenaerts (2010), 264.

276 Cherubini (2015), 149. See also Peers (2007), 103.

277 Peers (2007), 103.

278 See e.g. Jacobs (2003), 343; Peers (2007), 108.

279 See also Staffans (2010), 291, anticipating that 'the 'addition' in institutional power that the ECJ brings about to the field of judicial protection in asylum matters in Europe will be positive for asylum seekers'.

280 See e.g. CJ, case C-256/08 *Commission v the United Kingdom* (2009).

281 CJ (GC), case C-133/06 *Parliament v Council* (2008).

court sought to know when the period for the implementation of a Dublin transfer prescribed in the Dublin II Regulation should begin in the event of ongoing appeal proceedings that entailed a suspensive effect.[282] Next, the *Elgafaji* case pertained to the interpretation of the grounds for granting subsidiary protection under Article 15(c) of the 2004 Qualification Directive and their relation with Article 3 of the ECHR. In this case, the Luxembourg Court juxtaposed the complementary protection mechanisms provided for in the ECHR and EU law and for the first time referred to the ECtHR's asylum case-law, commencing the judicial dialogue between the two courts on human rights of asylum seekers.[283] This discussion continued (albeit implicitly) in the *Kadzoev* judgment concerning immigration detention of returnees and asylum seekers.[284]

The year 2010 was dedicated to cessation and exclusion clauses provided for in the 2004 Qualification Directive and intertwined with international refugee law. The reference in the *Salahadin Abdulla and Others* case concerned the conditions for a cessation of refugee status provided for in Article 11(1)(e) of the directive and derived from Article 1(C)(5) of the 1951 Refugee Convention.[285] In the *Bolbol* case, the CJ was asked to interpret Article 12(1)(a) of the directive, which was based on Article 1(D) of the 1951 Refugee Convention. The ruling pertained to the exclusion from protection of Palestinian asylum seekers.[286] The questions in the *B and D* case were also in regard to the exclusion clauses, but the ones expressed in Article 12(2)(b) and (c) of the directive and Article 1(F) of the 1951 Refugee Convention, thus applicable to undesirable asylum seekers like criminals and terrorists.[287] Thus, in 2010 the Luxembourg Court was challenged with providing the interpretation of not only the secondary asylum law but also international refugee law.[288]

At the beginning, questions concerning the 2004 Qualification Directive dominated the court's asylum workload. Soon enough, the CJ ruled for the first time also on the preliminary references concerning the 2005 Procedures Directive (in the *Samba Diouf* case of 2011[289]) and the 2003 Reception Directive (in

282 CJ, case C-19/08 *Petrosian and Others* (2009).

283 CJ (GC), case C-465/07 *Elgafaji* (2009). For more see Chapter 4, Title II, point 3.

284 CJ (GC), case C-357/09 PPU *Kadzoev* (2009). For more on detention, see Chapter 5.

285 CJ (GC), joined cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* (2010).

286 CJ (GC), case C-31/09 *Bolbol* (2010). For more see Chapter 4, Title III, point 2.2.

287 CJ (GC), joined cases C-57/09 and C-101/09 *B and D* (2010). For more see Chapter 4, Title III, point 3.

288 For more see these Chapter and Title, point 3.

289 CJ, case C-69/10 *Samba Diouf* (2011).

the *Cimade and GISTI* ruling of 2012[290]). Further preliminary questions concerning the interpretation and validity of the CEAS as well as the Return Directive followed. Until the end of 2020, the Luxembourg Court gave 102 asylum judgments in this regard.

2.3 Increasing Asylum Workload

The concerns that the enlargement of the CJ's jurisdiction in the field of asylum would lead to its flooding with preliminary references concerning the secondary asylum and immigration law did not materialize.[291] Twelve years after the entry into force of the Treaty of Lisbon, the number of asylum cases adjudicated by the court is still minuscule when compared with its overall workload. Even in 2018, when the number of preliminary rulings concerning the CEAS and the Return Directive peaked,[292] the asylum case-law of the Luxembourg Court constituted merely 2.2% of the total number of cases completed by the CJEU.[293]

However, it cannot be overlooked that the CJ has become more occupied with asylum matters in time. In the years 2009–2011, the Luxembourg Court gave three to four judgments that concerned the CEAS and the Return Directive yearly. In the years 2012–2014 this number steadily grew, reaching twelve rulings in 2014. The volume of asylum case-law dropped in 2015–2016 to rise considerably in 2017. In 2018 the CJ's asylum jurisprudence peaked, with seventeen judgments. In 2019 the court issued nine preliminary rulings in this regard and in 2020 the number rose again—to thirteen judgments. The increase in the court's asylum workload is perhaps not spectacular, but evident.

Obviously, this rise is connected with the enlargement of the court's jurisdiction since 2009. The post-Lisbon abolishment of the limitations in this regard allowed questions for a preliminary ruling concerning asylum and immigration matters to be referred by all national courts and tribunals, including those of lower instances. This change opened the Luxembourg Court to issues pertaining to asylum seekers, as it is established that asylum cases have difficulty reaching highest national courts[294]. In fact, lower national courts grabbed this new opportunity to ask for the interpretation of the secondary

290 CJ, case C-179/11 *Cimade and GISTI* (2012).

291 See e.g. Garlick (2010), 51, 60; Kaunert and Léonard (2011), 13; Peers (2014) 'Justice…', 25-26, 34. See also these Chapter and Title, point 2.1.

292 In 2018, the CJ issued seventeen asylum preliminary rulings.

293 The CJEU completed in total 760 cases in 2018, which included 520 preliminary references [CJEU (2020), 165].

294 See e.g. Arnull (1999), 116; Garlick (2010), 56; Cherubini (2015), 149.

asylum law and the Return Directive willingly.[295] That is not surprising given that the law in this area is becoming more and more complex as it now involves international refugee law, human rights law, EU asylum and immigration law and national provisions.[296]

However, the CJ's enhanced role is not the only reason why the number of asylum preliminary rulings has been rising. It is also a reflection of the general trend recognized before the court. Year by year preliminary ruling procedure is becoming more popular. National courts are more readily using this procedure in all cases, not only the asylum ones. While in 2007 (when the first asylum question was referred to the Luxembourg Court[297]) the total number of preliminary references reached 265, in 2019 the CJ obtained two and half times as many requests in this regard (641).[298]

Moreover, it is not a coincidence that the majority of the court's asylum rulings were given in the years 2016-2020.[299] The Luxembourg's Court workload was affected by the migration crisis which had started in 2015.[300] It prompted Member States to take measures that were supposed to be an answer to the crisis but at the same time were raising serious questions concerning their compliance with the EU law, human rights standards and international refugee law.[301]

3. Relation with International Refugee Law

The EU itself is not a party to the 1951 Refugee Convention and the 1967 Protocol,[302] so it is not bound by them as a matter of public international law.[303] However, all Member States of the EU are parties to those treaties.[304] This fact

295 See e.g. Peers (2015) 'Institutional Framework', 18. See also Thym (2019), 172.

296 For the diverse reasons for initiating preliminary ruling procedure in the area of migration, see e.g. Krommendijk (2018), 122-142.

297 CJ (GC), case C-465/07 *Elgafaji* (2009).

298 CJEU (2012), 96; CJEU (2020), 165.

299 Since 2016 the CJ has given 59 asylum rulings out of 102 in total. Those judgments constitute 57.8% of the asylum case-law of the court.

300 CJEU (2019), 52; CJEU (2020), 59. See also Heschl and Stankovic (2018), 105.

301 See e.g. CJ (GC), case C-646/16 *Jafari* (2017); CJ (GC), case C-490/16 *A.S.* (2017). See also CJ (GC), joined cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council* (2017), paras 338-343.

302 However, the EU's accession to those treaties was considered in the Stockholm Programme [European Council (2010), para 6.2.1].

303 Except those provisions which constitute customary international law [Hailbronner and Thym (2016), 1029, 1046].

304 In 1998 the Council confirmed the significance of the 1951 Refugee Convention and the 1967 Protocol within the EU legal order by enlisting them as a part of the EU acquis.

had to affect the EU asylum policy and law. Hence, international refugee law has been repeatedly mentioned and relied on in the primary and secondary EU law.[305] The Treaty of Maastricht specified that asylum policy must be realized in compliance with the 1951 Refugee Convention.[306] Under the Treaty of Amsterdam, the Council was obliged to adopt the measures on asylum in accordance with international refugee law and other relevant treaties.[307] This rule was confirmed in the Treaty of Lisbon as regards the whole European asylum policy.[308] Moreover, the 1951 Refugee Convention and the 1967 Protocol are two of the three treaties expressly mentioned in the EU Charter.[309] The secondary asylum law went even further in the endorsement of international refugee law. The respective directives are founded on the assertion that the CEAS should be 'based on the full and inclusive application' of the 1951 Refugee Convention.[310] As proclaimed in the 2004 and 2011 Qualification Directive, the above-mentioned treaty is a 'cornerstone of the international legal regime for the protection of refugees'. The directives should 'guide the competent national bodies of Member States in the application of the Geneva Convention'.[311] Accordingly, the rules arising from international refugee law are further developed under the secondary asylum law[312] or serve there as a point of reference[313]. In consequence, the 1951 Refugee Convention and the

States aspiring to become an EU member were expected to accede to those treaties [see e.g. Noll and Vedsted-Hansen (1999), 374-375; Guild (2006), 630].

305 See Cherubini (2015), 174, stating that the reference to international refugee law in the primary EU law ''opens up' the Treaties to the Refugee Convention, endowing them with the same legal value'.

306 Article K.2(1) of the original text of the TEU. The Treaty is silent about the 1967 Protocol though.

307 Article 63(1) of the TEC.

308 Article 78(1) of the TFEU. The Treaty of Lisbon clarified that the compliance with the 1951 Refugee Convention is required as regards all instruments of the EU asylum *acquis*, including temporary and subsidiary protection [Hailbronner and Thym (2016), 1029].

309 Article 18 of the EU Charter states that 'The right to asylum shall be guaranteed with due respect for the rules of' the 1951 Refugee Convention and the 1967 Protocol.

310 See e.g. Recital 3 of the Preamble to the 2011 Qualification Directive; Recital 3 of the Preamble to the 2013 Procedures Directive; Recital 3 of the Preamble to the 2013 Reception Directive; Recital 3 of the Preamble to the Dublin III Regulation.

311 Recitals 3 and 16 of the Preamble to the 2004 Qualification Directive; Recitals 4 and 23 of the Preamble to the 2011 Qualification Directive.

312 See e.g. Article 9(1) of the 2011 Qualification Directive providing for the understanding of the 'acts of persecution within the meaning of article 1A of the Geneva Convention' and Article 29(1)(c) of the 2013 Procedures Directive concerning the supervisory responsibilities of the UNHCR under Article 35 of the 1951 Refugee Convention.

313 See e.g. Article 12(1)(a) of the 2011 Qualification Directive referring to the Article 1(D) of the 1951 Refugee Convention; Article 38(1)(c) and (e) of the 2013 Procedures Directive mentioning the 1951 Refugee Convention; Recital 20 of the Preamble to the Dublin III

1967 Protocol have to be regarded not only as the cornerstones of international refugee law, but also as the centrepieces of the CEAS.

Such positioning of the 1951 Refugee Convention within the EU legal order must have influenced the CJ's jurisdiction and jurisprudence.[314] The Luxembourg Court is entitled to give preliminary rulings concerning the accordance of the EU law with international refugee law. It is obliged to provide the interpretation of the EU *aquis* that is compliant with the 1951 Refugee Convention and the 1967 Protocol. In the case of *M and Others*, the CJ explained that

> although the European Union is not a contracting party to the Geneva Convention, Article 78(1) TFEU and Article 18 of the Charter nonetheless require it to observe the rules of that convention. Directive 2011/95 must therefore, pursuant to those provisions of primary law, observe those rules (...). Consequently, the Court has jurisdiction to examine the validity of Article 14(4) to (6) of Directive 2011/95 in the light of Article 78(1) TFEU and Article 18 of the Charter and, in the context of that examination, to verify whether those provisions of that directive can be interpreted in a way which is in line with the level of protection guaranteed by the rules of the Geneva Convention.[315]

Moreover, the court may also interpret international refugee law.[316] However, its interpretation of the 1951 Refugee Convention and the 1967 Protocol is limited to situations that fall within the ambit of the EU law.[317]

The boundaries of the Luxembourg Court's jurisdiction were discussed in the case of *Qurbani*.[318] The case pertained to the application of Article 31 of the 1951 Refugee Convention to the asylum seeker who committed migration-related crimes in Germany. The questions referred by the national court focussed solely on the understanding of international refugee law, leaving the EU law beyond consideration. The CJ stated that the 1951 Refugee Convention did not provide for the clause conferring jurisdiction to the Luxembourg

Regulation stating that detention of asylum seekers must be in accordance with Article 31 of the 1951 Refugee Convention.

314 See also Rosas (2015), 15, explaining that the CJ's willingness to cite the 1951 Refugee Convention in its judgments results from the respect for international refugee law inscribed into the primary and secondary EU law.

315 CJ (GC), joined cases C-391/16, C-77/17 and C-78/17 *M and Others* (2019), paras 74-75. See also CJ (GC), joined cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council* (2017), paras 338-343.

316 See e.g. Battjes (2006), 561; Leboeuf and Tsourdi (2013), 403; Hailbronner and Thym (2016), 1047-1048. Cf. Garlick (2015) 'International Protection...', 108.

317 See e.g. Battjes (2006), 570; Hailbronner and Thym (2016), 1047.

318 CJ, case C-481/13 *Qurbani* (2014).

Court. As a result, 'the Court can interpret the provisions of that convention, in the present case Article 31 thereof, as requested only if the performance by it of such tasks is covered by Article 267 TFEU', so only in relation to the 'rules which are part of EU law'.[319] The CJ concluded that

> (i)n the present case, although several pieces of EU legislation have been adopted in the field to which the Geneva Convention applies as part of the implementation of a Common European Asylum System, it is undisputed that the Member States have retained certain powers falling within that field, in particular relating to the subject-matter covered by Article 31 of that convention. Therefore, the Court does not have jurisdiction to interpret directly Article 31, or any other article, of that convention.[320]

Interestingly, in the same judgment the Luxembourg Court noted that previously it had accepted its jurisdiction to interpret the provisions of the 1951 Refugee Convention, but only the ones which had been directly mentioned in the EU law.[321] At the time of the *Qurbani* judgment, only one reference to Article 31 of the 1951 Refugee Convention was made in the secondary asylum law,[322] but the specific provision seemed irrelevant in the *Qurbani* case.[323] Accordingly, the CJ held that it lacked the jurisdiction to give a preliminary ruling in that case.

The *Qurbani* judgment was considered—at least—a disappointment.[324] Certainly, it is confusing, as the Luxembourg Court first stated that it did not have jurisdiction concerning the 1951 Refugee Convention at all and afterwards claimed that its jurisdiction in this regard was limited. Moreover, the judgment was criticized for not being consonant with the EU's commitment that the CEAS should be in accordance with the 1951 Refugee Convention.[325] The court's reasoning was described as dubious[326], slightly tautological[327] and unjustified as the jurisdiction might have been drawn from other provisions[328]. Nevertheless, the CJ's judgment in that case was not a surprise at all. A closer

319 Ibid., paras 20-21.
320 Ibid., para 24.
321 Ibid., para 28.
322 Article 14(6) of the 2004 Qualification Directive.
323 CJ, case C-481/13 *Qurbani* (2014), para 28.
324 Costello (2015) *The Human Rights...*, 320; Holiday (2014).
325 Costello (2015) *The Human Rights...*, 284.
326 Ibid., 320.
327 Matera (2015), 7.
328 Holiday (2014).

look at its case-law pertaining to the 1951 Refugee Convention confirms that the reasoning of the *Qurbani* ruling is a reflection of the Luxembourg Court's practice hitherto (and in fact also afterwards).

In its asylum jurisprudence, the CJ refers to the 1951 Refugee Convention in rather general terms, highlighting its overall importance in the international and EU legal systems. The obligation of the EU asylum *acquis* to be in accordance with this treaty is accentuated. The Luxembourg Court also acknowledges that it must respect international refugee law when it interprets the EU law.[329] When the CJ decides to provide some interpretation of the 1951 Refugee Convention itself–for now, rather sparingly–it does so only in cases concerning the understanding of the secondary asylum law[330] that directly refer to the provisions of this convention[331] or are clearly drawn from international refugee law[332]. Thus, in practice, the CJ does allow for the possibility of interpreting the 1951 Refugee Convention and the 1967 Protocol, but to a limited extent, with regard to cases concerning the provisions of the EU law that directly or indirectly address those treaties.[333] The Luxembourg Court prefers

329 See e.g. CJ (GC), joined cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla* (2010), paras 51-53; CJ (GC), joined cases C-411/10 and C-493/10 *N.S. and M.E.* (2011), paras 4, 7, 75; CJ (GC), case C-181/16 *Gnandi* (2018), para 53.

330 International refugee law is mostly invoked in the judgments concerning the CEAS (in particular the 2004 and 2011 Qualification Directives). In cases pertaining to the Return Directive, such references occur sporadically, more often in the AGs' opinions than in the CJ's rulings [see Molnár (2019), 445-452].

331 See e.g. CJ (GC), case C-31/09 *Bolbol* (2009), paras 47, 48, 51; CJ (GC), case C-364/11 *El Kott and Others* (2012), paras 47-49, 51, 62; CJ (GC), case C-585/16 *Alheto* (2018), para 85–concerning Article 12(1)(a) of the 2004 and 2011 Qualification Directives and Article 1(D) of the 1951 Refugee Convention; CJ, joined cases C-199/12, C-200/12 and C-201/12 *X, Y and Z* (2013), paras 51 and 53; CJ (GC), joined cases C-71/11 and C-99/11 *Y and Z* (2012), para 61; CJ, case C-238/19 *EZ* (2020), paras 22, 43-44, 49–concerning Article 9 of the 2004 and 2011 Qualification Directives and Article 1(A) of the 1951 Refugee Convention; and CJ (GC), joined cases C-391/16, C-77/17 and C-78/17 *M and Others* (2019), paras 101-112, regarding Article 14(6) of the 2011 Qualification Directive that refers to multiple rights guaranteed in the 1951 Refugee Convention.

332 See e.g. CJ (GC), joined cases C-57/09 and C-101/09 *B and D* (2010), para 117; CJ (GC), case C-573/14 *Lounani,* para 48–both concerning Article 12(2) of the 2004 Qualification Directive and Article 1(F) of the 1951 Refugee Convention; CJ, case C-369/17 *Ahmed* (2018), paras 43-46, concerning Article 17 of the 2011 Qualification Directive that was inspired by Article 1(F) of the 1951 Refugee Convention; CJ, case C-720/17 *Bilali* (2019), paras 56-58, with regard to Article 19 of the 2011 Qualification Directive and Article 1(C) of the 1951 Refugee Convention; CJ (GC), joined cases C-391/16, C-77/17 and C-78/17 *M and Others* (2019), paras 84, 90-96, in regard to Articles 2(d) and 14(4) and (5) of the 2011 Qualification Directive and–respectively–Articles 1(A) and 33(2) of the 1951 Refugee Convention. See also CJ (GC), joined cases C-443/14 and C-444/14 *Alo and Osso* (2016), paras 28-35, 44, 51; CJ, case C-713/17 *Ayubi* (2018), para 24.

333 See e.g. Holiday (2014).

to refer to international refugee law briefly rather than to interpret it in detail. However, it should not be overlooked that even when the court focusses on the secondary asylum law, it may be indirectly providing guidance on the understanding of the 1951 Refugee Convention too.[334]

The *Qurbani* judgment may be then considered a disappointment, but with regard to the missed opportunity to alter the practice of the CJ which is too timidly interpreting international refugee law so far. The Luxemburg Court seems to be balancing between respecting international refugee law and giving rulings in the politically sensitive environment of the EU, where Member States are especially reluctant to give away their sovereignty with regard to asylum seekers. This has led to the CJ's 'fairly safe and consensus-based approach'[335] towards asylum preliminary references. It appears that the Luxembourg Court is sensitive to the 1951 Refugee Convention but rules in a moderate and watchful manner, so as not to impose too bold standards which would be difficult for the Member States to accept.[336]

As a result, the CJ is not using its unique potential fully.[337] Having jurisdiction to issue binding rulings on asylum preliminary references, it has already been providing the European standing on the interpretation of international refugee law and reinforcing the uniform understanding of it in Europe, but it has been performing too bashfully. By being more courageous in its approach towards the 1951 Refugee Convention, the Luxembourg Court may influence international refugee law in a way that no other judiciary body could. Taking into consideration the absence of the international tribunal rooted in the 1951 Refugee Convention and the ICJ's inactiveness in this area, the CJ is the one and only supranational court issuing binding judgments on the interpretation and application of international refugee law in Europe. Even if these judgments are limited in content, they are promoting a coherent understanding of this law in as many as 27 states, thus in 18% of the Contracting States of the 1951 Refugee Convention or the 1967 Protocol.[338] In consequence, the Luxembourg Court has a great potential to influence the understanding of international refugee law beyond the EU,[339] and it has already been recognized for contributing to the transnational dialogue concerning the application of

334 See e.g. de Baere (2013), 123-124; Drywood (2014), 1119. See also Boutruche Zarevac (2010), 69-71. Cf. Meyerstein (2005), 1551.

335 Drywood (2014), 1113, 1124.

336 Ibid., 1118, 1094-1095, 1124.

337 See e.g. Lehmann (2014), 81.

338 See e.g. Lambert (2014), 206-207; Drywood (2014), 1121.

339 See e.g. Drywood (2014), 1121-1122; Lambert (2014), 206-207; Garlick (2015) 'International Protection…', 112-113; Tsourdi (2017), 109.

the 1951 Refugee Convention around the world.[340] The special role of the CJ as regards the supervision of the 1951 Refugee Convention and the 1967 Protocol, then, cannot be overlooked and underestimated.

V. Conclusions

The 1951 Refugee Convention, ECHR and EU law all find their origins in the post-war reality of the 1950s. Only the 1951 Refugee Convention was directly aimed at the protection of refugees, but it provided for a flawed supervisory mechanism in this regard. The 1967 Protocol did not remedy those shortcomings. Meanwhile, neither the ECHR nor the EC law were adopted to guarantee specific rights of asylum seekers. The ECtHR and the CJ were not created with asylum seekers in mind. They started to adjudicate on asylum matters after many years of operation. The Strasbourg Court derived the principle of non-refoulement from Article 3 of the ECHR only in 1989. In the 1990s, the asylum jurisprudence of the ECtHR began to blossom. The Luxembourg Court gained limited jurisdiction in regard to asylum and immigration matters pursuant to the Treaty of Amsterdam, which entered into force in 1999. However, it gave its first preliminary ruling concerning asylum seekers ten years later. Despite those overdue beginnings, nowadays both courts deliver increasing numbers of judgments, decisions and orders concerning various rights of asylum seekers,[341] shaping standards of their protection around Europe. Hence, they are justly being described as, *inter alia,* refugee law courts[342], asylum courts[343], arbiters of asylum law[344] or European asylum courts.

The ECtHR and CJ fill—to some extent—the gap left by the inadequate monitoring system rooted in international refugee law. Asylum seekers can seek individual justice before the Strasbourg Court when national asylum and return proceedings fail to respect human rights protected under the ECHR. The Luxembourg Court issues preliminary rulings that reinforce the uniform interpretation and application of asylum seekers' rights within the EU.

340 Hailbronner and Thym (2016), 1047-1048.

341 Kaunert and Léonard (2011), 14, observed the phenomenon of what they called the 'increasing 'judicialisation' of asylum in the EU—that is, the increasing influence of juridical texts and actors on asylum policy-making', which includes the growing role of the CJ and—indirectly—the ECtHR.

342 Concerning the CJ: Costello (2015) *The Human Rights…*, 174.

343 Concerning the ECtHR: Bossuyt (2012), 203; concerning the CJ: Taylor (2014) 'The CJEU…', 77; de Baere (2013), 107.

344 Concerning the CJ: Drywood (2014), 1095.

However, neither of those courts (or even both of them considered jointly) provide for an effective and sufficient supervisory mechanism for the 1951 Refugee Convention and the 1967 Protocol.[345]

In fact, the ECtHR does not supervise the application of international refugee law at all. The Strasbourg Court reiterates that it is not its role to verify whether states respect their obligations under the 1951 Refugee Convention or the Protocol thereto. It has no means to enforce compliance with those treaties. It cannot find a violation of international refugee law and afford a just satisfaction on this basis. The ECtHR acknowledges the 1951 Refugee Convention, refers to it, avails itself of it, but it does not provide for an elaborate interpretation of international refugee law in its judgments and decisions. Thus, the Strasbourg Court cannot be considered a supervisory body monitoring the application of the 1951 Refugee Convention and the 1967 Protocol.

The relation between the Luxembourg Court and international refugee law is not so straightforward. On the one hand, the CJ is entitled to rule—in a binding manner—on the accordance of the EU *acquis* with the 1951 Refugee Convention and the 1967 Protocol. The Luxembourg Court ensures that the EU law is interpreted in conformity with international refugee law. It may provide for the interpretation of the 1951 Refugee Convention, but it does so rather indirectly—through the interpretation of the secondary asylum law. On the other hand, the Luxembourg Court cannot resolve domestic courts' doubts concerning the understanding of international refugee law that is not intertwined with the EU law. Thus, some provisions of the 1951 Refugee Convention and the 1967 Protocol may be slipping out of the court's jurisdiction. Moreover, even when the CJ decides to include some direct guidance on the interpretation of international refugee law in a judgment, most often it is provided timidly, scantily and incidentally to the considerations pertaining to the understanding of the EU law.

Despite being the only supranational court within Europe that has such broad competences towards international refugee law, the Luxembourg Court cannot be regarded as a judicial body supervising the interpretation and application of the 1951 Refugee Convention and the 1967 Protocol. If it is to be recognized as such, the monitoring system provided by it must be acknowledged as faulty, leaky and incomplete. It would be a supervisory mechanism that does not cover the whole international refugee law and all Contracting States.

345 See also Meyerstein (2005), 1551, claiming that the proceedings before the two courts are not sufficient supervisory mechanisms as regards the 1951 Refugee Convention, so the EU Asylum Appellate Court should be created. See also Bossuyt (2012), 244. Cf. Staffans (2010), 290, pointing out that, after the enlargement of the CJ's jurisdiction, the need for such a separate court appears to be fabricated.

The CJ examines the 1951 Refugee Convention and the 1967 Protocol only if and as far as they are intertwined with the EU law. The case-law of the Luxembourg Court hitherto reinforces the harmonized interpretation of international refugee law, but mainly indirectly and incidentally to the other court's considerations. It is very far from the monitoring system of international refugee law envisaged by Kälin or other scholars.[346]

Although neither the ECtHR nor the CJ can be described as a supervisory body as regards the 1951 Refugee Convention and the 1967 Protocol, their jurisprudence certainly is affected by and affects international refugee law. On the one hand, the 1951 Refugee Convention and the Protocol thereto are primary sources of refugee law in the overwhelming majority of the Contracting Parties to the ECHR and all Member States of the EU. Thus, those treaties have a great impact on asylum cases that reach the European asylum courts and cannot be overlooked by them. On the other hand, the asylum jurisprudence of the two courts has been increasingly exerting influence on the interpretation and application of the 1951 Refugee Convention and the 1967 Protocol on a national level. In particular, the Member States of the EU are obliged to read and apply international refugee law with the ECHR and its interpretation provided by the Strasbourg Court in mind. It is a reflection of a more universal idea that international refugee law should be understood in the light of human rights standards. Meanwhile, the Luxembourg Court—by providing guidance on the interpretation of the secondary asylum law in binding rulings—is in fact influencing the application of international refugee law on a domestic level and reinforcing its uniform understanding within Europe.

The overlapping of legal frameworks concerning asylum seekers may entail some perils too. As Durieux pointed out, states may prefer to apply the protection inherent to regional instruments (the protection against refoulement under Article 3 of the ECHR and subsidiary protection under the 2011 Qualification Directive) to the detriment of their more demanding obligations arising from international refugee law. They already 'attach greater importance to their non-refoulement obligations stemming from the ECHR than to a 'full and inclusive application' of the 1951 Refugee Convention'. This difference results from the fact that the ECHR provides for an effective supervisory mechanism while international refugee law does not. The CJ's asylum jurisprudence may also shift states' preferences from the 1951 Refugee Convention to the EU asylum law. In consequence, in Durieux's opinion, both the Strasbourg and Luxembourg Courts with their expanding asylum case-law

346 For the proposals on the current system's revision, see Hathaway (2001); Kälin (2003); North and Chia (2013); Simeon (2013) 'Monitoring…'.

are encouraging the marginalization and blurring of the protection offered by international refugee law. Accidentally, the 'refugee' in the sense of the 1951 Refugee Convention is vanishing.[347]

Durieux's vision may seem overly pessimistic, but it confirms that nowadays international refugee law, the ECHR and EU law closely interact with each other. Neither the ECtHR nor the CJ can be considered a judicial body that truly supervises the application and interpretation of the 1951 Refugee Convention and the Protocol thereto, but in practice they do acknowledge those treaties and take them into account when asylum cases are being decided. Importantly, the Strasbourg and Luxembourg Courts are working towards filling some gaps that remain in the supervisory mechanism rooted in international refugee law. It has encouraged their growing perception as the European asylum courts.

347 Durieux (2013), 228, 250, 254-255.

Chapter 3
Asylum Seekers and the Proceedings before the European Asylum Courts

I. Introduction

Despite the fact that both European asylum courts increasingly adjudicate on human rights of asylum seekers, in neither of them has a specialized 'asylum procedure' been established. In general, an asylum case is subject to the same procedural rules as any other case.

Meanwhile, asylum seekers form a vulnerable group of participants in the proceedings before the ECtHR and the CJ. They often do not know the language of the hosting state, do not understand the legal system they are liable to and are financially vulnerable. They struggle to retrieve information about their rights and obligations and have difficulty obtaining legal aid. Due to their vulnerability, accessing justice on both a national and regional level is often arduous. They also struggle to provide the respective authorities and the European asylum courts with all necessary information and evidence.

Furthermore, under domestic laws, asylum seekers are often 'detainable' and 'removable' during the proceedings before the Strasbourg and Luxembourg Courts. Fearing detention and refoulement, some asylum seekers go into hiding and refrain from contacting any authorities and even their representatives. Other applicants and parties to the main proceedings may be unduly detained in inhuman or degrading conditions while waiting for the judgment of the European asylum court. Before the ECtHR or CJ manages to decide on their application or preliminary reference, they may be also removed to a country where the risk of being persecuted or ill-treated may materialize.

All of the above-mentioned factors influence the participation of asylum seekers in the proceedings before the ECtHR and CJ. Taking into account the unusual situation of asylum seekers and the special character of asylum cases, two observations must be made. Firstly, some of the procedural rules applicable before the two courts affect this group of foreigners more than other persons, especially nationals of the Contracting Parties to the ECHR and the Member

States of the EU. For instance, the language requirements applicable before the two courts may constitute insurmountable barriers for asylum seekers to access justice. Secondly, some of the procedural rules are particularly relevant in asylum cases, e.g. the provisions concerning anonymity or those regarding interim measures in the ECtHR as well as the urgent procedure in the CJ.

A comprehensive analysis of the proceedings before both courts would be beyond the scope of this study. Therefore, in this chapter the procedural rules are discussed from the standpoint of an asylum seeker who initiates and pursues proceedings in the ECtHR or who is a party to the main proceedings during the preliminary ruling procedure before the CJ. Only those aspects of the courts' procedures are investigated that particularly affect those asylum seekers or are especially important from their perspective. Accordingly, the access to the two courts (II), the urgency of the proceedings (III) and the sources of information that the courts rely on (III) are examined. The dissimilarities in the courts' proceedings in this regard are identified. The main purpose of this chapter is to determine to what extent the Strasbourg and Luxembourg Courts take into consideration the unusual situation of asylum seekers and the special character of asylum cases while applying their procedural rules.

II. Access to the Court

The asylum workload of the Strasbourg and Luxembourg Courts is constantly rising,[348] creating the impression that both courts are progressively open for asylum seekers. Meanwhile, asylum seekers face multiple barriers in accessing justice before both courts. Those impediments result, on the one hand, from the specific situation in which asylum seekers are often constrained due to *inter alia* national laws and practices concerning this group of foreigners,[349] and, on the other hand, from the rules of procedure applied before the ECtHR and the CJ. Thus, in this subchapter, the practical difficulties are juxtaposed with the respective procedural rules.

First, the moment when the proceedings can be initiated in the ECtHR and the CJ is investigated (1). As a rule, the Strasbourg Court can adjudicate on asylum matters only if the respective national proceedings have been terminated, and the Luxembourg Court can do so only if they are still ongoing. Secondly, the question of who is entitled to initiate the proceedings before the

348 For more see Chapter 2, Title III, point 2.2, and Title IV, point 2.3.

349 See e.g. ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §82, as regards the situation of asylum seekers in Greece affecting their access to the ECtHR.

European asylum courts is examined (2). An application has to be lodged in the ECtHR by a concerned asylum seeker himself or his representative. Meanwhile, a request for a preliminary ruling is referred by a national court or tribunal irrespective of the concerned asylum seeker's opinion. Finally, other rules of procedure significant for the asylum seeker who wants to initiate or participate in the proceedings before the Strasbourg or Luxembourg Court are discussed, i.e. the provisions regarding the language of the procedure (3), anonymity (4), costs and legal aid (5). All of the above-mentioned aspects of the proceedings influence the asylum seekers' access to the Strasbourg and Luxembourg Courts.

1. Timing of the Initiating Action

Two admissibility criteria relating to timing arise from Article 35(1) of the ECHR: the domestic remedies must be exhausted and the application must be lodged to the ECtHR within a period of six or four months from the date on which the final decision was taken.[350] Conversely, preliminary questions can be referred to the CJ only within the duration of national proceedings. Thus, as a rule, the Strasbourg Court can adjudicate on asylum matters only if the respective domestic proceedings have been terminated and the Luxembourg Court only if they are still ongoing.

The different rules on the timing of the action initiating the proceedings before the CJ and the ECtHR result from the diverse objectives of those procedures. The rule of the exhaustion of domestic remedies is closely intertwined with the principle of subsidiarity.[351] National authorities must be afforded the opportunity to react, prevent and redress the ECHR's violations before the Strasbourg Court adjudicates on a matter. The prescribed time-limit maintains 'legal certainty by ensuring that cases raising issues under the Convention are examined within a reasonable time' and prevents 'the authorities and other persons concerned from being kept in a state of uncertainty for a long period of time'.[352] Meanwhile, the preliminary ruling procedure is aimed at safeguarding uniformity in the interpretation and application of the EU law.[353] National courts and tribunals were given a competence or obligation to refer

350 Until 31 January 2022—six months, since 1 February 2022—four months (see Article 4 of the Protocol no. 15).

351 See e.g. ECtHR (GC), *Akdivar and Others v. Turkey*, no. 21893/93 (1996), §65; ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §287.

352 ECtHR (GC), *Mocanu and Others v. Romania*, nos. 10865/09, 45886/07 and 32431/08 (2014), §258.

353 Lenaerts, Maselis and Gutman (2014), 50-51; Barents (2016), 368-369; Rosas (2016), 180.

preliminary requests in order to guarantee their continuous and effective dialogue with the Luxembourg Court.[354] In other words, a preliminary ruling is issued in order to support a domestic court in the appropriate understanding of the EU law. The CJ's judgments are in fact expected to contribute to the decision that a national court is about to make.[355] As a result, they cannot be delivered after the domestic proceedings are terminated.

Overall, those time-limits are well-suited for their purposes. In practice though, they may constitute barriers that for many asylum seekers are difficult to overcome. In this section the admissibility criteria established under Article 35(1) of the ECHR and the time-limits for initiating and participating in the preliminary ruling procedure are examined from the asylum seekers' perspective. Firstly, the required exhaustion of domestic remedies is explored [1.1(a)]. Secondly, the time-limit to submit an application to the ECtHR is discussed [1.1(b)]. Finally, the time-limits to initiate proceedings before the Luxembourg Court by a referring court or tribunal and to submit written observations by a concerned asylum seeker are briefly considered (1.2).

1.1 The ECtHR

a. Exhaustion of Domestic Remedies

The rule of the exhaustion of domestic remedies stems from the principle of subsidiarity that is 'a cornerstone, a *ratio conventionis,* of the European system of human rights protection'.[356] Under Article 35(1) of the ECHR, the ECtHR 'may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law'. Otherwise, the application to the court is considered inadmissible.

Thus, in principle, an asylum case has to go through the whole national procedure prescribed by law before a concerned asylum seeker may approach the Strasbourg Court. Meanwhile, domestic asylum-related proceedings are often flawed.[357] Asylum seekers may not be protected against refoulement during those proceedings. They may be removed to suffer torture or ill-treatment in another country before the national procedure ends. They may also have no chance of success before domestic authorities (for instance when their country of origin is indisputably considered to be safe[358]). Moreover, in some

354 Lenaerts, Maselis and Gutman (2014), 50-51; Barents (2016), 368-369.

355 Lenaerts, Maselis and Gutman (2014), 63.

356 Keller and Stone Sweet (2008), 701-702, who also noticed that Article 35 of the ECHR is used strategically by the court: it may be ignored when a problem at hand is important, but it also serves as a tool to cope with the overloaded docket of the court.

357 See also Chapter 6, Title I.

358 For the concept of 'safe third country', see Chapter 4, Title III, point 2.1.

countries, asylum-related procedures last years before they are decisively concluded.[359] They are time- and cost-consuming. Asylum seekers may not have sufficient resources to pursue their case until the very end of the national proceedings.[360] Asylum seekers struggle as well with access to information about available remedies and encounter barriers in obtaining legal aid.[361] As a result, in practice, it is difficult for asylum cases to reach the highest national courts.[362] *Ipso facto,* some asylum seekers may not be able to exhaust domestic remedies available in their case.

The ECtHR reiterates that Article 35(1) of the ECHR 'must be applied with some degree of flexibility and without excessive formalism'. The rule of the exhaustion of domestic remedies is not absolute nor automatic. The general legal and political context in which the remedies operate, as well as the personal circumstances of the applicants, must be taken into account.[363] Hence, the court allows some exceptions to the requirement that domestic remedies must be exhausted. However, the threshold in this regard is considered to be high.[364]

The case of *A.M. v. France* proves that the Strasbourg Court may indeed show a flexible attitude towards the required exhaustion of domestic remedies. In that case, the foreigner, who had been served with a deportation order, first requested interim measures before the ECtHR and next applied for asylum to national authorities. Asylum proceedings were an effective remedy that the applicant should have exhausted before approaching the Strasbourg Court. However, the ECtHR found that the applicant did exhaust domestic remedies in this case. The court relied on the fact that the asylum application had been rejected before the Strasbourg Court decided on the admissibility of the application and that the applicant had appealed against the deportation order before seeking the provisional measure. In those circumstances, the ECtHR found that declaring the application inadmissible would be 'excessively formalistic'.[365]

359 See e.g. FRA (2010), 33; ECRE (2016) 'Length…', 9-10.

360 See e.g. Arnull (1999), 116.

361 See e.g. FRA (2010), 19, 27-30; PACE (2011), para 13; ECRE/ELENA (2017), 4-9. As regards the Dublin cases: Garlick (2010), 56.

362 See e.g. Arnull (1999), 116; Garlick (2010), 56; Cherubini (2015), 149.

363 See e.g. ECtHR (GC), *Akdivar and Others v. Turkey,* no. 21893/93 (1996), §69.

364 See e.g. Harris et al. (2018), 62; Zwaak, Haeck and Burbano Herrera (2018), 130.

365 It would be excessively formalistic also because the applicant did not know that he could ask for asylum when he applied to the ECtHR, he claimed that if he had known about this possibility, he would prefer it to approaching the ECtHR, and in practice he faced obstacles in submitting the asylum application while in detention [ECtHR, *A.M. v. France,* no. 12148/18 (2019), §§57-58, 65, 79-81].

Not only may the Strasbourg Court turn a blind eye on the rule of the exhaustion of domestic remedies when necessary, but it also reiterates that not all domestic remedies must be exhausted to comply with Article 35 of the ECHR. Only those remedies that are 'effective' within the meaning of Article 13 of the ECHR are expected to be used by the applicants.[366] As the right to an effective remedy is examined in detail in chapter 6, only the most important questions are briefly answered here: whether the effectiveness of the remedy is undermined when it does not protect asylum seekers against refoulement, when it is bound to fail, when it takes an excessively long time to be decided and when the asylum seeker is uninformed or misinformed about his rights.

In non-refoulement cases, the ECtHR insists that domestic remedies do not have to be exhausted when they do not entail an automatic suspensive effect.[367] The court's tough stance in this regard results from 'the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises'.[368] Accordingly, an automatic suspensive effect of a remedy is regularly required by the court in regard to asylum[369] and return proceedings[370]. Remedies with automatic suspensive effect must be also made available to asylum seekers in the context of their admission to the territory of the Contracting States. For instance, in the case of *M.A. and Others v. Lithuania*, the applicants, who had tried in vain to apply for asylum at the Lithuanian border, were not expected to lodge appeals against the decisions on a refusal of entry they had received. The Strasbourg Court stressed that those remedies were non-suspensive: the applicants would have been returned to Belarus even if they had appealed. Thus, the preliminary objections based on Article 35 of the ECHR were rejected.[371]

Furthermore, the ECtHR holds that applicants are not required to use domestic remedies that are bound to fail according to the established national

366 See e.g. ECtHR, *M.K. and Others v. Poland*, nos. 40503/17, 42902/17 and 43643/17 (2020), §§142-144.

367 See e.g. ECtHR, *Al Hanchi v. Bosnia and Herzegovina*, no. 48205/09 (2011), §32; ECtHR, *A.A.M. v. Sweden*, no. 68519/10 (2014), §§44-46. See also ECommHR, *X v. Germany*, no. 7216/75, dec. (1976); ECommHR, *M v. France*, no. 10078/82, dec. (1984). For more see Chapter 6, Title IV.

368 ECtHR, *Mohammed v. Austria*, no. 2283/12 (2013), §72.

369 See e.g. ECtHR, *Diallo v. the Czech Republic*, no. 20493/07 (2011), §§6, 78; ECtHR, *Mohammed v. Austria*, no. 2283/12 (2013), §§78, 81.

370 See e.g. ECtHR, *Čonka v. Belgium*, no. 51564/99 (2002), §§45, 81-83; ECtHR, *Salah Sheekh v. the Netherlands*, no. 1948/04 (2007), §125.

371 ECtHR, *M.A. and Others v. Lithuania*, no. 59793/17 (2018), §§83-86. See also ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), §§206-207; ECtHR, *M.K. and Others v. Poland*, nos. 40503/17, 42902/17 and 43643/17 (2020), §§143-148.

case-law applied in comparable cases. For instance, in the case of *Salah Sheekh v. the Netherlands*, the Strasbourg Court considered the application admissible even though the applicant did not lodge a further appeal in the asylum proceedings. The court explained that the appeal would have no prospect of success due to, *inter alia*, the unfavourable interpretation of the concept of internal flight alternative accepted by the respective national authority at the relevant time.[372] Additionally, in some cases, the ECtHR found that the applicant who was advised by a lawyer that there was no prospect of success in relation to a respective remedy should be absolved from the obligation to exhaust such a remedy.[373] However, the case-law in this regard is dependent on the very circumstances of the particular case.[374] Moreover, in general the Strasbourg Court stresses that '(t)he "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant'[375] and that 'the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies'[376].

The ECtHR reiterates that the excessive duration of a remedial action can undermine the adequacy of the remedy. In asylum cases, the remedy is considered effective if it guarantees a 'particularly prompt response'.[377] Meanwhile, in the case of *M.S.S. v. Belgium and Greece*, it was established that the asylum procedure before the Supreme Administrative Court lasted on average five and a half years. The proceedings concerning the stay of the execution of the expulsion order were found to be excessively long (up to four years). In those circumstances, the appeal against a negative asylum decision was considered ineffective and the application to the Strasbourg Court admissible.[378]

372 ECtHR, *Salah Sheekh v. the Netherlands*, no. 1948/04 (2007), §124. See also ECtHR, *Said v. the Netherlands*, no. 2345/02, dec. (2004); ECtHR, *NA. v. the United Kingdom*, no. 25904/07 (2008), §91; ECtHR, *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07 (2011), §207.

373 See e.g. ECtHR, *NA. v. the United Kingdom*, no. 25904/07 (2008), §89; ECtHR, *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07 (2011), §209.

374 See e.g. ECtHR, *Mogos and Krifka v. Germany*, no. 78084/01, dec. (2003), where the ECtHR held that the application was inadmissible because the applicants did not lodge a complaint to the Federal Constitutional Court in the expulsion proceedings. The lawyer's opinion that this complaint had no prospect of success was not enough to absolve the applicants from the requirement to exhaust domestic remedies.

375 ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §197.

376 ECtHR (GC), *Akdivar and Others v. Turkey*, no. 21893/93 (1996), §71.

377 See e.g. ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §§292-293, 301, 320; ECtHR, *Mohammed v. Austria*, no. 2283/12 (2013), §§71-72. For more see Chapter 6, Title II.

378 ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §§190, 320.

The ECtHR may be also attentive to the asylum seekers' difficulty accessing information and legal aid. In the case of *Čonka v. Belgium,* the applicants were lured to the police station supposedly in order to complete their asylum application. Instead, they were served with the decision for their removal and detention. The applicants claimed that they had been informed (falsely) that no remedy was available. The written information about remedies they had received was printed in tiny characters and in a language that they did not understand. They could not effectively contact their lawyer, had limited access to an interpreter and were not offered any legal assistance by the authorities. Their representative learned about the situation too late to react efficiently. In consequence, the applicants did not appeal against the deportation and detention decisions. The Strasbourg Court held that they could not be faulted for 'their refusal to place any further trust in the authorities and their decision not to lodge an appeal with the Belgian courts' in those circumstances. It emphasized that '(a)s regards the accessibility of a remedy within the meaning of Article 35 §1 of the Convention, this implies, *inter alia,* that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy'. The applicants had no such possibility and as a result the preliminary objections concerning the exhaustion of domestic remedies were dismissed.[379]

Despite the fact that in some cases the ECtHR acknowledged the foreigners' hampered access to information and legal aid, it should not be overlooked that, in general, the court reiterates that the application must be considered inadmissible when the applicant failed to exhaust domestic remedies because he did not comply with national formal requirements or time-limits due to his negligence.[380] The Strasbourg Court held that 'even in cases of expulsion to a country where there is an alleged risk of ill-treatment contrary to Article 3, the formal requirements and time-limits laid down in domestic law should normally be complied with'.[381] Difficulty obtaining legal aid absolves applicants from the requirement to exhaust domestic remedies rather exceptionally[382]

379 ECtHR, *Čonka v. Belgium,* no. 51564/99 (2002), §§35-46. See also ECtHR, *M.A. and Others v. Lithuania,* no. 59793/17 (2018), §82; ECtHR, *Rahimi v. Greece,* no. 8687/08 (2011), §§77,79, where the applicants were not informed about their rights in a language that they understood and had no legal representation.

380 ECtHR (GC), *Akdivar and Others v. Turkey,* no. 21893/93 (1996), §66. See also Rainey, Wicks and Ovey (2017), 35; Harris et al. (2018), 51-52.

381 ECtHR, *Bahaddar v. the Netherlands,* no. 25894/94 (1998), §45.

382 See ECtHR, *Goldstein v. Sweden,* no. 46636/99, dec. (2000), where the applicant had not been granted the public legal aid. The court held that the application was inadmissible, as Article 13 of the ECHR 'does not guarantee a right to legal counsel paid by the State'. The court did not find the 'indication of any special reason calling for the granting of

–often in relation to highly complex legal issues–and applicants are expected to pursue the available remedy themselves if they are refused free legal assistance[383].

To sum up, the ECtHR may apply the rule of the exhaustion of domestic remedies with flexibility and without excessive formalism when it is needed in asylum cases. Moreover, the court does not demand that asylum seekers exhaust ineffective national remedies. However, the respective case-law is very casuistic and sometimes inconsistent. The distinction between being negligent and facing insurmountable impediments in accessing justice is fluid and is examined by the Strasbourg Court case by case.[384] The court's assessment of the prospect of success or the duration of a remedial action (excessive or not) is also highly dependent on the very circumstances of the particular case. Only the requirement that the remedy should entail an automatic suspensive effect in cases concerning the principle of non-refoulement seems to be well-established and dependable. The court's decision whether an asylum seeker should or could exhaust domestic remedies is often uncertain.[385]

b. Six-Month and Four-Month Time-Limits

An application has to be lodged to the Strasbourg Court within a specified period of time: six months (until 31 January 2022) and, after the entry into force of the Protocol no. 15, four months (since 1 February 2022) from the date on which the final decision was taken.[386] That is perceived as enough time for the applicant to think through the initiation of the ECtHR's proceedings and to prepare adequate complaints and arguments.[387] However, for many asylum seekers this period of time may be insufficient. When all domestic remedies are exhausted by the asylum seeker (and the time-limit to submit application to the

free legal aid in order for the applicant to take effective advantage of the available remedy'. Cf. ECtHR, *Agalar v. Norway*, no. 55120/09, dec. (2011), where this special reason was found.

383 Reid (2019), 37 fn 77.

384 See e.g. ECtHR, *Bahaddar v. the Netherlands*, no. 25894/94 (1998), §§45-46, where the applicant's lawyer failed to submit grounds for appeal in the asylum proceedings in the prescribed time-limit due to the difficulty of obtaining the documentary evidence from the applicant's country of origin. The ECtHR acknowledged the impediments in supplying the evidence that asylum seekers often face, but it concluded that in this case the lawyer had the possibility to ask for an extension of the prescribed time-limit which she did not use.

385 See also de Weck (2017), 117, where she considered the ECtHR's case-law in this regard 'slightly unpredictable'.

386 Article 35(1) of the ECHR and Articles 4 and 8(3) of the Protocol no. 15.

387 See e.g. ECtHR (GC), *Sabri Güneş v. Turkey*, no. 27396/06 (2012), §39. See also Zwaak, Haeck and Burbano Herrera (2018), 132.

ECtHR should start to run), he is often no longer protected against refoulement and accordingly he can be immediately and effectively deported to another country. In practice, some removals are enforced in such haste and in such a way that even requesting an interim measure from the Strasbourg Court is not possible.[388] Refouled asylum seekers, especially when a risk of torture or inhuman or degrading treatment or punishment materialises after a removal, may not be in the position to prepare and lodge an application to the ECtHR in the prescribed time.[389] Moreover, asylum seekers are often detained in the hosting country or go into hiding to avoid being deported. In all those situations, the asylum seekers' contact with the outside world—including lawyers and NGOs who may inform them about proceedings before the Strasbourg Court and provide adequate assistance—is often limited and hampered.[390] Hence, for the asylum seeker, applying to the ECtHR in the prescribed time-limit may be very difficult, if not impossible.

In general, the six-month rule was applied by the Strasbourg Court strictly,[391] but without unnecessary formalism.[392] In some special circumstances an applicant could have been absolved from satisfying this requirement.[393] The exception was applied as regards the calculation of the six-month period when the case pertained to the principle of non-refoulement. According to the literal wording of Article 35(1) of the ECHR, the time-limit starts to run 'from the date on which the final decision was taken'. Nevertheless, in cases concerning removals which may constitute a breach of Article 3 of the ECHR, the ECtHR defined the starting point of the six-month period differently. It reiterated that if a foreigner had already been removed, the time-limit started to run on the day of the enforcement of an applicant's expulsion.[394] If a removal order had been issued, but the foreigner concerned had not been removed and was still staying in the hosting country, the six-month period

388 PACE (2011), para 13; Weber (2011), 67; Papadouli and Hansen (2012), 59. For more on interim measures, see this Chapter, Title III, point 1.1.

389 See e.g. ECtHR, *Alzery v. Sweden*, no. 10786/04, dec. (2004), where the court found the application inadmissible as the applicant did not comply with the six-month rule even though the applicant argued that he had been arrested in his country of origin directly after the enforcement of the expulsion order and in consequence had had difficulty contacting his lawyer who had tried initiating the proceedings in the Strasbourg Court.

390 See e.g. PACE (2010) 'Preventing harm…', 11; Becue et al. (2011), 137-138; ECRE/ELENA (2017), 9.

391 See e.g. Rainey, Wicks and Ovey (2017), 40; Leach (2017), 161.

392 See e.g. ECtHR, *Fernandez-Molina and Others v. Spain*, no. 64359/01, dec. (2002). See also Reid (2019), 28.

393 Zwaak, Haeck and Burbano Herrera (2018), 138-139.

394 ECtHR, *P.Z. and Others v. Sweden*, no. 68194/10, dec. (2012), §34. See also ECtHR, *Alzery v. Sweden*, no. 10786/04, dec. (2004).

did not start to run.[395] This interpretation of the six-month rule in non-refoulement cases resulted from the assumption that

> the responsibility of a sending State under Article 3 of the Convention is, as a rule, incurred only at the time when the measure is taken to remove the individual concerned from its territory. Specific provisions of the Convention should be interpreted and understood in the context of other provisions as well as the issues relevant in a particular type of case. The Court therefore finds that the considerations relevant in determining the date of the sending State's responsibility must be applicable also in the context of the six-month rule. In other words, the date of the State's responsibility under Article 3 corresponds to the date when the six-month period under Article 35 §1 starts to run for the applicant.[396]

While the above-mentioned interpretation was established with regard to the six-month rule, there is no reason to depart from it due to the entry into force of the Protocol no. 15. However, it cannot be overlooked that the court's approach to the six-month rule in non-refoulement cases did raise controversy.[397] On the one hand, it is beneficial for asylum seekers and other foreigners who are at risk of being removed and who may be—because of this vulnerable position—facing more difficulty promptly submitting an application to the ECtHR than other applicants. On the other hand, this interpretation directly contradicts the wording of Article 35(1) of the ECHR. It allows some cases to be brought before the Strasbourg Court without specified time-limits.[398] The ECtHR found the applications admissible even when they were lodged to the court a couple

395 See e.g. ECtHR, *Dougoz v. Greece,* no. 40907/98, dec. (2000); ECtHR, *P.Z. and Others v. Sweden*, no. 68194/10, dec. (2012), §34; ECtHR, *B.Z. v. Sweden*, no. 74352/11, dec. (2012), §32; ECtHR, *M.Y.H. and Others v. Sweden*, no. 50859/10 (2013), §40; ECtHR, *T.K.H. v. Sweden*, no. 1231/11 (2013), §29; ECtHR, *A.A. and Others v. Sweden*, no. 34098/11 (2014), §37.

396 ECtHR, *P.Z. and Others v. Sweden*, no. 68194/10, dec. (2012), §34.

397 See dissenting opinion of judge Lemmens in ECtHR, *M.Y.H. and Others v. Sweden*, no. 50859/10 (2013), claiming that it is not understandable why a person who already can complain to the ECtHR on a potential violation of Article 3 of the ECtHR (because the expulsion order has been already issued) does not have to respect a six-month time-limit (because it has not been enforced). The judge concluded that the six-month period should be counted 'from the moment when the deportation order becomes enforceable.'

398 Hamdan (2016), 179, claimed that in this situation an application might be lodged to the ECtHR any time, 'regardless of the length of time that have passed after the final removal decision was adopted'. However, the Strasbourg Court held that the situation when an applicant was not removed from a hosting country despite a final deportation decision having already been issued is 'involving an ongoing potential violation of the Convention, thus resembles the continuing situations' [ECtHR, *P.Z. and Others v. Sweden*, no. 68194/10, dec. (2012), §34]. As regards 'continuing situations', the ECtHR reiterated that the application of the six-month rule cannot be postponed indefinitely and applicants are obliged to act with due diligence.

of years after the final deportation order was issued.[399] That approach stands against legal certainty that should be protected by the introduction of the six-month (so as the four-month) rule. Moreover, it may be perceived as unfair, because it gives the advantage to those foreigners who did not abide by deportation orders over those who did.

1.2 The CJ

In contrast to the ECtHR's proceedings, the preliminary ruling procedure in the Luxembourg Court does not require the exhaustion of domestic remedies and does not set a definite, monthly time-limit for lodging of a request. Preliminary questions have to be referred to the CJ during national proceedings.[400] If a domestic procedure has been terminated, the Luxembourg Court has no jurisdiction to give a preliminary ruling.[401] An asylum case has to be pending before a competent court or tribunal in order to seek a preliminary ruling. It is for the referring court or tribunal to decide on the point in time when a preliminary request is to be made,[402] although in some circumstances the Luxembourg Court may find a request to be premature.[403]

The limitations to the CJ's jurisdiction stemming from the Treaty of Amsterdam affected the timing of the initiating action in the preliminary ruling proceedings. In the years 1999–2009, only courts and tribunals of last instance could refer preliminary questions regarding visas, asylum, immigration and other policies related to free movement of persons.[404] With the entry into force of the Treaty of Lisbon, that limitation was abolished; now lower national courts and tribunals can also refer preliminary requests in asylum cases. Accordingly, the important matter nowadays is not whether a lower or higher court or tribunal adjudicates in an asylum case, but whether the domestic proceedings are ongoing.

An asylum seeker can initiate his participation in the preliminary ruling procedure by submitting written observations to the Luxembourg Court. He is bound by the two-month time-limit,[405] which cannot be extended in any

399 See e.g. ECtHR, *B.Z. v. Sweden*, no. 74352/11, dec. (2012), §33–three and half years.

400 The preliminary ruling procedure is an 'incident' in national proceedings, see Barents (2016), 364.

401 See e.g. CJ, case C-159/90 *The Society for the Protection of Unborn Children Ireland* (1991), para 12.

402 See e.g. CJ, case C-72/83 *Campus Oil Limited* (1984), para 10; CJ, case C-348/89 *Mecanarte* (1991), para 48; CJ, case C-60/02 *X* (2004), para 28. See also Wägenbaur (2013), 323; Barents (2016), 406.

403 Lenaerts, Maselis and Gutman (2014), 73.

404 Article 68(1) of the TEC. For more see Chapter 2, Title IV, point 2.1.

405 Article 23 of the CJ Statute. See also this Chapter, Title IV, point 2.2(a).

circumstances.[406] The AG Trstenjak claimed that this time-limit serves the interests of the efficient administration of justice. He specified that '(i)t is intended, on the one hand, to ensure that the participants in the proceedings have adequate time to prepare and submit their observations. On the other hand, it is intended to ensure that the proceedings are expedited.'[407] However, asylum seekers often do not know the language of the hosting state, do not understand its legal system and the procedural rules applicable before the CJ and have difficulty obtaining legal aid. In those circumstances, such a short and non-expandable time-limit to present their views on a preliminary reference may constitute an insurmountable barrier precluding their active participation in the proceedings.[408]

2. Originator of the Proceedings

Individual applications can be lodged to the ECtHR by 'any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto'. This wording of Article 34 of the ECHR guarantees that all persons (including asylum seekers), who claim that their rights were violated, are entitled to apply to the Strasbourg Court. Their nationality, status and place of stay are unimportant.[409] An applicant is never obliged to initiate proceedings in the ECtHR, it is his autonomous decision. His interest in the initiation and continuation of the proceedings is necessary for them to begin and carry on.[410] In asylum cases, the proceedings before the Strasbourg Court are predominantly initiated by asylum seekers (often rejected ones) claiming to be a victim or a potential victim of a violation of Articles 3, 5 or 13 of the ECHR.[411]

406 See e.g. Wägenbaur (2013), 79; Barents (2016), 401.

407 Opinion of AG Trstenjak delivered on 6 July 2010 in case C-137/08 *VB Pénzügyi Lízing,* EU:C:2010:401, para 81.

408 See also opinion of AG Sharpston delivered on 13 September 2012 in case C-364/11 *El Kott and Others,* EU:C:2012:569, para 21, noting that the written observations submitted on behalf of the concerned asylum seekers were returned, because they were received eighteen days after the expiry of the two-month period.

409 ECommHR, *Austria v. Italy,* no. 788/60, dec. (1961). See also ECtHR, *Mublilanzila Mayeka and Kaniki Mitunga v. Belgium,* no. 13178/03 (2006), §55. For more see Chapter 2, Title III, point 1.

410 Under Article 37(1)(a) of the ECHR, at any stage of the proceedings the application can be struck out of the court's list of cases if the applicant does not intend to pursue his application.

411 For more see Chapter 1, Title V, point 1.2.

The preliminary ruling procedure in the CJ may be initiated not only without a concerned asylum seeker's demand but also against his opposition. The decision whether to refer a question to the Luxembourg Court or not belongs exclusively to the national court or tribunal in which an asylum case is pending.[412] Only in the specified circumstances, is a court or tribunal of last resort obliged to request the CJ to give a preliminary ruling.[413] Thus, firstly, a party to the main proceedings (an asylum seeker) cannot force a national court to refer a preliminary question to the Luxembourg Court.[414] In this regard, he may only submit a non-binding request to a referring court.[415] If that court refuses to pose a preliminary question, even if this refusal amounts to a breach of the TFEU,[416] a party to national proceedings is not equipped with any measures under the EU law to challenge this decision. The European Commission may prosecute such breach of the EU law under Article 258 of the TFEU, but that is unlikely[417], inefficient[418] and 'hardly an appropriate solution'[419]. Secondly, just as a party to domestic proceedings cannot initiate the preliminary ruling procedure directly, neither can it under the EU law oppose a referral to the CJ.[420] He may only submit his written observations on the reference's admissibility under Article 23 of the CJ Statute.[421]

Therefore, an asylum seeker who claims that his rights guaranteed under the ECHR were violated is the sole originator of the proceedings before the ECtHR. He directly and autonomously commences them. Conversely, the preliminary ruling procedure is initiated elsewhere. It is for a domestic judicial

412 See e.g. CJ, case C-239/14 *Tall* (2015), para 34; CJ, case C-233/19 *B.* (2020), para 28.

413 Article 267 of the TFEU.

414 See e.g. Wägenbaur (2013), 323; Lenaerts, Maselis and Gutman (2014), 65; Broberg (2015), 22; Schima (2019), 1830.

415 Barents (2016), 399; Schima (2019), 1830. In fact, preliminary questions are predominantly raised by parties to the main proceedings, encouraging courts to initiate the procedure in the CJ [Barents (2016), 420]. See e.g. CJ, case C-403/16 *El Hassani* (2017), para 15. For more on inducing national courts to refer preliminary questions, see, in general, Broberg (2015), 21-29, and, in practice in asylum and migration cases, Krommendijk (2018), 138-141.

416 Article 267 of the TFEU [see Barents (2016), 429; Lenaerts, Maselis and Gutman (2014), 102].

417 Broberg and Fenger (2014), 270, considered the Commission's practice in this regard as 'reluctant'. Cf. CJ, case C-416/17 *Commission v French Republic* (2018), paras 113-115.

418 Lenaerts, Maselis and Gutman (2014), 102.

419 Barents (2016), 416.

420 However, some national systems provide for an appeal against a court's decision to refer a preliminary question. Article 267 TFEU does not exclude such solutions [Barents (2016), 408].

421 Wägenbaur (2013), 80. See also this Chapter, Title IV, point 2.2(a).

authority to decide on the necessity, relevance and content of a reference for a preliminary ruling.[422] This differentiation between the originator of the proceedings in the Strasbourg and Luxembourg Courts obviously makes the former court more accessible for asylum seekers than the latter, but it has also some secondary consequences. They are linked, firstly, to the asylum seekers' lack of necessary legal knowledge as well as the scarcity of the legal assistance they are entitled to in practice (2.1) and, secondly, to the asylum seekers' difficulties in initiating or actively participating in the proceedings before the ECtHR and CJ after their removal or disappearance (2.2).

2.1 Lack of Knowledge and Assistance

In practice, asylum seekers struggle to have access to information about their rights as well as to legal aid. They often do not know the language of the hosting country and lack legal knowledge as regards the national law, ECHR and EU law. They frequently are not aware whether, when and how they can initiate and participate in the proceedings before the ECtHR and the CJ. Most public legal assistance does not include those proceedings or is insufficient to cover all expenses incurred.[423]

In consequence, asylum seekers are often forced to initiate proceedings before the Strasbourg Court unaided. A lack of the necessary legal knowledge as well as of the language required for the communication with the court may directly affect the quality and scope of an application lodged by an asylum seeker in such circumstances. Meanwhile, only a correctly and fully completed application accompanied with all relevant documents interrupts the time-limit for initiating proceedings before the ECtHR.[424] The insufficient application may not be examined by the ECtHR[425] or may be considered inadmissible

422 See e.g. CJ, case C-239/14 *Tall* (2015), para 34, where the CJ emphasized that 'it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court.'

423 As regards the ECtHR, see e.g. PACE (2010) 'Preventing harm…', 12; Gruodyté and Kirchner (2016), 39; Leach (2017), 27. As regards the CJ, see e.g. Hoevenaars (2018), 148.

424 Rule 47(6)(a) of the ECtHR Rules of Court. See also ECtHR (2003) 'Institution of proceedings…', point 1.

425 When it does not satisfy all the requirements enlisted in Rule 47(1-3) of the ECtHR Rules of Court [see Rule 47(5)(1)]. Rule 47 is nowadays applied stringently [see e.g. Rainey, Wicks and Ovey (2017), 21; Leach (2017), 23]. However, the ECtHR retains a right to examine an application despite its non-compliance with the requirements set in Rule 47 (e.g. in relation to a request for interim measure or when an applicant provides an adequate explanation for the failure to comply).

due to its incompatibility with the prescribed time-limit or its being regarded as manifestly ill-founded.[426]

The Luxembourg Court is also entitled to declare a request for a preliminary ruling inadmissible when it is insufficient or imprecise.[427] Recently, it has become more rigorous in checking the admissibility of references in this regard[428]. However, the fact that those proceedings are never initiated by an asylum seeker himself, but by a court or tribunal, and thus by qualified legal professionals, diminishes the risk that an asylum case will not be considered due to the lack of legal knowledge on the part of the originator of the proceedings.

2.2 Removal, Disappearance, Detention

It is not infrequent that asylum seekers are removed to another state before they manage to apply to the ECtHR or before a referring court raises questions pertaining to their case before the CJ. They may also be deported or extradited during the individual complaints or preliminary ruling procedure. Some asylum seekers in fear of being removed go into hiding and their whereabouts are unknown. Others are detained in the hosting country awaiting their expulsion. In all those situations, asylum seekers and their representatives may face considerable difficulty initiating, pursuing and participating in the proceedings before the Strasbourg or Luxembourg Court.

a. The ECtHR

The rule that only a victim of a violation of the ECHR can lodge an application and pursue it before the ECtHR entails some additional problems in the event of the asylum seeker's removal, disappearance or detention. The difficulties may occur even if the foreigner has a representative willing to initiate and pursue an application on his behalf.

Firstly, in those circumstances, obtaining a written power of attorney within the time-limit provided for initiating the proceedings before the Strasbourg Court may be burdensome. The ECtHR acknowledges the problem and declares that it 'does not take lightly the difficulties that may be entailed by a sudden detention and deportation in asylum cases which might indeed render it impossible to obtain written power of attorney'.[429] Thus, in exceptional

426 Article 35(1) and (3)(a) of the ECHR.

427 Extensive case-law exists in this regard, see e.g. Lenaerts, Maselis and Gutman (2014), 75-78; Barents (2016), 445; Wahl and Prete (2018), 538. See e.g. CJ, case C-257/13 *Mlamali*, order (2013); CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 167-168, 172-174; CJ, case C-233/19 *B.* (2020), para 29.

428 Wahl and Prete (2018), 513. See also Grimbergen (2015), 64-65.

429 ECtHR, *Ebrahimi v. Austria*, no. 15974/11, dec. (2013), §§22-23. However, the court considered the application in this case inadmissible. It emphasized that the lawyer had

cases, the Strasbourg Court allows applications lodged by foreigners' representatives who did not present a written and duly signed authority to act or who submitted it with a delay.[430]

The ECtHR reiterates also that third parties can, in specific circumstances, act in the name of and on behalf of a vulnerable person who is not able to lodge a complaint with the court on account of his age, sex or disability[431] or other factors, such as the very nature of the complaint.[432] However, then, additional criteria have to be satisfied. The applicant must be at risk of being deprived of effective protection of his rights, and no conflict of interest between him and a third party can exist.[433] In the case of *N. and M. v. Russia* concerning the alleged abduction and deportation to Uzbekistan of two asylum seekers, the application to the Strasbourg Court was lodged by a lawyer who did not present the authority to act in this regard. The court found that the foreigners should be considered vulnerable persons who had not been able to lodge a complaint with the court by themselves. However, it also pointed out that they had family who could initiate the proceedings in the ECtHR. Thus, there was no risk that the foreigners would be deprived of effective protection of their rights. In consequence, the court decided that the lawyer had no standing to introduce the application in the name and on behalf of the asylum seekers.[434]

Secondly, representatives who obtained power of attorney struggle to maintain contact with their asylum-seeking clients for the duration of the proceedings before the Strasbourg Court. Asylum seekers may be no longer interested in pursuing their application, but also they may be facing some difficulties in contacting their representatives due to their removal, detention or disappearance. The ECtHR is usually satisfied with the representatives' assurances that they are staying in touch with applicants after their

represented the applicant throughout the domestic proceedings and therefore had had ample opportunity to obtain the power of attorney before the applicant's transfer to Greece. See also ECtHR, *Habtemariam and Others v. Turkey*, no. 22872/11, dec. (2012).

430 See e.g. ECtHR, *Shamayev and Others v. Georgia and Russia*, no. 36378/02 (2005), §§307–312, where the applicants were not allowed to consult their lawyers while in detention (against interim measures indicated by the ECtHR) and were extradited to Russia in such haste that the lawyers could not react in time. See also ECtHR, *D.B. v. Turkey*, no. 33526/08 (2010), §§3–11. Cf. ECtHR, *G.J. v. Spain*, no. 59172/12, dec. (2016), §§46–53.

431 See e.g. ECtHR (GC), *Lambert and Others v. France*, no. 46043/14 (2015), §§91–92.

432 See e.g. ECtHR, *N. and M. v. Russia*, nos. 39496/14 and 39727/14, dec. (2016), §60; ECtHR, *Isakov v. Russia*, no. 52286/14, dec. (2016), §40.

433 See e.g. ECtHR (GC), *Lambert and Others v. France*, no. 46043/14 (2015), §102.

434 ECtHR, *N. and M. v. Russia*, nos. 39496/14 and 39727/14, dec. (2016), §§60–63. See also ECtHR, *Isakov v. Russia*, no. 52286/14, dec. (2016), §§40–43; ECtHR, *G.J. v. Spain*, no. 59172/12, dec. (2016), §53.

expulsion, even only through e-mail or telephone[435] or in some circumstances through a third party[436]. The accounts of lawyers in this regard must be credible.[437] Most importantly, representatives should be in a position to provide detailed information about the applicants, including their fate after removal.[438]

When the contact is lost, an application may be struck out of the list of cases pursuant to Article 37(1)(a) of the ECHR. In such circumstances, the Strasbourg Court often assumes that an applicant does not intend to pursue his application anymore or that his 'representative could not "meaningfully" pursue the proceedings before it in the absence of instructions from the applicant'.[439]

However, exceptionally, applications are not struck out of the list of cases despite the whereabouts of the asylum seeker being unknown or his not maintaining contact with representatives and the ECtHR. In some cases, the Strasbourg Court found that the lack of communication could be explained by the fact that the applicant was removed to another state, but only when 'the inability of the lawyer to contact his client is a direct consequence of the State's action' (e.g. an expulsion in haste).[440] Non-compliance with interim measures may also encourage the court to consider a case on the merits despite a

435 See e.g. ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), §§51, 54; ECtHR, *Hussun and Others v. Italy,* nos. 10171/05, 10601/05, 11593/05, and 17165/05 (2010), §§28, 47-50; ECtHR (GC), *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15 (2020), §74. See also ECtHR, *Asady and Others v. Slovakia*, no. 24917/15 (2020), §§40-41, where the contact through WhatsApp or Facebook was considered.

436 See e.g. ECtHR, *Sharifi and Others v. Italy and Greece,* no. 16643/09 (2014), §131; ECtHR (GC), *V.M. and Others v. Belgium*, no. 60125/11 (2016), §38; ECtHR, *Abdullahi Elmi and Aweys Abubakar v. Malta*, nos. 25794/13 and 28151/13 (2016), §61. See also ECtHR, *Aoulmi v. France*, no. 50278/99 (2006), §31.

437 ECtHR (GC), *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15 (2020), §§74, 79.

438 See e.g. ECtHR, *Hussun and Others v. Italy,* nos. 10171/05, 10601/05, 11593/05 and 17165/05 (2010), §§48-49; ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), §54; ECtHR (GC), *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15 (2020), §72. See also ECtHR, *G.J. v. Spain*, no. 59172/12, dec. (2016), §45.

439 ECtHR (GC), *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15 (2020), §73 (with the case-law mentioned there). Cf. Dembour (2011), 102, noticing that the applicants in ECtHR, *Muskhadzhiyeva and Others v. Belgium*, no. 41442/07 (2010), disappeared by the time the ECtHR adjudicated on the case. However, the case was considered on the merits because the court and their lawyer were unaware of the applicants' disappearance.

440 ECtHR, *Diallo v. the Czech Republic,* no. 20493/07 (2011), §44, where the applicants were deported to Guinea unexpectedly, without prior notice to them or their lawyer. See also ECtHR, *Labsi v. Slovakia,* no. 33809/08 (2012), §100; ECtHR, *Safaii v. Austria,* no. 44689/09 (2014), §§35-36. Cf. ECtHR (GC), *V.M. and Others v. Belgium*, no. 60125/11 (2016), §38, where the Grand Chamber emphasized that the applicants had returned to Serbia voluntarily, so the respondent government cannot be faulted for the loss of contact. The case was struck out of the list of cases.

prolonged lack of contact with the applicant.[441] The ECtHR also takes into consideration conditions in the country to which an applicant was removed.[442] Moreover, if a foreigner is detained and prevented from consulting his lawyer, he cannot be faulted for the lack of contact with his representatives.[443]

While the loss of contact stemming from a removal or detention may be treated by the Strasbourg Court with some empathy, a disappearance of the asylum seeker's own accord usually entails striking the application out of the list of cases.[444] The court claims that if foreigner is afraid to reveal his place of stay, he should maintain contact in some other way (through e-mail, telephone, a third party). Hiding out of fear that the expulsion order will be enforced does not justify the lack of contact, especially when the ECtHR granted the interim measure.[445] When the applicant disappears, his family's expression of support for the pursuance of a case is insufficient to continue the proceedings.[446]

Overall, the Strasbourg Court interprets Article 37(1)(a) of the ECHR rather stringently, not leaving much space for excusing the applicant's lack of communication with the court and his representatives.[447] In many asylum cases regarding a violation of the principle of non-refoulement applications were struck out of the list of cases because an applicant was not communicating with his representatives.[448]

441 See e.g. ECtHR, *Aoulmi v. France,* no. 50278/99 (2006). Cf. ECtHR, *Sivanathan v. the United Kingdom*, no. 38108/07, dec. (2009).

442 However, the threshold seems to be very high, as the ECtHR held that even the on-going war in Syria, to where the applicants were removed, should not prevent them from contacting their lawyer [*M.H. and Others v. Cyprus,* nos. 41744/10 etc., dec. (2014), §14]. See also ECtHR, *Sharifi and Others v. Italy and Greece,* no. 16643/09 (2014), §§131-132; ECtHR (GC), *V.M. and Others v. Belgium*, no. 60125/11 (2016), §38.

443 See e.g. ECtHR, *Shamayev and Others v. Georgia and Russia,* no. 36378/02 (2005), §§304, 308, 310-312; ECtHR, *Muminov v. Russia,* no. 42502/06 (2008).

444 See e.g. ECtHR, *Ali v. Switzerland*, no. 24881/94 (1998); ECtHR, *Noor Mohammed v. the Netherlands*, no. 14029/04, dec. (2008); ECtHR, *Tubajika v. the Netherlands,* no. 6864/06, dec. (2009); ECtHR, *Ramzy v. the Netherlands,* no. 25424/05 (2010); ECtHR, *Ibrahim Hayd v. the Netherlands,* no. 30880/10, dec. (2011); ECtHR, *Kadzoev v. Bulgaria,* no. 56437/07, dec. (2013); ECtHR, *S.O. v. Austria*, no. 44825/15, dec. (2016).

445 ECtHR, *Ramzy v. the Netherlands,* no. 25424/05 (2010), §64.

446 ECtHR, *Kadzoev v. Bulgaria,* no. 56437/07, dec. (2013), §7.

447 See e.g. ECtHR, *Sivanathan v. the United Kingdom*, no. 38108/07, dec. (2009), where the court accepted the unsubstantiated argument of the Government that the applicant had returned voluntarily to Sri Lanka. The voluntariness of the return was contested by the applicant's lawyer. Due to that, he asked the ECtHR to restore the application to its list of cases [Dembour (2015), 246], albeit unsuccessfully.

448 Cf. Mole and Meredith (2010), 232-233. See also Saccucci (2014), 22, claiming that the formalistic approach taken by the court as regards Article 37(1)(a) of the ECHR is at odds with the absolute character of Article 3 of the ECHR.

Nevertheless, it should not be overlooked that the ECtHR is competent to decide not to strike an application out of the list of cases if the respect for human rights so requires.[449] This may occur when the impact of the individual case goes beyond the particular situation of the applicant. For instance, in the case of *N.D. and N.T. v. Spain*, the Grand Chamber decided that those criteria were satisfied because the case concerned important issues with respect to the interpretation of Article 4 of the Protocol no. 4 'in the context of the "new challenges" facing European States in terms of immigration control'.[450] The respect for human rights may be also invoked by the court if the applicant is in a very special situation.[451] Moreover, the Strasbourg Court can restore the application to its list of cases if the circumstances justify such a course. Either not striking the application for the respect for human rights or restoring it to the list of cases, constitutes an adequate measure for the court to address asylum seekers' difficulty maintaining contact after their removal or while in detention. However, the second sentence of Article 37(1) and Article 37(2) of the ECHR are in practice rarely applied.[452]

b. The CJ

A referring court or tribunal in which an asylum case is pending is exclusively entitled not only to initiate the proceedings before the CJ, but also to decide whether to continue them. In the face of the asylum seeker's removal or his prolonged disappearance, the national court may feel encouraged to terminate domestic proceedings.[453] Meanwhile, the Luxembourg Court can adjudicate only in cases that are still pending before domestic judicial authorities.[454] In

449 Article 37(1) of the ECHR. See e.g. ECtHR, *Labsi v. Slovakia*, no. 33809/08 (2012), §99.

450 ECtHR (GC), *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15 (2020), §78. See also ECtHR (GC), *F.G. v. Sweden*, no. 43611/11 (2016), §82; ECtHR (GC), *Paposhvili v. Belgium*, no. 41738/10 (2016), §132.

451 See e.g. ECtHR, *Tehrani and Others v. Turkey*, nos. 32940/08, 41626/08 and 43616/08 (2010), §§56-57.

452 In general, see Schabas (2017), 801; Harris et al. (2018), 138; Reid (2019), 62. See e.g. ECtHR (GC), *M.E. v. Sweden*, no. 71398/12 (2015), §§34-38, and the judgment's critique, Mrazova (2019), 201.

453 Cf. opinion of AG Sharpston delivered on 31 January 2019 in case C-704/17 *D.H.*, EU:C:2019:85, where she concluded that the EU law precludes a national rule requiring domestic courts automatically to discontinue judicial proceedings brought by an asylum seeker to challenge a detention decision if he is released from detention by a subsequent administrative order before the delivery of the court's decision. The case concerned an asylum seeker who had withdrawn his asylum application, had been released from detention and had voluntarily returned to Belarus. The case was removed from register after the withdrawal of the preliminary reference by the referring court [see CJ, case C-704/17 *D.H.*, order (2019)].

454 See e.g. CJ (GC), case C-181/16 *Gnandi* (2018), para 31. For more see these Chapter and Title, point 1.2.

such circumstances, the national court should withdraw the preliminary reference under Article 100(1) of the CJ Rules of Procedure. It is entitled to do so—even without giving any reasons—only until the notice of the date of delivery of the judgment has been served on interested persons. Moreover, the Luxembourg Court may at any time declare that the conditions of its jurisdiction are no longer fulfilled.[455] If the referring court terminates domestic proceedings, but it does not withdraw a preliminary reference, the CJ can issue a reasoned order that it is not necessary to give a ruling on the request for a preliminary ruling in that case.[456]

When a national court continues domestic proceedings and maintains the reference despite the asylum seeker's removal or disappearance, the Luxembourg Court may decide that the case has become devoid of purpose. The questions concerning the interpretation of the CEAS or the Return Directive may turn out to be immaterial after the foreigner's removal. Meanwhile, the CJ reiterates that '(a)ccording to settled case-law, the justification for a reference for a preliminary ruling is not that enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute'.[457] If the Luxembourg Court finds that the referred question became hypothetical due to the fact that the context of national proceedings has changed (e.g. after the removal of the party to the main proceedings), it may conclude that the reference has no purpose and a reply to the preliminary question would be of no avail to the national court. In those circumstances, the CJ can decide that there is no need to answer the question referred[458] or may consider a hypothetical question inadmissible[459]. While the operative parts of orders and judgments in this regard may differ,[460] the effect is the same: the Luxembourg Court does not consider the asylum case on the merits.

It is difficult to assess how often the CJ is in fact challenged with a removal or disappearance of the party to the main proceedings that affects the purpose of the preliminary ruling procedure, in particular because referring courts often withdraw their preliminary requests without any explanation. However, in the *Al Chodor and Others* case, the Luxembourg Court adjudicated on the lawfulness of the detention, even though the parties to the main proceedings,

455 Article 100(2) of the CJ Rules of Procedure.

456 See e.g. CJ, case C-189/13 *Da Silva* (2014), paras 34-35. See also Wahl and Prete (2018), 539.

457 CJ, case C-155/11 PPU *Mohammad Imran,* order (2011), para 21.

458 See e.g. CJ, case C-314/96 *Djabali* (1998); CJ, case C-225/02 *Garcia Blanco* (2005); CJ, case C-155/11 PPU *Mohammad Imran,* order (2011); CJ, case C-492/11 *Di Donna* (2013).

459 See e.g. CJ (GC), case C-396/11 *Radu* (2013), para 24.

460 For more on the lack of a uniform approach in this regard, see Grimbergen (2015), 66-67.

the asylum-seeking family, disappeared after being released from the detention centre.[461] This case shows that preliminary questions can be maintained by national courts and answered by the CJ even though the concerned asylum seeker disappeared or has been removed.

3. Language of the Proceedings

The official languages of the ECtHR are English and French. The proceedings before the Strasbourg Court can instead be initiated in one of the official languages of the Contracting Parties. The subsequent proceedings are conducted exclusively in English or French, unless leave for the continued use of the official language of a Contracting Party is granted. No non-European language can be used, unless a person without sufficient knowledge of any of the official languages appears before the ECtHR.[462] Judgments are given in English and/or French.[463] As a result, many asylum seekers cannot initiate the proceedings before the Strasbourg Court in their national language.[464] Moreover, if they do not know English or French, they cannot understand the court's letters and the judgment itself.

In the preliminary ruling procedure, the language of the case is the language of the referring court or tribunal.[465] That means that the CJ proceeds in one of the official languages of the EU.[466] If a party to the main proceedings decides to submit written observations, they have to be lodged in the language of the referring court or tribunal. Some exceptions concerning the language are permissible but only as regards oral proceedings. An asylum seeker who is a party to the main proceedings may demand in a duly substantiated request to change the language of the oral part of the procedure. However, the language used still has to be one of the official languages of the EU;[467] the change to a non-EU language cannot be authorized.[468]

Taking those requirements into account, it is not surprising that some asylum seekers who know only non-European language(s) struggle with the

461 CJ, case C-528/15 *Al Chodor and Others* (2017), paras 18–19. For more see Chapter 5, Title II.

462 Rule 34 of the ECtHR Rules of Court.

463 Rule 76(1) of the ECtHR Rules of Court.

464 Cf. ECtHR (2003) 'Requests for interim measures', point II, stating '(t)he request should, where possible, be in one of the official languages of the Contracting Parties', implying that the request in non-European language may be accepted in some circumstances. See also Leach (2017), 35.

465 Article 37(3) of the CJ Rules of Procedure.

466 Article 36 of the CJ Rules of Procedure.

467 Article 37(3) of the CJ Rules of Procedure.

468 CJEU (2020) 'Practice directions…', point 63. See also Broberg and Fenger (2014), 379.

preparation of the application to the ECtHR or written observations to the CJ. The financial vulnerability frequent in this group and the hampered access to legal aid make the problem worse. In consequence, an asylum seeker who speaks only a non-European language may be practically excluded from the active participation in the proceedings before the two courts. In the case of the ECtHR, he may encounter great difficulty in lodging the application at all.

4. Anonymity

Asylum seekers fear going back to their countries of origin. They are frequently reluctant to reveal their place of stay as they are frightened of being tracked by their national authorities. They refrain from any public activities and sometimes even are hiding. As the proceedings before the European asylum courts are public,[469] asylum seekers may be discouraged from or opposed to initiating them.[470]

However, both courts can render the asylum seeker's data confidential. Before the Strasbourg Court, the asylum seeker should request the anonymity in the application (or as soon as possible afterwards) and justify its necessity. The ECtHR may accept such a request as well as grant the anonymity *ex officio*.[471] In practice, the applicant's personal data are often concealed in non-refoulement cases. Moreover, the public character of documents and hearings held in the Strasbourg Court can be restricted in some circumstances.[472] The Luxembourg Court respects anonymity that has already been granted during the national proceedings.[473] It can also render the asylum seeker's data confidential 'at the request of the referring court or tribunal, at the duly reasoned request of a party to the main proceedings or of its own motion'.[474]

469 In regard to the ECtHR, see Article 40 and Article 44(3) of the ECHR, Rule 33 and 63 of the ECtHR Rules of Court. In regard to the CJ, see Article 31 and 37 of the CJ Statute.

470 Mole and Meredith (2010), 230, pointed out, as regards the ECtHR, that 'individuals seeking judgment from the Court would understandably fear that its publication would attract the adverse interest of the authorities', especially when being a rejected asylum seeker entails the additional risk of being persecuted in a country of origin. See also CJ, case C-652/16 *Ahmedbekova* (2018), paras 41, 84-90, where the asylum seeker claimed that she would be persecuted in Azerbaijan due to her involvement in a complaint brought against that country before the ECtHR.

471 Rule 47(4) of the ECtHR Rules of Court. See also ECtHR (2010).

472 Rule 33(1-3) and Rule 63(1-2) of the ECtHR Rules of Court. See e.g. ECtHR, *Mohammed Hassan and Others v. the Netherlands and Italy,* nos. 40524/10 etc., dec. (2013), §§74, 139; ECtHR, *S.H. v. the Netherlands*, no. 47607/07, dec. (2013), §8.

473 Article 95(1) of the CJ Rules of Procedure. A referring court or tribunal should send to the CJ two versions of the request: nominal including all the required data and the anonymized one[CJEU (2019) 'Recommendations…', point 22].

474 Article 95(2) of the CJ Rules of Procedure.

The anonymity should be granted before the publication in the OJ of the notice about a case.[475] Moreover, the written procedure in the CJ is not made public[476] and the Luxembourg Court can hear a case *in camera* for serious reasons related[477].

While those general rules are commendable, they may not be enough. Firstly, in both courts, if asylum seekers decide to apply for anonymity, they must present sufficient reasons. Moreover, such a request should be made at the earliest possible stage of the proceedings.[478] In practice though, asylum seekers may find it difficult to learn about that possibility and quickly lodge a request with a proper reasoning. Therefore, as in both proceedings the anonymity can also be granted *ex officio,* the ECtHR's and the CJ's judges adjudicating in asylum cases should be particularly attentive to the special needs of asylum seekers concerning anonymity and, where needed, promptly grant it on their own motion.[479]

Secondly, the anonymity granted by the two European asylum courts may not be enough to conceal the identity of the asylum seeker. In principle, in the Strasbourg and Luxembourg Courts the 'anonymization' is provided by omitting the personal data of the concerned persons and replacing them with initials or a single letter.[480] However, an asylum seeker may be identified on the basis of only the facts of a case that are published on the courts' websites.[481] Thus, the risk of being revealed by the asylum seeker's national authorities as a result of pursuing a case in one of the European asylum courts is a real one.

Additionally, the risk turns into a certainty, when the asylum seeker is a national of a Member State of the EU or a Contracting Party to the ECHR seeking

475 See CJEU (2019) 'Recommendations…', point 21.

476 See e.g. Barents (2016), 566; Tridimas (2018), 601.

477 Article 79 of the CJ Rules of Procedure. See also Article 31 of the CJ Statute.

478 The anonymization granted after a certain point in the proceedings is often devoid of purpose. See e.g. CJ, case C-563/10 *Khavand,* order (2011), concerning the homosexual asylum seeker whose full data were published by the CJ. Accordingly, the question whether he could be expected to live discreetly in the country of origin became void and the case was removed from the register after he had been granted protection in Germany [Jansen (2013), 5; Lehmann (2014), 68 fn 19]. For more on the discretion requirement, see Chapter 4, Title II, point 2.

479 See CJEU (2020) 'Practice directions…', point 7, where the practice of applying the anonymization *ex officio* is described.

480 See ECtHR (2003) 'Institution of proceedings…', point 12(b); CJEU (2020) 'Practice directions…', point 7. In regard to CJ, see also Barents (2016), 470.

481 Cf. CJEU (2020) 'Practice directions to parties…', point 7, where it is stressed that the court can redact not only parties' names, but also 'if necessary, other information that may enable them to be identified'.

protection in another Member State or Contracting Party. Every request for a preliminary ruling is notified to all Member States.[482] The ECtHR is obliged to inform the country of origin of the applicant about a case, if this country is a Contracting Party to the ECHR.[483] In those circumstances, a state to which an asylum seeker fears to go back is directly informed about his case by the European asylum courts. This fact may effectively discourage some asylum seekers from engaging in those proceedings.

5. Costs and Legal Aid

Proceedings before the ECtHR and the CJ are as a rule free of charge. Nevertheless, they are not entirely cost-free for applicants or parties to the main proceedings. Incurred costs include payments for legal assistance in particular, but also for translation services or travel expenses. Meanwhile, asylum seekers are often financially vulnerable. As a result, paying costs of the proceedings before the Strasbourg or Luxembourg Court may be beyond their reach.

Legal assistance in those proceedings seems in practice indispensable considering that asylum seekers constantly struggle to gain access to information about their rights and they often do not understand the legal system of the hosting country or the rules of procedure in the Strasbourg and Luxembourg Courts. Moreover, the legal representation is not only advisable but also required. An asylum seeker can present his application to the ECtHR by himself, but after its notification to the respondent state he has to be represented by a legal professional fulfilling the specified criteria, unless the President of the Chamber decides otherwise.[484] The lack of a proper legal representation can lead to the application being struck out of the list of cases.[485] The CJ Rules of Procedure are less rigorous in this regard. In the preliminary ruling procedure, a party to the main proceedings is obliged to have a representative only if it is mandatory under the respective national law and in accordance with this law.[486] As a result, if the national rules do not require engaging a representative, a party to the main proceedings can represent

482 Article 23 of the CJ Statute.

483 See Article 36(1) of the ECHR. See e.g. ECtHR, *K.K.C. v. the Netherlands*, no. 58964/00 (2001), §6; ECtHR, *I.K. v. Austria*, no. 2964/12 (2013), §6, where the Russian Government was asked to inform the court whether they wished to exercise their right to intervene in cases concerning rejected asylum seekers of Chechen origin fearing expulsion to Russia.

484 Rule 36(1-5) of the ECtHR Rules of Court.

485 See e.g. ECtHR, *Grimaylo v. Ukraine*, no. 69364/01, dec. (2006).

486 Article 97(3) of the CJ Rules of Procedure.

himself in the Luxembourg Court.[487] If the domestic law allows it, a party to the main proceedings can also be represented by a person who is not a legal professional.[488]

Despite the apparent need for professional assistance to initiate and pursue a case in the European asylum courts, legal aid granted on a national level often does not include the proceedings before the ECtHR and the CJ or it is insufficient to cover all expenses.[489] However, legal aid may be also awarded by the Strasbourg and Luxembourg Courts. It is provided in cases of financial vulnerability[490] and granted on a motion (the ECtHR, the CJ) or *ex officio* (the ECtHR).[491]

In practice, asylum seekers may face particular difficulties in applying for legal aid in the Strasbourg and Luxembourg Courts. An application for legal aid itself does not have to be made through a lawyer. Nonetheless, it should exhaustively explain the applicant's financial situation and include necessary evidence.[492] It may be beyond the capabilities of asylum seekers to fulfil those requirements by themselves. Moreover, it may be particularly difficult for asylum seekers to submit certified documents from national authorities, which are required in the proceedings concerning legal aid before the ECtHR[493] and advised in similar proceedings in the CJ[494]. Asylum seekers, especially rejected ones, often avoid contacting public authorities for fear of a removal. Obtaining

487 See e.g. Lenaerts, Maselis and Gutman (2014), 793; Barents (2016), 480.

488 See e.g. Broberg and Fenger (2014), 377; Lenaerts, Maselis and Gutman (2014), 744; Barents (2016), 399.

489 As regards the ECtHR, see e.g. PACE (2010) 'Preventing harm…', 12; Gruodyté and Kirchner (2016), 39; Leach (2017), 27. As regards the CJ, see e.g. Hoevenaars (2018), 148. Cf. CJEU (2020) 'Practice directions…', point 5, where it is stated: 'the parties to the main proceedings must, first of all, apply for any legal aid from that court or tribunal or the competent authorities of the Member State concerned, the aid granted by the Court being only subsidiary to the aid granted at national level'.

490 Rule 106(b) of the ECtHR Rules of Court specifying that free legal aid shall be granted if 'the applicant has insufficient means to meet all or part of the costs entailed' and Article 115(1) of the CJ Rules of Procedure enabling awarding such aid to 'a party to the main proceedings who is wholly or in part unable to meet the costs of the proceedings before the Court'.

491 Rule 105(1) of the ECtHR Rules of Court. See e.g. ECtHR, *D and Others v. Turkey*, no. 24245/03 (2006), §2, where legal aid was granted to the Iranian asylum seekers.

492 Rule 107(1) of the ECtHR Rules of Court and Article 115(2-3) of the CJ Rules of Procedure.

493 Rule 107(1) of the ECtHR Rules of Court requires presenting a declaration concerning the financial situation of an applicant certified by the appropriate domestic authority.

494 Article 115(2) of the CJ Rules of Procedure requires presenting 'all information and supporting documents making it possible to assess the applicant's financial situation, such as a certificate issued by a competent national authority attesting to his financial situation'. Some authors claim that this certificate is required [Lenaerts, Maselis and Gutman (2014), 794]. However, in practice the CJ accepts also other documents like salary slips or bank statements [Broberg and Fenger (2014), 472; Barents (2016), 488].

the certification from public officials may then constitute an insurmountable barrier for them.

Moreover, legal aid before the ECtHR may be granted only after the application is communicated to the respondent state.[495] Meanwhile, the legal assistance available in national proceedings often ends with the exhaustion of domestic remedies.[496] As a result, a person wanting to apply to the Strasbourg Court but lacking resources to pay for legal assistance is often forced to prepare an application without any professional support.[497] Taking into account that only a correctly and fully completed application accompanied with all relevant documents interrupts the prescribed time-limit,[498] the lack of legal assistance at this introductory stage might have grave consequences for an indigent applicant.

In the preliminary ruling procedure, an application for legal aid can be lodged at any time,[499] so also before the proceedings in the Luxembourg Court.[500] A party to the main proceedings should apply for legal aid as soon as possible, as the two-month time-limit for submitting written observations cannot be extended.[501] Only if a party acts with due diligence does he stand a chance to be represented throughout the whole procedure before the CJ (during the written as well as the oral part). However, taking into consideration asylum seekers' difficulty obtaining effective access to information about their rights, there is a risk that the asylum seeker in whose case the preliminary question was asked would not be in a position to act sufficiently promptly. In consequence, he would be forced to prepare written observations by himself or would not submit them at all.[502]

495 Rule 105(1) of the ECtHR Rules of Court specifies that legal aid can be granted after the submission of the Contracting Party's observations in writing on the admissibility of an application (or after the time-limit for the submission of the observations has expired).

496 See e.g. PACE (2010) 'Preventing harm…', 12; Gruodyté and Kirchner (2016), 39; Leach (2017), 27.

497 However, the costs of the legal assistance received at the introductory stage of the proceedings before the ECtHR can be later reimbursed by the Strasbourg Court [see e.g. Leach (2017), 30; Harris et al. (2018), 144]. Nonetheless, in practice, the sums awarded by the ECtHR cover merely a part of the incurred costs [see e.g. Harby (2005), 44; Becue et al. (2011), 143-144; Dembour (2011), 100-101; Leach (2017), 50-51; Harris et al. (2018), 144-145; Reid (2019), 24].

498 Rule 47(6)(a) of the ECtHR Rules of Court. See also ECtHR (2003) 'Institution of proceedings…', point 1.

499 Article 115(1) of the CJ Rules of Procedure.

500 Broberg and Fenger (2014), 472.

501 See also these Chapter and Title, point 1.2.

502 With the latter being more probable, as asylum seekers and migrants are considered 'more passive litigants' before the CJ, who 'often are completely reliant on their lawyer' [Hoevenaars (2018), 72].

It has to be concluded that the legal aid systems available at the Strasbourg and Luxembourg Courts do not answer the specific needs of indigent asylum seekers. They create bureaucratic barriers which may prove to be insurmountable, especially for foreigners fearing a refoulement. Furthermore, they do not guarantee that asylum seekers are assisted in the most important stages of the proceedings. Meanwhile, the lack of adequate legal assistance may effectively preclude asylum seekers from lodging an application to the ECtHR or written observations to the CJ.

6. Comparison

The ECtHR and the CJ are not easily accessible for asylum seekers. Foreigners seeking asylum face multiple impediments in accessing justice at the European level. Those difficulties result from both external (the special situation of asylum seekers) and internal (the rules governing the proceedings before both courts and the courts' practice) factors. When juxtaposed, they create an image of the European asylum courts as being hard for asylum seekers to approach, particularly in comparison to nationals of the Contracting Parties to the ECHR or the Member States of the EU.

The exceptional difficulties in accessing justice that asylum seekers face on a regular basis are—to some extent—recognized by the Strasbourg and Luxembourg Courts and balanced, on the one hand, by the procedural rules applicable in the two courts and, on the other hand, by their interpretation. For instance, the ECtHR tries to balance its strict admissibility criteria with a certain flexibility and lack of excessive formalism in applying them. The court occasionally adjusts its procedural rules to the special circumstances of the asylum case (*inter alia* by introducing a different starting point for the calculation of the prescribed time-limit in non-refoulement cases). However, its case-law in this regard is often casuistic, sometimes inconsistent and, as such, unpredictable.

Further problems with asylum seekers' access to the European asylum courts were identified. In particular, the procedural rules applied before both courts concerning the language of the procedure, anonymity and legal aid seem to insufficiently answer the special needs of asylum seekers. Moreover, the ECtHR's practice of striking applications out of the list of cases in the event of the loss of contact between the applicant and his representatives, raises some concerns. Article 37(1)(a) of the ECHR is applied rather strictly. Not much space is left for excusing the applicant's lack of communication, even when he was detained or subject to persecution after a removal. While the CJ did not establish similar rules in the preliminary ruling procedure, a

referring court or tribunal may easily withdraw its questions after the asylum seeker's removal or disappearance. In those circumstances, the Luxembourg Court itself can also decide that the respective references no longer need to be answered. Those practices may significantly limit asylum seekers' access to the two courts. Furthermore, they may persuade national authorities to enforce removals in order to avoid the unfavourable judgment.[503] Nevertheless, in both courts special precautions are taken to preclude such disputable actions.[504]

For an asylum seeker, it is not easy to initiate, pursue and participate in the proceedings before either European asylum court. Access to the ECtHR and the CJ is hampered by the specific circumstances in which asylum seekers are often forced to operate, which are not adequately balanced by the courts' procedural rules and their interpretation. Thus, it seems that despite the fact that the asylum workload of the Strasbourg and Luxembourg Courts is constantly rising,[505] it may truly be only 'the tip of the iceberg in terms of the number of requests which could be made'[506].

III. Urgency of the Proceedings

Asylum cases can often be characterized as urgent. Asylum-seeking applicants and parties to the main proceedings may be refouled before the ECtHR and CJ manage to decide on the respective application or preliminary reference. They may also be unlawfully detained in a hosting state, frequently in degrading or inhuman conditions, until the judgment of the Strasbourg or Luxembourg Court is given. The asylum seeker's premature removal as well as his prolonged detention may undermine the purposefulness and the efficacy of the proceedings before the European asylum courts. Thus, as regards the asylum seeker's stay in a hosting state, the status quo should be maintained during the proceedings before the ECtHR and the CJ. Moreover, asylum cases should be considered by those courts as quickly as possible, in particular when the asylum seeker is held in detention or the removal is imminent.

503 As regards the ECtHR, see e.g. Forowicz and Gribincea (2011), 129. As regards the CJ, see by analogy, Hoevenaars (2018), 221-223, 226, 229-230, explaining the Member States' practice of granting residence permits to foreigners after the preliminary question has been referred to the CJ in cases concerning refusals of those permits [see e.g. CJ, case C-155/11 PPU *Mohammad Imran,* order (2011)] in order to escape the court's adjudication threatening a national migration policy.

504 For more see this Chapter, Title III.

505 For more see Chapter 2, Title III, point 2.2, and Title IV, point 2.3.

506 PACE (2010) 'Preventing harm…', 11, in regard to the number of requests for interim measures before the ECtHR.

The procedural rules applicable before the two courts enable—to some extent—maintaining the status quo and accelerating proceedings in asylum cases. While the Strasbourg Court can grant interim measures (1.1), the Luxembourg Court lacks such competence. However, under Article 23 of the CJ Statute domestic proceedings should be stayed for the duration of the preliminary ruling procedure (1.2). Moreover, the ECtHR adopted the priority policy that guarantees that more urgent categories of cases are dealt with more rapidly (2.1). Meanwhile, the Luxembourg Court can accord priority treatment or apply the expedited or urgent preliminary ruling procedure (2.2). Hence, both courts have at their disposal explicit measures which can be used to address the urgency of asylum cases.

1. Maintaining the Status Quo

In asylum cases, the applicant or party to the main proceedings should be allowed to remain in the hosting state for the duration of the proceedings before the European asylum courts; thus, his removal should be suspended. The Strasbourg and Luxembourg Courts approach this issue differently. The ECtHR may grant an interim measure indicating that the expulsion, extradition or transfer should be halted for the duration of the proceedings (1.1). Meanwhile the CJ is not competent to indicate provisional measures in the preliminary ruling procedure. Nevertheless, Article 23 of the CJ Statute presupposes that national proceedings are stayed when a national court or tribunal refers a preliminary question (1.2). The present section seeks to elucidate whether those measures are a sufficient safeguard to prevent the asylum seeker from being removed before the proceedings before both European asylum courts are concluded.

1.1 The ECtHR

An application can be submitted to the ECtHR only if domestic remedies are exhausted.[507] Meanwhile, the conclusion of national asylum-related proceedings often entails that the asylum seeker is 'removable': he can at any time be expelled, extradited or transferred to another country where he fears ill-treatment. However, an applicant may request the Strasbourg Court to grant him interim measure staying the enforcement of the removal for the duration of the proceedings in that court. In this section the scope and duration of the protection offered to asylum seekers by the ECtHR through interim measures is analysed. Provisional measures are indicated in limited spheres (a)

507 See this Chapter, Title II, point 1.1(a).

and for a limited period of time (b). Furthermore, the rigorous approach of the Strasbourg Court as regards the application of Rule 39 of the ECtHR Rules of Court (hereinafter Rule 39) is discussed (c). Finally, the states' compliance with interim measures is briefly considered (d).

a. Scope of Interim Protection

Under Rule 39 the Strasbourg Court may indicate any interim measure that should be adopted in the interests of the parties or of the proper conduct of the proceedings. The ECtHR reiterates that

> (i)n cases (...) where there is plausibly asserted to be a risk of irreparable damage to the enjoyment by the applicant of one of the core rights under the Convention, the object of an interim measure is to maintain the status quo pending the Court's determination of the justification for the measure.[508]

Provisional measures 'play a vital role in avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted'.[509]

In practice, interim measures are granted predominantly in the non-refoulement context. Removing an asylum seeker to a country, where his rights set forth in Article 3 of the ECHR could be violated, before the Strasbourg Court considers his claims, constitutes an irreversible situation[510] that should be avoided by indicating to the responding state to halt the expulsion or extradition for the duration of the court's proceedings.[511] The practice of granting interim measures in such circumstances is well established: they have been indicated in non-refoulement cases at least since 1964 by the ECommHR and since 1989 by the ECtHR.[512]

508 ECtHR (GC), *Mamatkulov and Askarov v. Turkey,* nos. 46827/99 and 46951/99 (2005), §108.

509 Ibid., §125.

510 Carrera, De Somer and Petkova (2012), 12, stressed that 'the sending back of an asylum-seeker to his/her country of origin or transit could irretrievably close the case before the ECtHR and would lead to a violation of Arts. 2 (the right to life) and/or 3 ECHR'. Similarly, Zupančič (2011), 3.

511 See e.g. ECtHR, *NA. v. the United Kingdom*, no. 25904/07 (2008), §5; ECtHR, *Tehrani and Others v. Turkey,* nos. 32940/08, 41626/08 and 43616/08 (2010), §3; ECtHR (GC), *F.G. v. Sweden,* no. 43611/11 (2016), §4.

512 Rieter (2010), 271 and 282.

Furthermore, at least since 2008, Rule 39 has also been applied to halt Dublin transfers.[513] Interim measures were indicated by the Strasbourg Court particularly in regard to transfers to states struggling with large flows of asylum seekers, notably Greece, Italy, Malta and Hungary.[514] Requests for those removals to be halted were made under Rule 39, due to the inhuman and degrading detention or reception conditions as well as the deficiencies in national asylum proceedings.[515]

Moreover, Rule 39 has been applied to enable access to national asylum proceedings. In the case of *D.A. and Others v. Poland*, the applicants claimed that on numerous occasions they tried to lodge asylum applications at the Polish border, but they were repeatedly turned back to Belarus. The ECtHR decided to indicate to the Polish Government that the applicants should not be removed to Belarus. Additionally, it clarified that the indication should be understood in such a way that when the applicants 'presented themselves at a Polish border checkpoint, the applicants' applications for asylum should be received and registered by the Border Guard and forwarded for examination by the competent authorities. Pending examination of their asylum application, the applicants should not be sent back to Belarus'.[516]

Besides granting provisional measures in individual non-refoulement cases, the Strasbourg Court attempted to influence national return policies when it considered that interim measures should be applied systematically to the specified group of returnees. In 2004 it indicated to the government of the Netherlands not to expel an asylum seeker to Somalia.[517] To ensure that the national authorities understood that this measure applied also to other asylum-seeking Somalis in a similar situation to that of the applicant, the court included an appropriate explanatory sentence in its decision.[518] Furthermore, in 2007, after being challenged by the increasing number of requests

513 Burbano Herrera and Haeck (2011), 48. See also ECtHR, *K.R.S. v. the United Kingdom*, no. 32733/08, dec. (2008), stating that between 14 May 2008 and 16 September 2008 the ECtHR had applied Rule 39 in eighty cases concerning Dublin transfers from the United Kingdom to Greece.

514 See e.g. ECtHR, *Shakor and Others v. Finland*, no. 10941/10 etc., dec. (2011); ECtHR, *F.S. and Others v. Finland*, no. 57264/09, dec. (2011); ECtHR (GC), *Tarakhel v. Switzerland*, no. 29217/12 (2014), §21; ECtHR, *Mohammadi v. Austria*, no. 71932/12 (2014), §4; ECtHR, *A.M.E. v. the Netherlands*, no. 51428/10, dec. (2015), §16; ECtHR, *Ojei v. the Netherlands*, no. 64724/10, dec. (2017), §14.

515 Keller and Marti (2013), 350.

516 ECtHR, *D.A. and Others v. Poland*, no. 51246/17 (2021), §16. See also ECtHR, *M.K. and Others v. Poland*, nos. 40503/17, 42902/17 and 43643/17 (2020), §§58–59.

517 ECtHR, *Barakat Saleh v. the Netherlands*, no. 15243/04, dec. (2008).

518 Rieter (2010), 181 fn 368. See also Reneman (2014) *EU Asylum Procedures (…)*, 136 fn 83. The ECtHR's approach to Somali returnees resulted in the one-year memorandum on expulsions from the Netherlands in respect to the specified groups of Somalis and

for interim measure from Tamils who were being removed from the United Kingdom to Sri Lanka, the Section Registrar wrote a letter to the British authorities asking them to 'assist the Court by refraining for the time being from issuing removal directions in respect of Tamils who claim that their return to Sri Lanka might expose them to the risk of treatment in violation of the Convention'. The United Kingdom refused to comply with this request. In consequence, the ECtHR indicated—pending the leading judgment in the case of *NA. v. the United Kingdom*—provisional measures in 342 similar cases concerning removals of ethnic Tamils to Sri Lanka.[519] Moreover, in 2010—in the face of the alarming rise in the number of requests for interim measures—the Strasbourg Court informed numerous Contracting Parties that it would apply Rule 39 in any case involving an expulsion to Iraq[520] or a transfer to Greece under the Dublin II Regulation. States were expected to halt those removals in order to give the ECtHR more time to examine potential risks in Iraq or pending the leading judgment in the Dublin case of *M.S.S. v. Belgium and Greece*.[521]

Occasionally interim measures are also granted in other asylum-related situations. Rule 39 was applied to detainees, *inter alia* by indicating to a respondent state to provide applicants with food[522] or appropriate medical treatment[523] as well as to enable contact with a lawyer while in detention[524]. Moreover, interim measures have been granted in order to prevent or end inhuman or degrading living conditions[525] or to preclude a poor examination of an asylum application[526]. Furthermore, the ECommHR as well as the ECtHR sporadically requested that the asylum seeker be allowed to come back to a

subsequently in the new Ministry's policy [ECtHR, *Salah Sheekh v. the Netherlands*, no. 1948/04 (2007), §§86-87].

519 ECtHR, *NA. v. the United Kingdom*, no. 25904/07 (2008), §§21-22.

520 'For a short period in late 2010, the Court, under unusual pressure, adopted a 'quasi-systematic' approach involving a presumption in favour of application of Rule 39 in these cases' [CDDH (2013), 2].

521 Papadouli and Hansen (2012), 39-45. While the *M.S.S.* case is surely a leading judgment concerning Dublin transfers, the ECtHR refused to apply Rule 39 there [ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §32].

522 EASO (2019), 161.

523 See e.g. ECtHR, *Tehrani and Others v. Turkey*, nos. 32940/08, 41626/08 and 43616/08 (2010), §5.

524 See e.g. ECtHR, *D.B. v. Turkey*, no. 33526/08 (2010), §5.

525 See e.g. ECtHR, *Afif v. the Netherlands*, no. 60915/09, dec. (2011), §25, where the ECtHR indicated that the failed asylum seekers should 'be provided with adequate accommodation pending their effective removal from the Netherlands'. See also Rieter (2010), 170, 525-526, noticing that in 1992 the ECommHR indicated to Spain to take measures preventing irreparable harm in case of more than 50 asylum seekers who had been denied access to Spain and had been stranded on 'no-man's land' in tents under burning sun without water, sanitary facilities or medication.

526 Papadouli and Hansen (2012), 33.

Contracting Party when his expulsion had been enforced against the previously granted interim measure.[527]

Most provisional measures are indicated to the Contracting Parties, although occasionally the ECommHR and the Strasbourg Court decide to apply Rule 39 to the applicant himself. For instance, in the case of *Bhuyian v. Sweden*, the Commission ordered the asylum-seeking applicant that 'he should commit no further suicide attempts and no longer refuse to eat'.[528]

b. Duration of Interim Protection

Both the application to the ECtHR and the request for interim measure are non-suspensive. An asylum seeker is not protected against refoulement until the court decides whether a provisional measure should be indicated. Thus, it is of great importance both that the applicant submits the request immediately and that the court considers it promptly.

A request for interim measure should be lodged to the Strasbourg Court 'in good time';[529] that is, when domestic remedies are exhausted and the removal is imminent. Otherwise, the request may be considered premature.[530] Because of the requirement of imminence, the ECtHR must often act very rapidly in order to prevent a removal. To remedy this, the Strasbourg Court allows requests for a provisional measure to be submitted before the exhaustion of domestic remedies in the case of national decisions that may be immediately enforced after the conclusion of the proceedings in a Contracting Party.[531] The ECommHR and the ECtHR have occasionally indicated interim measures in advance of such final decisions.[532]

Lodging a request for a provisional measure, especially 'in good time', may be difficult for asylum seekers. They face multiple impediments to access justice in the Strasbourg Court.[533] However, some facilitations in this regard are provided for foreigners. Exceptionally, the ECtHR allows requests for interim relief to be made in non-European languages.[534] Moreover, such

527 See e.g. ECommHR, *Mansi v. Sweden*, no. 15658/89, dec. (1989); ECommHR, *Mansi v. Sweden*, no. 15658/89, report (1990) and ECtHR (Plenary), *Cruz Varas and Others v. Sweden*, no. 15576/89 (1991), §§61, 104. In the first case the applicant–after he had suffered torture in Jordan–was allowed back to Sweden (contrary to the second case).

528 ECommHR (Plenary), *Bhuyian v. Sweden*, no. 26516/95, dec. (1995).

529 ECtHR (2003) 'Requests for interim measures'.

530 See e.g. ECtHR, *Hassan Abukar v. the Netherlands*, no. 20218/04, dec. (2008).

531 ECtHR (2003) 'Requests for interim measures', point III.

532 See e.g. Garry (2001), 410-411.

533 For more see this Chapter, Title II.

534 ECtHR (2003) 'Requests for interim measures', point II.

requests can be lodged by 'any other person concerned'[535] (e.g. a relative of a detained person[536] or a non-governmental organization[537]), which could come in handy when the asylum seeker himself is unable to act sufficiently promptly and knowingly. Nevertheless, no significant practice has developed in this regard so far. The possibility to indicate an interim measure *proprio motu* is also rarely used by the Strasbourg Court.[538]

The ECtHR should proceed without a delay when it receives a request for a provisional measure. The court emphasizes that it needs at least one working day before the planned time of removal to make a decision on interim measures.[539] Hence, requests received after working hours, at weekends or on holidays may not be considered on time. Moreover, the one-working-day rule applies only if an applicant is aware of his date of removal.[540] Meanwhile, some returns are enforced without prior information given to a foreigner or his representatives.

Interim relief is usually granted for the duration of the proceedings before the court or 'until further notice'.[541] The Strasbourg Court occasionally indicates provisional measures for a definite period of time, which can be subsequently extended (again temporarily or pending the court's decision)[542] or not[543]. Such temporal measures have mostly been needed to enable more information to be gathered.[544] Nevertheless, in the case of *Labsi v. Slovakia* the interim relief was granted in order to guarantee that the applicant would not be removed before he had exhausted domestic remedies.[545] When the

535 Rule 39(1) of the ECtHR Rules of Court.

536 Leach (2017), 30-31.

537 See e.g. ECtHR, *Kamaliyevy v. Russia*, no. 52812/07 (2010), §§30-31, where the NGO specializing in providing assistance to refugees from Central Asia, on instructions from the applicant, successfully submitted the request under Rule 39 to suspend his extradition to Uzbekistan.

538 Keller and Marti (2013), 331.

539 ECtHR (2003) 'Requests for interim measures', point III.

540 CDDH (2013), 7.

541 See Keller and Marti (2013), 342, claiming that in practice the use of the 'until further notice' expression entails that the interim measure is applied for the duration of the proceedings.

542 See e.g. ECtHR, *Abdolkhani and Karimnia v. Turkey,* no. 30471/08 (2009), §3; ECtHR, *F.H. v. Sweden,* no. 32621/06 (2009), §§40, 44, 46. See also ECtHR (Plenary), *Cruz Varas and Others v. Sweden,* no. 15576/89 (1991), §§56, 61, 63-64.

543 See e.g. ECtHR, *Hassan Abukar v. the Netherlands,* no. 20218/04, dec. (2008).

544 See e.g. ECtHR, *M.H. and Others v. Cyprus,* nos. 41744/10 etc., dec. (2014), §5. For more see these Chapter and Title, point 1.1(c).

545 ECtHR, *Labsi v. Slovakia,* no. 33809/08 (2012), §§49-51. See also ECtHR, *Al Husin v. Bosnia and Herzegovina*, no. 3727/08 (2012), §4.

Chamber delivers a judgment, interim measures remain valid until it becomes final pursuant to Article 44(2) of the ECHR or until the Grand Chamber takes a further decision in this regard.[546] In practice, provisional measures remain in effect for various periods of time, from days to years.

Interim measures can be lifted at any time, if the court considers that the risk of irreparable damage has ceased to exist, is no longer imminent or never existed.[547] In the *M.A. v. Cyprus* case, the provisional protection was lifted because the applicant had been recognized as a refugee and released from detention.[548] In the case of *Shamayev and Others v. Georgia and Russia,* the Strasbourg Court decided that the extension of interim protection against extradition was not needed as the Russian Government delivered proper diplomatic assurances.[549] However, the undertakings of a receiving state are not always sufficient to lift the interim relief during the ECtHR's proceedings.[550]

The Strasbourg Court can also decide not to lift the measure when it considers that it may still be needed in future. In the case of *Abdulkhakov v. Russia*, the court maintained the provisional measure indicated to the Russian Government halting the extradition to Uzbekistan even though the applicant was no longer in Russia. The ECtHR, 'bearing in mind that the applicant may be able to return to Russia and having regard to the finding that he would face a serious risk of being subjected to torture or inhuman or degrading treatment in Uzbekistan', not only did not lift the interim measure but also stressed that the indication under Rule 39 must stay in force until the judgment became final or until further order.[551]

c. Refusal of Interim Protection

Rule 39 is applied by the Strasbourg Court intentionally strictly.[552] To use the ECtHR's own words, provisional measures are issued 'as a matter of principle,

546 See e.g. ECtHR, *F.H. v. Sweden,* no. 32621/06 (2009), §§106-107; ECtHR, *F.G. v. Sweden*, no. 43611/11 (2014), §47.

547 See e.g. ECtHR, *M.H. and Others v. Cyprus,* nos. 41744/10 etc., dec. (2014), §§5-6. See also ECtHR, *M.K. and Others v. Poland*, nos. 40503/17, 42902/17 and 43643/17 (2020), §§60-65, where the interim measure was not lifted despite the numerous requests of the responding state.

548 ECtHR, *M.A. v. Cyprus,* no. 41872/10 (2013), §§59-60.

549 ECtHR, *Shamayev and Others v. Georgia and Russia,* no. 36378/02 (2005), §§20-21.

550 See e.g. ECtHR (GC), *Chahal v. the United Kingdom,* no. 22414/93 (1996), §§4, 37, 105; ECtHR (GC), *Saadi v. Italy,* no. 37201/06 (2008), §§39-41, 51-55, 147-148.

551 ECtHR, *Abdulkhakov v Russia,* no. 14743/11 (2012), §243.

552 Keller and Marti (2013), 328, pointed out that 'a clear intent to keep the number of cases in which interim measures are granted to a strict minimum can be observed'.

in truly exceptional cases'.[553] The yearly recognition rate of interim measures requests in the years 2011-2020 varied from 5 to 12%. Most of the requests are considered to be outside the scope or refused.[554]

The Strasbourg Court does not justify its decisions concerning interim measures. Only very exceptionally can some information in this regard be found in the court's documents, including judgments. In general, requests are qualified as 'outside the scope' when they are incomplete (lacking information or documents) or submitted too late, as well as when they do not invoke a real risk of irreversible damage.[555] They are refused if they are not substantiated (*inter alia* a removal is not imminent, it does not involve irreparable harm)[556] or generally lack credibility, as well as when a significant change of circumstances has occurred in a receiving or hosting state[557]. In particular, a request for provisional measure is not justified when a final decision denying asylum has been issued but it does not contain an expulsion order or is not followed by one.[558] For instance, in the case of *Al Husin v. Bosnia and Herzegovina*, the provisional measure was first refused due to the fact that the deportation order had not yet been issued and subsequently awarded when this order had become final.[559]

An applicant has to present at least *prima facie* evidence for indicating interim measures. A request should include domestic decisions, especially given that the ECtHR attaches great importance to the reasoning of national asylum and expulsion orders.[560] The Strasbourg Court takes into consideration *inter alia* whether the applicant sought asylum, what decision was issued by the domestic asylum authorities and whether the UNHCR participated in those proceedings.[561] A request for interim relief should also contain information concerning the situation in a receiving country that constitutes a serious threat of irreparable harm to the applicant.[562] General information in this

553 ECtHR, *Savriddin Dzhurayev v. Russia*, no. 71386/10 (2013), §213.

554 See de Weck (2017), 73-74; ECtHR (2018) 'Rule 39…'; ECtHR (2021). In years 2015-2017, 2740 requests for interim relief were considered 'outside scope', 2266 were refused and only 407 granted. In years 2018-2020, 2851 requests were considered 'outside the scope', 1742 were refused and 541 were granted.

555 CDDH (2013), 8.

556 De Weck (2017), 71.

557 Garry (2001), 411-412.

558 Burbano Herrera and Haeck (2011), 32 fn 8; Burbano Herrera (2017), 241 fn 13.

559 ECtHR, *Al Husin v. Bosnia and Herzegovina*, no. 3727/08 (2012), §§4, 7.

560 See e.g. CDDH (2013), 6. Cf. Papadouli and Hansen (2012), 62.

561 See e.g. Garry (2001), 414.

562 Keller and Marti (2013), 334, indicated that the ECtHR can examine this situation as well *proprio motu*. For more see this Chapter, Title IV, point 1.3.

regard is not sufficient.[563] Moreover, a request should prove that a damage is imminent, for instance by including the expected date of a removal.[564]

The ECtHR can seek for itself, as well as ask an applicant or a respondent government, for additional documents or data. It established the practice of indicating temporal interim measures in order to allow supplementary information to be gathered. In the *M.H. and Others v. Cyprus* case, the Strasbourg Court stated that 'the applicants should not be deported to Syria until the Court had had the opportunity to receive and examine all the documents pertaining to their claim'. Afterwards, the ECtHR decided to lift interim measures in respect to seventeen Kurds who were subsequently removed to Syria before the conclusion of the court's proceedings.[565] In the case of *Hassan Abukar v. the Netherlands,* the Strasbourg Court decided not to prolong the interim relief halting the expulsion of the asylum seeker to Somalia. However, after the applicant submitted reports concerning the security situation in Somalia, the court decided to apply Rule 39 once again.[566]

Nevertheless, in the proceedings concerning provisional measures, the ECtHR is often compelled to act hurriedly and without comprehensive information as regards the applicant and the situation in the receiving state.[567] Moreover, as put by judge Zupančič in respect to the application of Rule 39,

> (i)n the context of human rights the minimal empathy and the humanness of human rights dictate that a person threatened with expulsion should not bear an excessive burden of proof or risk of non-persuasion. The expelling State, in other words, is morally responsible for the mistaken assessment of risk, whereas the Court must in such situations favour the security of the person being expelled.[568]

Accordingly, the Strasbourg Court perforce applies a lower threshold in the risk assessment for provisional measures than in the subsequent proceedings regarding admissibility and merits.[569] In fact, the ECtHR often holds that the

563 See e.g. Zwaak, Haeck and Burbano Herrera (2018), 95.

564 ECtHR (2003) 'Requests for interim measures', point I.

565 ECtHR, *M.H. and Others v. Cyprus,* nos. 41744/10 etc., dec. (2014), §5–6.

566 ECtHR, *Hassan Abukar v. the Netherlands,* no. 20218/04, dec. (2008).

567 See Zupančič (2011), 3; ECtHR (2011); Keller and Marti (2013), 332. See also ECtHR (GC), *M.S.S. v. Belgium and Greece,* no. 30696/09 (2011), §355, where the court emphasized that 'when an interim measure is indicated, it is not for the Court to analyse the case in depth—and indeed it will often not have all the information it needs to do so'.

568 Concurring opinion of judge Zupančič (§1) in ECtHR (GC), *Saadi v. Italy,* no. 37201/06, (2008).

569 See e.g. Rieter (2010), 831; Keller and Marti (2013), 333-334. Cf. ECtHR, *Savriddin Dzhurayev v. Russia,* no. 71386/10 (2013), §213, where the court stated that interim

application is inadmissible or finds no violation of the ECHR in cases where interim measures were previously indicated.[570] Meanwhile, the application is rarely successful on the merits when the court refused to apply Rule 39.[571]

Despite the application of the lower threshold in the risk assessment at this stage of the proceedings, for most asylum-seeking applicants it is still difficult to successfully apply for provisional protection. Their requests are predominantly deemed outside the scope or refused. However, the overall rigorous approach of the Strasbourg Court as regards the application of Rule 39 is considered a reason why the Contracting Parties predominantly comply with interim measures.[572]

d. Compliance

In practice, an asylum seeker is protected by the interim measure indicated by the ECtHR only if a Contracting Party decides to comply with it. Most of the time, states were and are willing to act in compliance with provisional measures granted by the Strasbourg Court and previously the ECommHR. Those measures were as a rule respected by responding states even when the possibility to indicate them was not included in the rules of procedure[573] and they were considered non-binding[574].

The *Cruz Varas and Others v. Sweden* case commenced the practice of not abiding by decisions indicating that the expulsion should be halted.[575] The ECommHR ordered that Sweden should not deport the family of rejected asylum seekers to Chile 'until the Commission had had an opportunity to examine the application during its forthcoming session'. Despite this, one of the applicants was expelled the same day. Subsequently, the ECommHR indicated that the responding state should 'enable this applicant's return to Sweden

measures are granted 'on the basis of a rigorous examination of all the relevant circumstances'.

570 See e.g. Rieter (2010), 831.

571 See e.g. ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §32; ECtHR, *Ilias and Ahmed v. Hungary*, no. 47287/15 (2017), §§3, 4, 125; ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §§151-164.

572 See e.g. Garry (2001), 418; Szklanna (2011), 363.

573 Only in 1974 was the possibility to indicate interim measures incorporated into the Rules of Procedure of the ECommHR (Rule 36). See Garry (2001), 407; Rieter (2010), 173-174. See also ECtHR (GC), *Mamatkulov and Askarov v. Turkey*, nos. 46827/99 and 46951/99 (2005), §106.

574 ECtHR (Plenary), *Cruz Varas and Others v. Sweden*, no. 15576/89 (1991), §100, where the court stated that '(t)he practice of Contracting Parties in this area shows that there has been almost total compliance with Rule 36 indications'. Garry (2001), 418-419, identified six cases of incompliance until July 2000.

575 Garry (2001), 419.

as soon as possible'. The Contracting Party did not comply: the applicant's requests to be allowed to come back to Sweden were rejected.[576]

In the *Cruz Varas* case, the ECtHR concluded that interim measures are not binding and compliance with them is based only on good faith co-operation between states and the ECHR's organs.[577] That interpretation persisted for many years. It was finally overturned by the Grand Chamber's judgment given in the case of *Mamatkulov and Askarov v. Turkey*. In this case two Uzbek nationals were removed to Uzbekistan against the interim measure indicating a stay of their extradition until further notice. The Strasbourg Court decided that the non-compliance with provisional measures prevents the adequate examination of a complaint and hinders the effective exercise of the applicant's right of individual application. In consequence, it must be considered a violation of Article 34 of the ECHR.[578] Nowadays, the binding force of the measures granted by the ECtHR under Rule 39 is beyond doubt.[579]

Taking that into account it is surprising that states were in general more willing to comply with interim measures when their binding force was not determined than they have been in recent years. The scope of non-compliance, although still low, has recently increased.[580] The reasons for this worrisome phenomenon are complex and their comprehensive analysis would be beyond the scope of this study. However, it is worth noticing that as regards removals of asylum seekers against Rule 39 the non-compliance may be rooted in the increasing xenophobia and the fear of asylum seekers and refugees spreading across Europe. More restrictive asylum and immigration laws and policies followed the negative public opinion. In those circumstances, governments may prefer to show diligence in enforcing removals.[581] Moreover, the fact that a lot of the cases of non-compliance with interim measures occur in regard to alleged terrorists or criminals proves that the governments put their security first,[582] even before the obligations arising from the ECHR.

576 ECtHR (Plenary), *Cruz Varas and Others v. Sweden*, no. 15576/89 (1991), §§38, 56-64.

577 Ibid., §§100, 102.

578 ECtHR (GC), *Mamatkulov and Askarov v. Turkey*, nos. 46827/99 and 46951/99 (2005), §§24-27; 99-128. For a comprehensive analysis, see Rieter (2010), 912-929.

579 See e.g. Schabas (2017), 749-750.

580 See e.g. Haeck, Burbano Herrera and Zwaak (2011), 380; Hamdan (2016), 158; Leach (2017), 38; De Weck (2017), 68; Harris et al. (2018), 148.

581 Haeck, Burbano Herrera and Zwaak (2011), 400.

582 See also Harris et al. (2018), 148.

1.2 The CJ

On the one hand, Article 23 of the CJ Statute presupposes that the main proceedings are suspended when a national court or tribunal refers a question to the Luxembourg Court. As a matter of fact, the suspension of domestic proceedings is considered a normal consequence of initiating the preliminary ruling procedure.[583] It is needed if the CJ is to be of any assistance to domestic judicial authorities. As recommended by the CJEU, the initiation of the preliminary ruling procedure calls for the national proceedings to be stayed until the Luxembourg Court adjudicates on the matter, irrespective of the other protective measures ordered by a domestic court or tribunal.[584]

On the other hand, the CJ has no power to grant interim measures in the preliminary ruling procedure. Requests for provisional measures submitted in the Luxembourg Court are considered inadmissible. Only referring courts or tribunals are responsible for staying the national proceedings for the duration of the preliminary ruling procedure and capable of granting interim protection.[585] The CJ cannot order them to do so.[586] It results from the fact that a case is not transferred to the Luxembourg Court after the reference is lodged; it is still pending before a national court or tribunal.[587] In consequence, during the preliminary ruling procedure domestic judicial authorities remain competent to make use of any procedural measures that they have power to take under the national law.[588]

Applying those general considerations to asylum cases, it has to be concluded that the suspension of the main proceedings, as required under Article 23 of the CJ Statute, does not fully protect asylum seekers from being removed to another country during the preliminary ruling procedure. In practice it is possible that the asylum seeker is returned, transferred or extradited even though the preliminary question referred in his case is still pending before the Luxembourg Court. Some examples, proving that the safeguards provided for in Article 23 of the CJ Statute are not always sufficient in asylum cases, are indicated below.

In general, the stay of the main proceedings as provided for in Article 23 of the CJ Statute can efficiently protect the asylum seeker against removal when

583 Broberg and Fenger (2014), 324.

584 CJEU (2019) 'Recommendations…', point 25.

585 CJ, case C-186/1 R *Dory,* order (2001), paras 6, 11 and 13.

586 However, some guidelines in this regard are provided in the CJ's judgments [see e.g. Lenaerts, Maselis and Gutman (2014), 150-155, 572; Barents (2016), 448-449].

587 CJ, joined cases C-422/93, C-423/93 and C-424/93 *Zabala Erasun and Others* (1995), para 28.

588 Broberg and Fenger (2014), 324.

preliminary questions are referred in the asylum, Dublin or return procedure. In all those proceedings, a foreigner has a right to an effective remedy that entails a suspensive effect. Additionally, under the CEAS, pending the outcome of a remedy, the asylum seeker continues to have a right to remain on the territory of a Member State.[589] Thus, the suspension ordered in accordance with Article 23 of the CJ Statute should maintain that status quo: the suspensive effect continues to apply and the asylum seeker has a right to remain in the Member State for the duration of the appeal proceedings, including the preliminary ruling procedure.

However, the suspensive effect is not always granted or required in appeal asylum-related proceedings[590] and the right to remain does not apply to all asylum seekers[591]. Then, the stay of the main proceedings only maintains the status quo, so it does not establish a right to remain in a Member State or a suspensive effect of an appeal. Thus, then, the suspension of the main proceedings as provided for in Article 23 of the CJ Statute would not–in itself–prevent the implementation of the removal of the party to the main proceedings.

Moreover, if the preliminary ruling procedure concerns reception or detention of asylum seekers, Article 23 of the CJ Statute presupposes that only those proceedings are suspended. Thus, the asylum seeker can be effectively removed irrespective of the fact that the preliminary ruling procedure concerning his reception or detention is still pending in the CJ.

Furthermore, sometimes the rules of procedure applicable in a respective national procedure preclude staying the main proceedings. In the Dublin case of *C.K. and Others*, the Luxembourg Court stated that 'the possibility that the appellants in the main proceedings may be transferred to the Republic of Croatia before the end of an ordinary preliminary ruling procedure cannot be ruled out in the present case', because the referring court had indicated that there had been no judicial measure suspending the enforcement of the Dublin

589 See Articles 9 and 46(5-8) of the 2013 Procedures Directive; Article 27(1-4) of the Dublin III Regulation; Articles 9(1)(b) and 13(1-2) of the Return Directive. For more on suspensive effect, see Chapter 6, Title IV.

590 See e.g. Articles 46(6-7) of the 2013 Procedures Directive. See also CJ, case C-239/14 *Tall* (2015), para 60; CJ, case C-175/17 *X* (2018), para 48; CJ, case C-180/17 *X and Y* (2018), para 44. For more see Chapter 6, Title IV.

591 See Articles 9(2) and 41 of the 2013 Procedures Directive. Reneman (2014) *EU Asylum Procedures (...)*, 143-144, emphasized that, taking into account the principle of non-refoulement, Article 9(2) may be applied only in exceptional circumstances. See also Article 9(3) of the 2013 Procedures Directive, excluding the possibility of applying the exception in case of an extradition that will result in direct or indirect refoulement. However, Cherubini (2015), 234, noticed that this provision omits surrender on the basis of a European Arrest Warrant or on the request of an international court, so it is still insufficient from the perspective of the principle of non-refoulement.

decision at issue at this stage of the national proceedings.[592] That risk of imminent removal prompted the CJ to apply the urgent procedure in this case.[593]

The above examples prove that in asylum cases the suspension of the main proceedings provided for in Article 23 of the CJ Statute may be insufficient to protect a party to those proceedings from a removal enforced during the preliminary ruling procedure. Moreover, the Luxembourg Court itself has no means to remedy this situation, as it has no power to grant interim measures. Only national authorities can take additional actions in order to halt the removal, awaiting the CJ's judgment,[594] but whether and to what extent that is possible highly depends on the respective domestic law and practice. However, the Luxembourg Court reiterates that a national court or tribunal seized of a dispute governed by the EU law must be in a position to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under this law.[595] Moreover, the efficacy of the system establishing the preliminary ruling procedure 'would be impaired if a national court, having stayed proceedings pending the reply by the Court of Justice to the question referred to it for a preliminary ruling, were not able to grant interim relief until it delivered its judgment following the reply given by the Court of Justice.'[596] In practice though, as shown above, awarding provisional protection in asylum cases is not always possible.

2. Expediting the Proceedings

The proceedings in both courts often last months or years before the court adjudicates on the matter. In the Strasbourg Court, on average the proceedings in cases decided on the merits last from 24 to 36 months.[597] In the Luxembourg Court, the preliminary ruling is given after approximately

592 See CJ, case C-578/16 PPU *C. K. and Others* (2017), para 50.

593 See also these Chapter and Title, point 2.2.

594 For a good practice, see CJ, case C-180/17 *X and Y* (2018), paras 15-16, where the referring court not only stayed the respective proceedings, but also, on the foreigners' demand, ruled that they could not be expelled prior to the outcome of the further appeal proceedings. It emphasized that such additional action 'was justified by the need to prevent X and Y being expelled before the Court of Justice was able to rule on the questions referred for a preliminary ruling', as according to the law their further appeals did not entail automatic suspensive effect.

595 CJ, case C-432/05 *Unibet* (2007), para 67. See also CJ, case C-213/89 *Factortame* (1990), para 21.

596 CJ, case C-213/89 *Factortame* (1990), para 22.

597 Reid (2019), 19. See also de Weck (2017), 65, who claims that in non-refoulement cases judgments on average are reached in one to three years.

15-16 months.[598] The excessive duration of those proceedings may discourage applicants and courts or tribunals from initiating them.[599] Moreover, asylum cases decided in those courts often require a quick, or at least quicker, resolution. Asylum seekers awaiting the courts' judgments are often deprived of liberty or threatened with immediate removal. A prolonged detention or refoulement of the applicant before the ECtHR or the CJ reaches its judgment could negatively affect the effectiveness of judicial protection offered by those courts. In asylum cases, the saying 'justice delayed, justice denied' is even more true, considering the irreparable harm that the asylum seeker may experience as a result of the deferred adjudication. However, both European asylum courts are competent to expedite the proceedings when they are challenged with such urgent matters.

2.1 The ECtHR

Under Rule 40 of the ECtHR Rules of Court, the application can be urgently notified to a Contracting Party by the Registrar (with the authorization of the President of the Chamber). Moreover, some cases are prioritized by the court. Pursuant to Rule 41, the Strasbourg Court has regard to the importance and urgency of the issues raised on the basis of the fixed criteria when it determines the order in which the cases are to be dealt with.

Accordingly, the ECtHR adopted a priority policy establishing seven categories of cases from the most urgent ones (category I) to manifestly inadmissible applications (category VII).[600] The application of Rule 39 is categorized as urgent, so requests for interim measure are considered by the court first. Category I (urgent applications) also includes other asylum matters, i.e. cases involving the risk to life or health of the applicant (e.g. cases concerning the principle of non-refoulement) and the deprivation of the applicant's liberty that is a direct consequence of the alleged violation of his ECHR rights (e.g. cases concerning detention of asylum seekers). Asylum cases may also fall into other categories[601], especially category III[602].

598 CJEU (2020), 172, with regard to years 2015-2019.

599 As regards the CJEU, see Tridimas (2018), 606. See also Broberg and Fenger (2018), 1002.

600 ECtHR (2009).

601 The information concerning the category in which a case was placed is not made public, so by no means it is possible to analyse to which category asylum cases are classified in practice. For a criticism of this lack of transparency, see Gerards and Glas (2017), 25.

602 'Applications which on their face raise as main complaints issues under Articles 2, 3, 4 or 5 § 1 of the Convention ("core rights"), irrespective of whether they are repetitive, and which have given rise to direct threats to the physical integrity and dignity of human beings'.

The priority policy was adopted in order to manage the ECtHR's docket more efficiently in the face of the court's increasing workload. On the one hand, it enabled faster examination of important and urgent matters concerning serious human rights violations. On the other hand, it may now take even longer to decide on the less pressing cases.[603] Nevertheless, it should not be overlooked that the Chamber, or its President, may derogate from this policy and give priority to a particular application.[604] The Strasbourg Court, like the ECommHR previously, grants the priority irrespective of its earlier decision regarding interim measures.[605]

Importantly, being awarded priority does not mean that a case is considered swiftly, but only as quickly as possible. Thus, in practice, it usually takes the ECtHR one or two years to deliver a judgment in a prioritized case.[606]

2.2 The CJ

The case can be also prioritized in the Luxembourg Court. Under Article 53(3) of the CJ Rules of Procedure, the President may in special circumstances grant the case a priority over others. However, in practice the priority treatment has no significant impact on the pace of the proceedings[607] and it is applied rarely, only when an expedited and urgent procedure cannot be used.[608]

The expedited preliminary ruling procedure is applied to all references when 'the nature of the case requires that it be dealt with within a short time'.[609] Meanwhile, the urgent procedure is availed of in cases that raise questions in the Area of Freedom, Security and Justice (thus, concerning asylum and immigration) and that present a certain degree of urgency.[610] The application of one of those procedures is regularly requested in asylum cases, in particular when the party to the main proceedings is detained.

603 See e.g. Glas (2016), 40; Gerards and Glas (2017), 25. See also Cameron (2013), 43.

604 Previously, the ECommHR could give precedence to a particular application under Rule 33 of its Rules of Procedure.

605 See e.g. Rieter (2010), 175, 832; Mole and Meredith (2010), 226. Cf. de Weck (2017), 66. See e.g. ECtHR, *J.H. v. the United Kingdom*, no. 48839/09 (2011), §§4-5; ECtHR, *M.H. and Others v. Cyprus*, nos. 41744/10 etc., dec. (2014), §5; ECtHR, *Ilias and Ahmed v. Hungary*, no. 47287/15 (2017), §4.

606 See e.g. de Weck (2017), 66; Reid (2019), 19.

607 Wathelet (2014), 39. Cf. Broberg and Fenger (2014), 395.

608 Wägenbaur (2013), 268; Wathelet (2014), 45. See e.g. CJ (GC), case C-490/16 *A.S.* (2017), paras 21-23.

609 Article 105(1) of the CJ Rules of Procedure. This new wording replaced the formulation of Article 104a of the previous Rules of Procedure, which required an 'exceptional urgency' in order to apply the accelerated procedure.

610 Article 107(1-2) of the CJ Rules of Procedure.

Under Article 267 of the TFEU, the CJ is obliged to act with the minimum of delay if a preliminary question is raised with regard to a person in custody. Both the expedited and urgent procedures implement this provision.[611] Accordingly, deprivation of the liberty of the party to the main proceedings, including immigration detention, may entail the use of the expedited[612] or urgent procedure. The latter procedure is applied when the answer to the question raised by a referring court or tribunal may decisively affect the legal situation of the detainee[613] (in particular, when it considers the lawfulness of the detention[614]). It has to be established that the resolution of the reference can result in that person's release from detention or preclude him being detained at all.[615] Hence, in the *Mirza* case, concerning the interpretation of the Dublin III Regulation, the Luxembourg Court decided to apply the urgent procedure, because the continued detention of the asylum seeker relied on the outcome of the case in the main proceedings, which concerned the lawfulness of the rejection of his application for international protection. The CJ reached the judgment in this case in less than three months.[616] The urgent procedure was applied by the court when the party to the main proceedings was detained pursuant to the 2013 Reception Directive[617] and the Return Directive[618]. In some asylum cases, the Luxembourg Court decided to use the expedited procedure instead of the urgent one.[619]

Both the expedited and urgent procedures are also applied in asylum cases that are not intertwined with the detention of the party to the main proceedings, but where a risk of interference with fundamental rights exists. In the cases of *Mengesteab* and *Jafari* the CJ granted the requests of the referring

611 Barents (2016), 833.

612 See e.g. CJ, joined cases C-188/10 and C-189/10 *Melki* and *Abdeli* (2010). See also view of AG Sharpston delivered on 26 January 2016 in case C-601/15 PPU *J.N.*, EU:C:2016:85, para 48.

613 CJEU (2019) 'Recommendations…', point 36.

614 Bartolini (2018), 221.

615 See e.g. CJ (GC), case C-357/09 PPU *Kadzoev* (2009), paras 32-33; CJ, case C-383/13 PPU *G and R* (2013), paras 25-26; CJ, case C-146/14 PPU *Mahdi* (2014), paras 35-36; CJ, case C-695/15 PPU *Mirza* (2016), paras 34-36; CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 99-103. See also Wathelet (2014), 41-42; Barents (2016), 833-834; Bartolini (2018), 222-223.

616 CJ, case C-695/15 PPU *Mirza* (2016), paras 35-36.

617 See e.g. CJ (GC), case C-601/15 PPU *J.N.* (2016), paras 37-42.

618 See e.g. CJ, case C-383/13 PPU *G and R* (2013), paras 22-26; CJ, case C-146/14 PPU *Mahdi* (2014), paras 32-36. Cf. CJ (GC), joined cases C-473/13 and C-514/13 *Bero* and *Bouzalmate* (2014), paras 19, 22-23, where the court refused to apply the urgent procedure despite the fact that the rejected asylum seeker was detained pending his return in a prison with ordinary prisoners.

619 See e.g. CJ (GC), case C-329/11 *Achughbabian* (2011), paras 26-27, and Bartolini (2018), 223. See also Wathelet (2014), 42; Barents (2016), 835.

courts to apply the expedited procedure. Both cases concerned the interpretation of the Dublin III Regulation in the circumstances resulting from the large influx of asylum seekers and both were decided within approximately 7 months.[620] In the *C.K. and Others* case, the Luxembourg Court applied the urgent preliminary ruling procedure, taking into account the state of health of the party to the main proceedings (an asylum seeker who suffered from some psychological disorders) and the fact that due to the lack of legal measures available to the referring court the Dublin transfer could be enforced at any time during the proceedings before the CJ. The Luxembourg Court reached a judgment in less than three months.[621]

Recently, the CJ has also applied the urgent preliminary ruling procedure because the parties to the main proceedings were facing a real risk of being treated contrary to Article 4 of the EU Charter and Article 3 of the ECHR. The *X and X* case concerned the refusal of visas for the Syrian family living in Aleppo who planned to apply for asylum in Belgium. The family stayed in Syria during the preliminary ruling procedure. The referring court justified the request for the application of the urgent procedure with the ongoing 'serious armed conflict in Syria, the young age of the children of the applicants in the main proceedings, their particular vulnerability, associated with their belonging to the Orthodox Christian community'. The Luxembourg Court concluded that it was not disputed that 'the applicants in the main proceedings were facing a real risk of being subjected to inhuman and degrading treatment, which must be regarded as an element of urgency justifying the application of Article 107 et seq. of the Rules of Procedure'. The case was decided in less than 3 months.[622]

The expedited and urgent preliminary ruling procedures meaningfully accelerate the proceedings before the CJ.[623] Taking into account the urgency

620 CJ (GC), case C-646/16 *Jafari* (2017), paras 37-38; CJ (GC), case C-670/16 *Mengesteab* (2017), paras 39-40. See in particular, CJ, case C-670/16 *Mengesteab,* order (2017), para 16, where the court concluded that in the exceptional situation of the refugee crisis, the recourse to the expedited procedure is necessary to remove, as soon as possible, the uncertainty as to the determination of the Member State responsible for examining applications for asylum that affects the proper functioning of the CEAS. Cf. CJ, case C-411/10 *N.S.*, order (2010), paras 4 and 7.

621 CJ, case C-578/16 PPU *C.K. and Others* (2017), paras 47-51. See also, similarly, CJ, case C-422/18 PPU *FR*, order (2018), para 27; CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 104-107.

622 CJ (GC), case C-638/16 PPU *X and X* (2017), paras 30, 33-34. Cf. ECtHR (GC), *M.N. and Others v. Belgium*, no. 3599/18, dec. (2020), concerning similar circumstances, where the ECtHR had not given a priority and the case was considered after 2 years and almost 4 months. For more on those cases, see Chapter 4, Title III, point 1.

623 In general, in years 2015-2019, the urgent preliminary ruling procedure lasted on average 1.9-3.7 months, the expedited procedure took on average 2.2-9.9 months, while the ordinary procedure lasted approx. 15-16 months [CJEU (2020), 172].

that many asylum cases entail, it is not surprising that the use of the expedited and urgent procedures is requested by referring courts.[624] However, overall, both procedures are applied restrictively and in consequence rarely.[625]

3. Comparison

Asylum cases adjudicated by the ECtHR and the CJ are often urgent. The 'urgency' of a case may be triggered by factors common to other applicants and parties to the main proceedings (e.g. a medical condition), but predominantly it originates from the crux of the asylum case. It stems from the fact that the asylum seeker is detained pending asylum or return proceedings or from the risk that he may be refouled before the European asylum court manages to adjudicate on his case. In practice, those asylum-related factors regularly urge the Strasbourg and Luxembourg Courts to apply specific measures that maintain the status quo for the duration of the proceedings and expedite the consideration of a case. However, the question is whether those measures are sufficient to address the specific needs of asylum seekers and to enable a proper and prompt examination of asylum cases by the European asylum courts.

As regards maintaining the status quo during the court's proceedings, the ECtHR has at its disposal a powerful instrument: interim measures. The broad formulation of Rule 39 allows the Strasbourg Court to apply it to numerous situations. It allows the special needs of asylum seekers to be taken into account. In fact, in many asylum cases, the indications of the ECtHR did prevent irreparable harm and contributed to the actual protection of life and limb, otherwise endangered.[626] The binding nature of provisional measures compels the Contracting Parties to respect asylum seekers' rights, in particular the principle of non-refoulement.

However, the protection offered by the Strasbourg Court through the interim measures is still not sufficient. As requests for provisional measure are not suspensive, the applicant can be removed and suffer irreparable harm before the court considers his request[627] or before the state manages to react

624 In years 2015-2019, 21 requests for the application of the urgent procedure were made in the area of borders, asylum and immigration [CJEU (2020), 176].

625 In years 2009-2020, in ten asylum cases the urgent preliminary ruling procedure was applied (out of 102 asylum judgments given in this timeframe). See also, in general, Wägenbaur (2013), 346; Wathelet (2014), 40; Barents (2016), 831. See also CJEU (2020), 175-176.

626 See e.g. ECtHR, *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05 (2007), §56; ECtHR, *I.M. v. France*, no. 9152/09 (2012), §§156-158; ECtHR, *M.A. v. Cyprus*, no. 41872/10 (2013), §139.

627 See e.g. ECtHR, *Al-Moayad v. Germany*, no. 35865/03, dec. (2007), §§43-48.

to the granted interim relief[628]. Lodging a request in good time may prove to be impossible or very troublesome considering, on the one hand, the asylum seekers' lack of legal knowledge and linguistic competences as well as their hampered access to legal aid, and, on the other hand, the governments' determination to remove a foreigner as quickly as possible. Moreover, the interim relief is granted intentionally rarely, leaving some asylum applicants without the protection against refoulement throughout the proceedings in the ECtHR. Meanwhile, in a few cases where interim measures were refused, the Strasburg Court eventually held that the expulsion, extradition or transfer of a foreigner would be or had been in breach of the ECHR.[629] Furthermore, in practice, some asylum seekers were removed to another country against ordered interim measures[630] which not only might have put them in danger but also could have hampered the ECtHR's proper examination of their applications.

Despite those critical comments regarding interim measures indicated by the Strasbourg Court, it cannot be overlooked that the ECtHR is better equipped than the CJ to react to a threat of the applicant's imminent removal during the court's proceedings. The Luxemburg Court has no power to grant provisional measures during the preliminary ruling procedure. A referring court or tribunal should under Article 23 of the CJ Statute stay the main proceedings, but it may be not enough to protect the asylum seeker against refoulement. National authorities are entitled or even expected to take additional actions in order to suspend the removal, pending the CJ's judgment, but those are dependent on the respective domestic law and practice. The weaknesses of the preliminary ruling procedure in this regard can be partly remedied by the accelerated consideration of the asylum case.[631]

Both the Strasbourg and Luxembourg Courts have appropriate tools to expedite the proceedings when they are challenged with urgent matters. If applied, those measures can reduce the duration of the proceedings to on average 2-3 months for the CJ and 1-2 years for the ECtHR. That is a significant

628 See e.g. ECtHR, *Muminov v. Russia,* no. 42502/06 (2008), §§133-138; ECtHR, *M.B. and Others v Turkey,* no. 36009/08 (2010), §§46-48.

629 See e.g. ECtHR (GC), *M.S.S. v. Belgium and Greece,* no. 30696/09 (2011), §§31-32, 360; ECtHR, *Ilias and Ahmed v. Hungary,* no. 47287/15 (2017), §§3, 4, 125, with ECtHR (GC), *Ilias and Ahmed v. Hungary,* no. 47287/15 (2019), §§151-164.

630 See e.g. ECommHR, *Mansi v. Sweden,* no. 15658/89, dec. (1989); ECtHR (Plenary), *Cruz Varas and Others v. Sweden,* no. 15576/89 (1991); ECtHR, *Čonka v. Belgium,* no. 51564/99 (2002); ECtHR, *Aoulmi v. France,* no. 50278/99 (2006); ECtHR, *Mostafa and Others v Turkey,* no. 16348/05 (2008); ECtHR, *Kamaliyevy v. Russia,* no. 52812/07 (2010); ECtHR, *Toumi v. Italy,* no. 25716/09 (2011); ECtHR, *Labsi v. Slovakia,* no. 33809/08 (2012); ECtHR, *Trabelsi v. Belgium,* no. 140/10 (2014); ECtHR, *A.S. v. France,* no. 46240/15 (2018), §§72-78; ECtHR, *M.K. and Others v. Poland,* nos. 40503/17, 42902/17 and 43643/17 (2020), §§235-238.

631 See CJ, case C-578/16 PPU *C.K. and Others* (2017), para 50.

acceleration, when compared to the general duration of the proceedings in both courts. Taking that into account, it has to be concluded that the application of a priority treatment (the Strasbourg Court) or of the urgent and expedited procedure (the Luxemburg Court) does in fact contribute to a better protection against irreparable harm to fundamental rights of individuals,[632] including asylum seekers. It also supports effective access to both courts.[633]

Nevertheless, the measures accelerating the proceedings are rarely applied in practice, particularly in the Luxembourg Court.[634] Moreover, it should not be overlooked that even if such measure is applied, it still means that the asylum seeker–while he waits for the CJ's or ECtHR's judgment–spends several months (if not years) in detention or in a state of uncertainty about whether he will eventually be refouled or not. Furthermore, during the courts' proceedings the legal situation of asylum seekers may be not determined by a national law, leaving them without any state support. From this perspective, even a couple of months of waiting may be considered excessive.

In conclusion, both European asylum courts have at their disposal explicit measures which can be used to answer the specific needs of asylum seekers stemming from the urgency of asylum cases. Some of those measures in fact capable of preventing irreparable harm to asylum seekers (especially interim measures indicated by the Strasbourg Court) and truly accelerate the court's proceedings (particularly the urgent preliminary ruling procedure). However, in practice, some asylum seekers are still refouled during the proceedings before both European asylum courts or are protractedly detained pending the CJ's or ECtHR's judgment. This results from the fact that the measures available to the two courts are applied too restrictively or are not in themselves sufficient to provide an adequate answer to the urgency of the proceedings.

632 Bartolini (2018), 214, 225.

633 See e.g. Capik (2016), 144, who claimed that the urgent procedure 'facilitates access to the CJEU by individuals'. However, a party to the main proceedings cannot request the CJ to apply the urgent or expedited procedure. They can be applied only on a referring court or tribunal's demand or *proprio motu*. The urgent procedure was applied by the court's own motion only once [Bartolini (2018), 215 fn 10].

634 Cf. Schima (2019), 1837, claiming that the urgent procedure has been applied more often in recent years and it is connected with the significant number of cases regarding asylum law and detained persons being now adjudicated before the CJ.

IV. Sources of Information

Asylum cases adjudicated by the ECtHR and the CJ require the collection of diverse and advanced information pertaining to both facts and laws. Taking into account that often the life and limb of the concerned asylum seeker is at stake, the judgment of the European asylum court should be as well-informed and evidence-based as possible. Meanwhile, asylum seekers face particular difficulties in submitting all necessary information and evidence to the Strasbourg and Luxembourg Courts due to their vulnerability and special situation. Frequently, they do not understand what data and documents are needed, they have limited access to legal assistance and they endure detention and reception conditions that hamper the gathering of evidence. Moreover, it may be simply impossible to obtain some types of proofs, particularly when presenting them to the court requires contacting national authorities—the ones from which the asylum seeker fled in the first place.

The aim of this subchapter is to analyse whether the European asylum courts notice and take into account these difficulties. The sources of information that the ECtHR and CJ rely on in asylum cases are examined, including the accounts of the concerned asylum seekers and the opinions of the interested states, institutions and organizations. The courts' approach to gathering information *proprio motu* is also looked into. Lastly, the key shortcomings in the respective courts' practice are identified and compared.

1. The ECtHR

Asylum cases decided by the ECtHR are highly fact-dependent.[635] When the asylum seeker complains before the court about his detention or reception in a responding state, the respective practice has to be examined. When he invokes that no effective remedy was available to him, not only laws but also factual information must be assessed. In non-refoulement cases, reliable, objective and up-to-date information about a state of destination has to be gathered to enable the thorough assessment of the risks upon removal. When the general situation of violence in a receiving country is so extreme that there is a real risk of ill-treatment simply by virtue of an individual being exposed to such violence, the information about the security and human rights situation in that country is in fact the most important and decisive evidence.[636] In

635 See also Sadeghi (2009), 127.

636 Vogelaar (2016), 307. For more on general situation of violence, see Chapter 4, Title II, point 3.

other cases, accounts about the receiving and responding states are used to support or challenge the applicant's statements about his detention, reception, risks upon removal or access to effective remedy.[637]

Meanwhile, documents provided by the parties in asylum cases are often insufficient for the Strasbourg Court to assess a case with a rigorous scrutiny[638]. On the one hand, asylum seekers are often not able to present their claims comprehensively, with references to multiple accounts and documents corroborating their story.[639] Those may be impossible to obtain (especially when evidence must be gathered in a country where the applicant fears ill-treatment or when it is in the possession of a responding state) or significantly difficult to collect due to special circumstances that the asylum seeker is facing (e.g. being detained, the lack of legal assistance, the language barrier precluding finding reliable information). On the other hand, responding states are not constrained by such difficulties, but they may be unwilling to present some information to the court. Moreover, in non-refoulement cases, governments often present before the Strasbourg Court the same materials that the national authorities had used to refuse international protection and order the removal of an applicant. Meanwhile, asylum seekers often argue before the ECtHR that the assessment made by domestic authorities was inadequate and not sufficiently supported by reliable and objective materials. Thus, the Strasbourg Court reiterates that the materials given by the responding state should not be the sole source of information that the court relies on.[640]

Hence, asylum cases are often more demanding than other cases decided by the ECtHR.[641] Not being able to rely solely on the documents given by the parties (1.1), the Strasbourg Court is regularly compelled to seek more information elsewhere. It relies on third party interventions (1.2) and collects some information *proprio motu* (1.3). It pays particular attention to the information about receiving and responding states provided by international, governmental and non-governmental organizations and institutions, but its approach to secondary sources is criticized (1.4). Meanwhile, the ECtHR should be particularly inquisitive in asylum cases as the life and limb of the asylum seeker may

637 See also Wiik (2018), 354.

638 That the court requires from itself in non-refoulement cases, see e.g. ECtHR, *Vilvarajah and Others v. the United Kingdom*, nos. 13163/87 etc. (1991), §108. For more on rigorous scrutiny, see Chapter 6, Title III.

639 See also this Chapter, Title II, point 2.1.

640 See e.g. ECtHR, *Salah Sheekh v. the Netherlands*, no. 1948/04 (2007), §136.

641 See e.g. Leach (2017), 55; Harris et al. (2018), 151; Reid (2019), 13, indicating that in most cases the ECtHR is able to establish the facts of a case relying only on the documents provided by the parties.

be at stake. If the court improperly establishes facts and allows the asylum seeker's removal on this basis, the applicant is to be deported, extradited or transferred to a country where he may face a real risk of being tortured or ill-treated. Taking into account the absolute character of Article 3 of the ECHR as well as the irreversibility and gravity of the harm that might occur after a removal, gathering reliable, objective and up-to-date information in non-refoulement cases is indispensable.

1.1 Accounts of the Parties

Every applicant, including an asylum-seeking one, is responsible for providing the ECtHR with substantial facts and supporting evidence.[642] In practice, the Strasbourg Court requires from asylum-seeking applicants a high standard of proof.[643] In the case of *Said v. the Netherlands,* the court emphasized that it is

> incumbent on persons who allege that their expulsion would amount to a breach of Article 3 to adduce, *to the greatest extent practically possible,* material and information allowing the authorities of the Contracting State concerned, as well as the Court, to assess the risk a removal may entail.[644]

Hence, asylum seekers are not easily excused from not presenting sufficient information and evidence in the proceedings before the ECtHR.

Nevertheless, the Strasbourg Court is aware of the difficulties that asylum seekers face in gathering evidence, especially when it has to be obtained from a country where they fear persecution.[645] For instance, the requirement to present the documents confirming that the applicant is wanted by national authorities can be a *probatio diabolica*. The inability to bring such proof in the proceedings before the ECtHR is then not decisive *per se*.[646] The Strasbourg Court acknowledges that the special situation of asylum seekers often requires giving them the benefit of doubt when assessing their credibility and the evidence supporting their claims.[647]

642 Rule 47 (1)(e) and (f), (2)(b), (3.1) of the ECtHR Rules of Court. See also ECtHR (GC), *F.G. v. Sweden,* no. 43611/11 (2016), §113.

643 See e.g. Baldinger (2015), 315; De Weck (2017), 235-236.

644 ECtHR, *Said v. the Netherlands,* no. 2345/02 (2005), §49 (emphasis added).

645 See e.g. ECtHR, *Bahaddar v. the Netherlands,* no. 25894/94 (1998), §45; ECtHR, *Said v. the Netherlands,* no. 2345/02 (2005), §49. Cf. ECtHR, *Nasimi v. Sweden,* no. 38865/02, dec. (2004).

646 ECtHR, *Mawajedi Shikpokht and Mahkamat Shole v. the Netherlands,* no. 39349/03, dec. (2005). Cf. ECtHR, *Karim v. Sweden,* no. 24171/05, dec. (2006).

647 See e.g. ECtHR, *A.A. and Others v. Sweden,* no. 34098/11 (2014), §73; ECtHR (GC), *F.G. v. Sweden,* no. 43611/11 (2016), §113.

Applicants are allowed to present any evidence that in their opinion is relevant in a case.[648] In practice, asylum-seeking applicants adduce diverse materials, such as reports from international and non-governmental organizations as well as information from media regarding their personal circumstances,[649] the situation in the receiving state, and detention and reception conditions in the respondent state; medical reports concerning their state of health[650]; arrest warrants produced by the country of origin; documents confirming the UNHCR's assessment of the applicant's claims[651]; witnesses' affidavits; video and photographic evidence[652]; etc. Asylum seekers may also be invited or requested by the court to present additional materials.[653] In the case of *S.A. v. the Netherlands*, the ECtHR asked the applicant to submit supplementary evidence substantiating her fears of becoming a victim of an honour killing or being sentenced to death for adultery in Afghanistan, but she failed to do so. As a result, the application was found manifestly ill-founded, as her claims were considered wholly unsubstantiated.[654]

A responding state is also allowed to present observations and supporting evidence before the ECtHR. Moreover, it may be requested to submit any factual information, documents or other material considered by the Chamber or its President to be relevant in a case.[655] States are obliged to act cooperatively.[656] In the *Khamidkariyev v. Russia* case, the Strasbourg Court stressed that 'Article 38 of the Convention requires the respondent State to submit the requested material in its entirety, if the Court so requests, and to account for any missing elements'.[657] The state's refusal to comply with the court's

648 See e.g. ECtHR, *Iskandarov v. Russia*, no. 17185/05 (2010), §107, where the court explained that '(i)n the proceedings before the Court, there are no procedural barriers to the admissibility of evidence (...)'.

649 See e.g. ECtHR, *S.H. v. the United Kingdom*, no. 19956/06 (2010), §§48-57, 69-72.

650 See e.g. ECtHR, *R.C. v. Sweden*, no. 41827/07 (2010), §§23-25.

651 In some cases, the ECtHR attached notable weight to the UNHCR's conclusion that the applicant was eligible for international protection, see e.g. ECtHR, *Jabari v. Turkey*, no. 40035/98 (2000), §41; ECtHR, *Abdolkhani and Karimnia v. Turkey*, no. 30471/08 (2009), §82; ECtHR, *Yakubov v. Russia*, no. 7265/10 (2011), §91. See also Forowicz (2010), 242-246. Cf. ECtHR, *Y. v. Russia*, no. 20113/07 (2008), §§90-91; ECtHR, *D and Others v. Turkey*, no. 24245/03 (2006), §57. See also Sadeghi (2009), 146-148, criticizing the inconsistent approach of the ECtHR to the UNHCR's information.

652 See e.g. ECtHR (GC), *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15 (2020), §86.

653 Rule 49(3)(a), Rule 54(2)(a-c) and Rule 59(1) of the ECtHR Rules of Court. See e.g. ECtHR, *R.C. v. Sweden*, no. 41827/07 (2010), §§23-25.

654 ECtHR, *S.A. v. the Netherlands*, no. 3049/06, dec. (2006).

655 Rule 49(3)(a), Rule 54(2)(a-c) and Rule 59(1) of the ECtHR Rules of Court.

656 Article 38 of the ECHR; Rule 44(A)-44(C) of the ECtHR Rules of Court.

657 ECtHR, *Khamidkariyev v. Russia*, no. 42332/14 (2017), §107.

requests to provide it with the relevant information and evidence can amount to the violation of Article 38 of the ECHR.[658] Thus, responding states may be expected to actively participate in the proceedings.[659]

In non-refoulement cases, the burden of proof shifts to the responding government when the applicant presents evidence capable of proving that there are substantial grounds for believing that, if removed, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the ECHR.[660] In those cases, it is well established that the ECtHR cannot rely solely on materials presented by a respondent state. Such materials have to be juxtaposed with other sources,[661] including third party interventions and accounts obtained *proprio motu*.

1.2 Third Party Interventions

Article 36 of the ECHR allows participation in the proceedings before the ECtHR by three categories of intervenors: the Contracting Parties (other than a responding state), the CoE Commissioner for Human Rights and 'any persons concerned'. The CoE Commissioner and a Contracting Party one of whose nationals is an applicant have a right to submit interventions.[662] Other Contracting States and 'persons concerned' have to be invited or granted leave by the President of the Chamber to intervene 'in the interests of the proper administration of justice'.[663] Most often, interventions are lodged at the merits stage, although intervenors can also submit them before a decision on admissibility is made.[664] They are allowed in the proceedings before the Chambers and/or the Grand Chamber.

All third party intervenors are welcome to submit comments in writing. However, if a leave to intervene is granted, the ECtHR can determine conditions for submitting those comments as regards e.g. the length of the submission, time-limits and the matters that can be covered.[665] The Strasbourg Court

658 See e.g. ibid., §109. See also ECtHR, *Nizomkhon Dzhurayev v. Russia*, no. 31890/11 (2013), §165.

659 De Weck (2017), 239.

660 See e.g. ECtHR (GC), *Saadi v. Italy*, no. 37201/06 (2008), §129.

661 ECtHR, *Salah Sheekh v. the Netherlands*, no. 1948/04 (2007), §136.

662 Article 36(1) and (3) of the ECHR; Rule 44(1-2) of the ECtHR Rules of Court.

663 Article 36(2) of the ECHR; Rule 44(3)(a) of the ECtHR Rules of Court.

664 See e.g. ECtHR, *T.I. v. the United Kingdom*, no. 43844/98, dec. (2000); ECtHR, *Ramzy v. the Netherlands*, no. 25424/05 (2010), §5; ECtHR (GC), *M.N. and Others v. Belgium*, no. 3599/18, dec. (2020), §§86-95. For reasons for making early submissions, see Vajic (2005), 98.

665 See e.g. the first intervention submitted by the UNHCR to the ECtHR of 4 February 2000 in the case of *T.I. v. the United Kingdom*, no. 43844/98, dec. (2000), where it is specified

may indicate that an intervenor should not discuss particular facts and merits of a case.[666] Moreover, the CoE Commissioner for Human Rights and a Contracting Party one of whose nationals is an applicant have a right to take part in a hearing.[667] Other intervenors are invited or granted leave to participate in a hearing only 'in exceptional cases'.[668] Despite the fact that the overall number of oral submissions has dropped over time, some increase in this regard can be observed in the proceedings before the Grand Chamber held in politically sensitive cases, including asylum ones.[669]

In practice, all of the above intervenors participate in asylum cases. Third party interventions concerning human rights of asylum seekers are of great significance for three reasons. Firstly, they may support claims of the asylum-seeking applicant who, due to his vulnerable situation, cannot by himself provide the court with such professional expertise.[670] Secondly, concerning the amount of information that often needs to be gathered in asylum cases regarding e.g. the situation in the receiving country, third party interventions have the potential to save the court time.[671] Some submissions are in fact so detailed and comprehensive that the court can refrain from collecting materials *proprio motu*.[672] Taking into account the urgency of the proceedings in asylum cases, saving time is also significantly advantageous for an asylum-seeking applicant, as it may protect him from real harm.[673] Lastly, third party intervenors often cite and refer to diverse sources of information, including those not publicly available, *ipso facto* increasing the quality of a judgment.

that the ECtHR requested the UNHCR to 'deal with the aspects of the case relevant to refugee protection', in particular with the operation of the Dublin Convention. Cf. Wiik (2018), 307, 335, 350-352, who claims that the ECtHR has already abandoned this practice and accepts requests for leave as proposed by intervenors.

666 Leach (2017), 53. See also Van den Eynde (2013), 282; Reid (2019), 18-19.

667 Article 36(1) and (3) of the ECHR; Rule 44(1-2) of the ECtHR Rules of Court.

668 Rule 44(3)(a) of the ECtHR Rules of Court.

669 See Wiik (2018), 320-321, referring to ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011) and ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012). See also ECtHR (GC), *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15 (2020), §13; ECtHR (GC), *M.N. and Others v. Belgium*, no. 3599/18, dec. (2020), §§6-7.

670 See e.g. Carrera, De Somer and Petkova (2012), 8, and, in general, Wiik (2018), 44. See also ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §304; ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), §203; ECtHR, *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15 (2017), §119.

671 In general, see Bartholomeusz (2005), 241. Cf. Wiik (2018), 65.

672 Cf. Wiik (2018), 241, claiming that uncritical reliance on those interventions could lead to 'inadvertent adoptions of partial information'. See also Sadeghi (2009), 142-147, proving that even the materials originating from the sources that are considered reputable should be cross-checked.

673 For more see this Chapter, Title III.

In consequence, it is not surprising that third party intervenors eagerly submit comments in asylum cases (especially in cases that are considered landmarks[674]) and that the ECtHR willingly accepts those submissions[675] and often accords them great importance[676].

a. The Contracting Parties

The Contracting Parties can intervene before the Strasbourg Court both when asylum-seeking applicants are their nationals and when they are not. The first situation occurs when a national of one of the Contracting Parties is seeking asylum in another Contracting Party.[677] In the second scenario, that is, when the case concerns asylum seekers not originating from any Contracting Party, states most often decide to request a leave to intervene due to either their indirect involvement in the case[678] or the possible impact of the forthcoming judgment on their own law and practice[679]. Through those interventions the Contracting Parties can inform the ECtHR on the possible implications or attempt to convince the court to change its previous case-law.[680] For instance, in the *Saadi v. Italy* case, the United Kingdom tried to persuade the Strasbourg Court to alter its approach towards removals of suspected terrorists as expressed in the case of *Chahal v. the United Kingdom*.[681] The attempt was

674 Cichowski (2011), 95-96; Carrera, De Somer and Petkova (2012), 9; Wiik (2018), 105.

675 However, the exact scope of the court's willingness to allow third party interventions cannot be determined as the ECtHR does not, in general, disclose (in judgments or otherwise) its decisions to reject requests for leave to intervene [see also Wiik (2018), 305].

676 See e.g. Bürli (2014), 122 and 130, who emphasized that those interventions 'have greatly contributed to the development of safeguards against expulsion and extradition' and 'had some bearing' in detention cases.

677 See e.g. ECtHR, *K.K.C. v. the Netherlands*, no. 58964/00 (2001), §6; ECtHR (GC), *Kurić and Others v. Slovenia*, no. 26828/06 (2012), §§7-8.

678 For instance, in cases where a state responsible under the Dublin Convention or Regulations decided to intervene, see e.g. ECtHR, *T.I. v. the United Kingdom*, no. 43844/98, dec. (2000); ECtHR (GC), *Tarakhel v. Switzerland*, no. 29217/12 (2014), §6.

679 As regards the Dublin system, see e.g. ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §7; ECtHR, *Ali v. the Netherlands and Greece*, no. 26494/09, dec. (2012), §7; ECtHR (GC), *Tarakhel v. Switzerland*, no. 29217/12 (2014), §6. As regards the removals of terrorists, see e.g. ECtHR, *Ramzy v. the Netherlands*, no. 25424/05 (2010), §5; ECtHR, *A v. the Netherlands*, no. 4900/06 (2010), §§125-130. As regards the access to a territory and collective expulsions, see e.g. ECtHR (GC), *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15 (2020), §§144-151. As regards humanitarian visas for asylum seekers, see e.g. ECtHR (GC), *M.N. and Others v. Belgium*, no. 3599/18, dec. (2020), §90. See also Wiik (2018), 142-143.

680 See also Wojnowska-Radzińska (2013), 109-110; Wiik (2018), 143, 359.

681 ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §§73-107; ECtHR (GC), *Saadi v. Italy*, no. 37201/06 (2008), §§117-123. For more see Chapter 4, Title III, point 3.

unsuccessful,[682] but this case accurately shows how Contracting Parties use third party interventions to pursue their own interests in the ECtHR, especially in order to reinforce their sovereignty[683]. In asylum cases, states are particularly willing to convince the court that migration and national security are matters that should be left in the national domain.[684]

b. The CoE Commissoner for Human Rights

The CoE Commissoner for Human Rights, who has had a right to intervene before the ECtHR on its own initiative since 2010,[685] decided to submit written comments in several asylum cases. The Commissioner intervenes only in carefully selected cases that 'reveal a priori systemic violations'. Migration is considered a priority area in this regard.[686]

The Commissioner's interventions predominantly pertained to the operation of the Dublin system.[687] The written comments presented the situation of asylum seekers in Greece and Hungary, concluding that the asylum law and practice in those countries were not in compliance with international and European human rights standards. In the case of *M.S.S. v. Belgium and Greece*, the ECtHR attached due weight to the Commissioner's observations.[688]

The Commissioner decided to intervene twice in the case of *N.D. and N.T. v. Spain*. The interventions were based on information the Commissioner obtained during a visit to Melilla and Madrid in 2015. The Commissioner confirmed that foreigners were collectively returned to Morocco by Spanish border guards and that those returnees had no access to an effective remedy. Relying on those findings, the Chamber concluded that Spain had violated Article 4 of the Protocol no. 4 as well as Article 13 of the ECHR, but the Grand Chamber did not uphold this decision.[689]

682 ECtHR (GC), *Saadi v. Italy,* no. 37201/06 (2008), §§138-141. For an analysis of the United Kingdom's arguments and the ECtHR's response, see Moeckli (2008), 540-544.

683 Bürli (2014), 179, claimed that the role of member-state interventions is to reinforce the state sovereignty, which is accomplished by contributing to the judicial restraint.

684 Ibid., 191.

685 Pursuant to Protocol no. 14. Previously, the Commissioner had to be granted a leave to intervene to participate in the proceedings before the ECtHR.

686 Tishaev (2016), 24-25.

687 ECtHR (GC), *M.S.S. v. Belgium and Greece,* no. 30696/09 (2011), §7; ECtHR, *Ali v. the Netherlands and Greece,* no. 26494/09, dec. (2012), §7; ECtHR, *S.O. v. Austria*, no. 44825/15, dec. (2016), §4; ECtHR, *A.A. v. Austria*, no. 44944/15, dec. (2016), §4.

688 ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §§ 300, 304, 318, 320.

689 ECtHR, *N.D. and N.T. v. Spain*, no. 8675/15 and 8697/15 (2017), §119; ECtHR (GC), *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15 (2020), §§5, 12, 218.

c. *Any Person Concerned*

Article 36(2) of the ECHR allows for interventions by 'any person concerned'. Hence, in asylum cases, interventions are submitted predominantly by international, intergovernmental as well as non-governmental organizations and institutions[690] specializing in asylum and human rights matters[691]. They provide the court with the information about international and EU law relating to the case (the legal expertise) as well as with the context of a case regarding the human rights situation in a receiving country or a responding state (the factual knowledge). In particular, 'a large practice' can be observed in the ECtHR of accepting interventions concerning the human rights situation in certain countries. The Strasbourg Court particularly appreciates information provided by organizations and institutions that carried out the monitoring in the state where the applicant is about to be removed, or that have been involved in the case at an earlier stage.[692]

Amongst diverse third party intervenors who need leave to submit written comments before the ECtHR there is one organization that in practice stands out: the UNHCR. It has intervened repeatedly in asylum cases considered by the court.[693] The Strasbourg Court describes the UNHCR as 'the most authoritative international organisation in the field of refugee law'[694] and considers its independence, reliability and objectivity to be beyond doubt[695]. Such high regard affects the organization's position as a third party intervenor. Firstly, the UNHCR is one of the few organizations that were invited by the ECtHR on its own initiative to submit written comments in a

690 For instance, the European Commission and other EU institutions can be allowed to submit interventions as 'a person concerned', see ECtHR, *EMESA SUGAR N.V. v. the Netherlands*, no. 62023/00, dec. (2005). See also Wiik (2018), 235, 237; Callewaert (2018), 1688-1690. Occasionally, private persons are given a right to intervene as well, see e.g. ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §5, where the court granted a leave to intervene to five Italian scholars.

691 Wiik (2018), 143, 237, 240-241, claimed that 'some expertise on the relevant issues' is generally expected, but no official criteria are set for the level of expertise and experience required.

692 Wiik (2018), 155, 354.

693 See UNHCR (2015), 183, and ECtHR, *J.R. and Others v. Greece*, no. 22696/16 (2018), §2; ECtHR (GC), *Z.A. and Others v. Russia*, nos. 61411/15, 61420/15, 61427/15 and 3028/16 (2019), §8; ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §5; ECtHR (GC), *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15 (2020), §§6, 12.

694 ECtHR, *Azimov v. Russia*, no. 67474/11 (2013), §141.

695 ECtHR, *K.R.S. v. the United Kingdom*, no. 32733/08, dec. (2008). Cf. Chapter 2, Title II, point 1.

case.[696] Secondly, despite the fact that 'persons concerned' as specified in Article 36(2) of the ECHR are not usually granted leave to participate in a hearing[697], the UNHCR's oral submissions are welcomed by the court[698]. Thirdly, the Strasbourg Court attaches due weight to the UNHCR's views—both those contained in its third party interventions and other materials.[699] Thus, the UNHCR has established a particularly strong position as a third party intervenor in the ECtHR.

1.3 Information Obtained *Proprio Motu*

Under Article 38 of the ECHR, the Strasbourg Court can undertake investigations by itself, but only if they are needed, so rather as the exception than the rule. In non-refoulement cases,[700] the ECtHR reiterates that in the assessment of a risk that a removal may lead to a treatment contrary to Article 3 of the ECHR, it will take into account all the material placed before it and, if necessary, material obtained *proprio motu*.[701] The principle that the court may obtain relevant materials by itself when the case pertains refoulement is firmly established in its case-law.[702] The Strasbourg Court undertakes investigation especially when the materials provided by an applicant or third party intervenors cast reasoned doubts on the accuracy of information that was a basis for national decisions.[703] The quality and thoroughness of domestic proceedings are decisive in the court's assessment of whether and to what extent

696 See e.g. Van den Eynde (2013), 277 fn 42; Myjer (2013), 430. See also ECtHR, *S.O. v. Austria*, no. 44825/15, dec. (2016), §4, and ECtHR, *A.A. v. Austria*, no. 44944/15, dec. (2016), §4, where the UNHCR declined the court's invitation to intervene.

697 See e.g. Van den Eynde (2013), 282; Wiik (2018), 320.

698 See e.g. ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §7; ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), §7; ECtHR, *I.M. v. France*, no. 9152/09 (2012), §7; ECtHR (GC), *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15 (2020), §13.

699 See e.g. Forowicz (2010), 242-248; Baldinger (2015), 56-57; Garlick (2015) 'International Protection…', 115; Hamdan (2016), 255-257. See also ECtHR, *Z.N.S. v. Turkey*, no. 21896/08 (2010), §48; ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §349; ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §159-160. For the critique of the ECtHR's use of the UNHCR's information, see Sadeghi (2009), 144-148.

700 Baldinger (2015), 338, specified that in those cases the investigation is undertaken in three situations: when national proceedings are considered insufficient, when new facts come to light and when the absolute nature of Article 3 of the ECHR was disrespected in domestic proceedings. See also Myjer (2013), 429.

701 See e.g. ECtHR, *Vilvarajah and Others v. the United Kingdom*, nos. 13163/87 etc. (1991), §107; ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §97; ECtHR (GC), *Saadi v. Italy*, no. 37201/06 (2008), §128.

702 ECtHR (GC), *J.K. and Others v. Sweden*, no. 59166/12 (2016), §90.

703 See e.g. ECtHR, *Salah Sheekh v. the Netherlands*, no. 1948/04 (2007), §136; ECtHR, *Kolesnik v. Russia*, no. 26876/08 (2010), §71.

to conduct its own establishment of facts.[704] However, the ECtHR also stresses that in non-refoulment cases it cannot rely only on materials presented by a respondent state; they need to be cross-checked with other reliable and objective sources.[705]

In the proceedings before the Strasbourg Court new circumstances may also occur. They can emerge from documents and witnesses' accounts that were not obtained during the national proceedings[706] or result from developments in the receiving state. The ECtHR reckons that it is obliged to conduct 'a full and *ex nunc* examination' of an alleged risk of a treatment contrary to Article 3 of the ECHR.[707] Accordingly, it regularly examines and takes into account whether the situation in a receiving country has changed after a final decision was made in a respondent state.[708] Even if the applicant has already been removed, then 'the Court is not precluded (...) from having regard to information which comes to light subsequent to the expulsion. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party of the well-foundedness or otherwise of an applicant's fears.'[709] In particular, the court takes into account whether the applicant was detained or illtreated after the removal. Nevertheless, overall, the Strasbourg Court is more reluctant to obtain *proprio motu* information regarding personal circumstances than materials concerning the situation in a receiving country.[710]

The ECtHR has at its disposal a wide range of investigative measures.[711] It can, in order to clarify the facts, invite the parties to produce documentary evidence or decide to hear a witness or expert, as well as ask any person or

704 Baldinger (2015), 307.

705 ECtHR, *Salah Sheekh v. the Netherlands*, no. 1948/04 (2007), §136.

706 See e.g. ECtHR, *N. v. Finland*, no. 38885/02 (2005), §152-157.

707 ECtHR, *Salah Sheekh v. the Netherlands*, no. 1948/04 (2007), §136. See also ECtHR, *S.H.H. v. the United Kingdom*, no. 60367/10 (2013), §72; ECtHR (GC), *J.K. and Others v. Sweden*, no. 59166/12 (2016), §83; ECtHR, *S.A. v. the Netherlands*, no. 49773/15 (2020), §61. For more see Chapter 6, Title III, point 3.

708 See e.g. ECtHR, *Salah Sheekh v. the Netherlands*, no. 1948/04 (2007), §136; ECtHR, *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07 (2011), §215; ECtHR, *Abdulkhakov v. Russia*, no. 14743/11 (2012), §135. However, the materials concerning the situation in a receiving state obtained by the court are not always up to date, see e.g. dissenting opinion of judge Kalaydjieva in ECtHR, *H. and B. v. the United Kingdom*, nos. 70073/10 and 44539/11 (2013); Vogelaar (2016), 315-316.

709 ECtHR (Plenary), *Cruz Varas and Others v. Sweden*, no. 15576/89 (1991), §76. See also ECtHR (GC), *Mamatkulov and Askarov v. Turkey*, nos. 46827/99 and 46951/99 (2005), §69.

710 De Weck (2017), 240.

711 See Rule A1(1-3) of the Annex to the ECtHR Rules of Court (concerning investigations).

institution to express an opinion or make a written report on any matter it considers relevant to the case.[712] Moreover, it can appoint a delegation to conduct an inquiry, carry out an on-site investigation or take evidence in some other manner. In the case of *N. v. Finland*, the Strasbourg Court decided to delegate two judges to take the oral evidence in Finland 'in order to carry out its own assessment of the facts'. The judges interviewed the asylum-seeking applicant, his wife, another asylum seeker and a senior official in the Finnish Directorate of Immigration. The delegates' report on the credibility of the interviewees influenced the court's final determination that, if expelled, the applicant would be exposed to a real risk of treatment contrary to Article 3 of the ECHR.[713] In the case of *Georgia v. Russia (I)*, the delegation of five judges heard twenty-one witnesses in Strasbourg 'in order to clarify certain matters relating particularly to the conditions of arrest, detention and expulsion of Georgian nationals'.[714] In other cases, the ECtHR decided to inspect by itself detention conditions that the applicants endured.[715]

In general, investigative measures such as hearings and fact-finding missions are used rarely nowadays,[716] due to, *inter alia*, their costs, the resources and time that they involve and the lack of cooperation on the part of some responding states.[717] In non-refoulement cases, the fact that a receiving country is not a Contracting Party to the ECHR can be decisive in this regard.[718] Despite those practical limitations, the Strasbourg Court is increasingly active in obtaining information *proprio motu* in asylum cases.[719] In practice, it does not abstain from requesting for additional evidence from applicants and states and it gathers information by itself, mostly from publicly available secondary sources.[720]

712 See also Zwaan (2005), 41-42, who claimed that the UNHCR should be considered by the ECtHR an expert in asylum cases.

713 ECtHR, *N. v. Finland*, no. 38885/02 (2005), §§152-157 and 167.

714 ECtHR (GC), *Georgia v. Russia (I)*, no. 13255/07 (2014), §§13-16.

715 See e.g. ECtHR, *Kaja v. Greece*, no. 32927/03 (2006), §§ 19-25.

716 See e.g. Leach (2017), 55; Harris et al. (2018), 151. See also Sadeghi (2009), 129, noticing that the ECommHR often heard witnesses and organized fact-finding missions.

717 See e.g. Sadeghi (2009), 133; Forowicz and Gribincea (2011), 133-134; Keller and Heri (2014), 738-739; Harris et al. (2018), 151.

718 Hamdan (2016), 199. See also Sadeghi (2009), 133-134.

719 Baldinger (2015), 341. See also Sadeghi (2009), 132-133.

720 See Sadeghi (2009), 133. For more on sources used in non-refoulement cases, see de Weck (2017), 317-319.

1.4 Key Shortcomings

The ECtHR relies on diverse sources of information when it is establishing facts in asylum cases. The accounts of the applicant are complemented by the statements and materials provided by a responding state and in some–particularly significant–cases also by third party intervenors. If this evidence is still not sufficient, the Strasbourg Court undertakes its own investigation. In asylum cases, the ECtHR pays particular attention to the information provided by international, governmental and non-governmental organizations and institutions.

The Strasbourg Court reiterates that in its assessment of secondary sources, it takes into account multiple factors, *inter alia* the independence, reliability and objectivity of the source, the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions, their corroboration by other sources, the presence and reporting capacities of the author in the country in question and whether the report concerns the general situation in the receiving country or provides more individualized insight into the alleged risk of ill-treatment of the applicant after the removal.[721] However, those rules are considered insufficient and not clear enough.[722] The ECtHR itself does not follow them in a thorough manner. In some cases, the materials that the court referred to were not sufficiently current, reliable and comprehensive.[723] The court is also criticized for relying too uncritically on some information, when even those secondary sources that originate from reputable organizations and institutions should be cross-checked.[724] Moreover, the quantity and quality of materials used by the Strasbourg Court differ between asylum cases. Sometimes the court relies on a substantial amount of data and occasionally one report is considered enough.[725] The selection of sources varies considerably between cases, even when they concern the situation in the same country

721 See e.g. ECtHR, *NA. v. the United Kingdom*, no. 25904/07 (2008), §§120-122; ECtHR, *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07 (2011), §§230-234; ECtHR (GC), *J.K. and Others v. Sweden*, no. 59166/12 (2016), §88-89.

722 See e.g. Sadeghi (2009), 128; Reneman (2014) *EU Asylum Procedures (...)*, 69; Wiik (2018), 241, 448-449.

723 See Vogelaar (2016), 315-321, proving that the ECtHR does not always rely on the dependable and up-to-date sources in non-refoulement cases and the court's conclusions are sometimes not sufficiently corroborated by the reports it relied on. See also Sadeghi (2009), 136-140.

724 Sadeghi (2009), 142-143. See also Weissbrodt and Hortreiter (1999), 35-36.

725 See e.g. ECtHR, *Dougoz v. Greece*, no. 40907/98 (2001), §§46-49; ECtHR, *Rahimi v. Greece*, no. 8687/08 (2011), §§30-50.

or region[726]. Despite the fact that those differences may result from diverse factors (i.e. the subject-matter of a case, a dissimilar eagerness of the parties in presenting evidence, the involvement of third party intervenors), it must be concluded that the ECtHR's approach to data collection and assessment is inconsistent and lacking transparency.[727]

A judgment that is based on improperly established facts may put the applicant at risk of being refouled, but it also weakens the authority of the court. Given the indispensability of reliable, objective and current information in asylum cases, any shortcomings in this regard may negatively affect the quality of the court's case-law.[728] Uncritical reliance on some sources, even reputable ones, may jeopardize the legitimacy of the ECtHR's judgments. Moreover, the lack of consistency in using secondary sources 'undermines the apparent and/or actual fairness of the Court's decision making'.[729]

2. The CJ

The preliminary ruling procedure is not fact-based. The Luxembourg Court gives the interpretation of the EU law, but it does not apply it to the actual case: that is left for the referring court.[730] However, facts are not redundant in those proceedings. The CJ has to know and understand the facts and laws that are deciding factors in the main proceedings to determine the legal problem that is the essence of the preliminary question. The factual and legal background of domestic proceedings is essential to the context of a preliminary ruling and thus it has to be considered by the Luxembourg Court to ensure the referring court has the best-suited answer to its questions.

In the preliminary ruling procedure, a national court or tribunal ascertains and assesses facts.[731] The CJ takes the facts and laws as they are determined in the request for a preliminary ruling.[732] In general, the Luxembourg Court is not empowered to solve the disputes between the parties to the main proceedings regarding facts[733] or investigate facts and national laws by

726 Vogelaar (2016), 313-314.

727 Ibid., 303, 325-326. See also Sadeghi (2009), 146-149; Dembour (2015), 216-217.

728 As regards non-refoulement cases, see Vogelaar (2016), 326.

729 Sadeghi (2009), 128.

730 Cf. Broberg and Fenger (2014), 430-431, who point out that in practice the CJ often leaves referring courts with no discretion in this regard.

731 See e.g. CJ (GC), case C-31/09 *Bolbol* (2010), para 40; CJ, case C-648/11 *MA and Others* (2013), para 37; CJ, case C-146/14 PPU *Mahdi* (2014), paras 78-80.

732 See e.g. CJ, case C-466/00 *Kaba* (2003), para 41.

733 See e.g. CJ, case C-51/74 *P.J. van der Hulst's Zonen* (1975), para 12.

itself[734]. However, those rules are not absolute nor applied in an excessively formalistic manner.[735] In practice, the CJ tries to detect relevant elements of a case from other sources in addition to the national court's request.[736] Thus, a preliminary reference is the main source of information that the Luxembourg Court relies on, but not the only one.

Complementary sources of information are particularly important in asylum cases, where it is often necessary—even more than usual—to deliver solid, evidence-based judgments. On the one hand, the CJ's jurisdiction in the area of asylum is still relatively new. The court gave its first asylum judgment only in 2009.[737] Meanwhile, asylum cases considered in the preliminary ruling procedure are often politically sensitive. They originate from areas that traditionally were perceived as being strictly intertwined with state sovereignty. The Member States are accustomed to deciding independently on asylum seekers' stay and rights, thus, they may be reluctant to abide by an interpretation of the EU law given by the Luxembourg Court that is inconsistent with their national interest and practice. For these reasons, the CJ has to strive even more to convince the Member States to respect its judgments in this area. On the other hand, preliminary rulings regarding the CEAS and Return Directive affect fundamental rights of asylum seekers. The Luxembourg Court's judgment can—indirectly—compel national authorities to release the concerned asylum seeker from detention, respect the prohibition of refoulement by staying his return or Dublin transfer and grant him international protection. Moreover, it may carry the same result for other asylum seekers staying in the same or other Member States, as the rulings of the CJ are considered to have *erga omnes* effect.[738]

The asylum jurisprudence of the Luxembourg Court must be particularly well-informed. In consequence, the CJ has to rely on various sources of information. Those include a request for a preliminary ruling (2.1) and observations submitted by interested persons, including by the concerned asylum seekers (2.2). The court's investigative powers are significantly limited in the preliminary ruling procedure, both in law and, even more, in practice. However, the AGs support the court in this regard (2.3). While the possibility to submit third party interventions is excluded in the preliminary ruling procedure,

734 See e.g. CJ, case C-6/64 *Costa v E.N.E.L.* (1964).

735 Barents (2016), 410. See also Wägenbaur (2013), 327.

736 Wägenbaur (2013), 327.

737 For more see Chapter 2, Title IV, points 2.1 and 2.2.

738 See e.g. Lenaerts, Maselis and Gutman (2014), 244-246; Broberg (2015), 10-11; Barents (2016), 453; Rosas (2016), 188.

the views of non-governmental and international organizations and institutions are in practice provided to the court indirectly (2.4). The overall competences and approach of the Luxembourg Court to gathering and assessing information in asylum cases are criticized (2.5).

2.1 Request for a Preliminary Ruling

A request for a preliminary ruling submitted in relation to an asylum case, as in any other case, should provide the Luxembourg Court with the factual and legal context of the main proceedings. It is the national court's responsibility to inform the CJ about 'the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based' and 'the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law'.[739] The factual and legal background of the case should be determined by the referring court before the preliminary question is submitted to the Luxembourg Court, otherwise the reference may be considered premature and hypothetical.[740]

The comprehensiveness of the description of facts and laws provided for in the reference can influence the CJ's decision on its admissibility. The Luxembourg Court reiterates that it

> (...) may refuse to rule on a question referred for a preliminary ruling from a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[741]

The factual and legal background of a case should therefore be presented thoroughly, as it provides the CJ with the essential context in which it interprets the EU law or assesses its validity.

As a rule, a referring court is solely responsible for providing the Luxembourg Court with the description of the respective facts and laws. In practice though, when necessary, the CJ tries to detect relevant elements of a case from

739 Article 94(a-b) of the CJ Rules of Procedure.

740 Lenaerts, Maselis and Gutman (2014), 73. See also CJEU (2019) 'Recommendations...', point 13. However, exceptionally, a national court can refer questions based on supposed facts [Wägenbaur (2013), 327; Barents (2016), 414-415].

741 CJ, case C-648/11 *MA and Others* (2013), para 37. See also CJ, case C-534/11 *Arslan* (2013), para 34; CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), para 167.

other sources in addition to a national court's request,[742] including observations of interested persons.

2.2 Observations of Interested Persons

All interested persons referred to in Article 23 of the CJ Statute are entitled to take part in the preliminary ruling procedure. As a rule, this participation involves submitting written observations and oral submissions at a hearing. However, the Luxembourg Court can decide to dispense with the oral procedure.[743]

Article 23 of the CJ Statute exhaustively specifies the entities that are entitled to submit observations to the Luxembourg Court in the preliminary ruling procedure.[744] In practice, in asylum cases, observations are lodged in the CJ predominantly by three categories of interested persons: parties to the main proceedings, the Member States and the European Commission. The latter institution and Member States enjoy an advantageous position in the preliminary ruling procedure, particularly in comparison with vulnerable parties to the main proceedings. They can join any preliminary ruling procedure, and they possess resources not available to asylum seekers.[745]

a. Parties to the Main Proceedings

It is for a national court or tribunal to determine who is a party to the main proceedings.[746] In asylum cases, it usually includes the concerned asylum seeker(s) and respective national authorities.

Submitting written observations or taking part in a hearing ensures that the asylum seeker's stand on preliminary questions is heard in the CJ. However, the range of arguments that a party to the main proceedings can efficiently raise in the observations is limited. He cannot dispute the relevance of a reference, amend it or broaden it. Parties to the main proceedings are not prevented from clarifying, supplementing or even contesting facts and laws that were presented to the Luxembourg Court by a referring court,[747] but the court takes such submissions into account rather exceptionally.[748] Moreover, asylum seekers are treated before the CJ like any other party to the main

742 Wägenbaur (2013), 327.

743 For instance, under Article 76(2) of the CJ Rules of Procedure.

744 See also Article 96(1) of the CJ Rules of Procedure.

745 For the privileged position of the Commission and Member States, see Hoevenaars (2018), 232, 253-254.

746 Article 97(1) of the CJ Rules of Procedure.

747 Broberg and Fenger (2014), 383. See also Broberg (2015), 31-32.

748 See e.g. CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 283-286.

proceedings. Neither in law nor in practice are their particular vulnerability and the difficulties that they may face in submitting written observations and participating in a hearing taken into account.[749]

Occasionally, also third party intervenors are allowed to submit observations, but only if they were admitted in the national proceedings and are considered 'a party to the main proceedings' by a referring court. A referring court can join such intervenors into the domestic proceedings also after a preliminary question is submitted to the CJ, but then intervenors must accept the case as they find it at the time when the Luxembourg Court is informed about the new party.[750] Being an intervenor in national proceedings is in most cases the only route for the representatives of civil society to participate in the preliminary ruling procedure.[751]

In practice, third party intervenors rarely participate in the preliminary ruling proceedings concerning asylum seekers. Only in a few asylum cases adjudicated before the CJ did non-governmental organizations[752] or the UNHCR[753] manage to submit written observations or take part in a hearing. The first asylum case in which non-state actors officially intervened was the landmark case of *N.S. and M.E* decided in 2011.[754]

b. The Member States

All Member States are notified of each request for a preliminary ruling and are entitled to submit written observations in all of them.[755] However, if the urgent procedure is applied, only the Member State from which a reference is made can submit written observations, unless the Luxembourg Court invites other states to provide information in writing or at the hearing.[756]

749 See this Chapter, Title II, in particular point 1.2.

750 Article 97(2) of the CJ Rules of Procedure.

751 However, representatives of civil society can also initiate national proceedings concerning asylum seekers in which subsequently preliminary questions are asked, see e.g. CJ, case C-179/11 *Cimade and GISTI* (2012). For the limited access of civil society to the preliminary ruling procedure, see also these Chapter and Title, point 2.4.

752 See e.g. CJ, case C-648/11 *MA and Others* (2013).

753 See e.g. CJ (GC), joined cases C-411/10 and C-493/10 *N.S.* and *M.E.* (2011); CJ (GC), case C-364/11 *Abed El Karem El Kott and Others* (2012); CJ, joined cases C-199/12, C-200/12 and C-201/12 *X, Y and Z* (2013); CJ (GC), joined cases C-148/13, C-149/13 and C-150/13 *A, B and C* (2014). For more on the UNHCR's participation in those proceedings, see also these Chapter and Title, point 2.4.

754 Carrera and Petkova (2013), 253; CJ (GC), joined cases C-411/10 and C-493/10 *N.S.* and *M.E.* (2011).

755 Article 23 of the CJ Statute.

756 Article 109 (2-3) of the CJ Rules of Procedure. Moreover, in cases of extreme urgency, the CJ can decide to omit the written part of the procedure (Article 111 of the CJ Rules

From the very beginning of the CJ's jurisdiction in the area of asylum the Member States have actively participated in the respective preliminary ruling procedures.[757] They have submitted numerous observations, even over a dozen in one case.[758] Through those observations the Member States pursue their interests in the Luxembourg Court and more generally in the EU by trying to convince the court to accept the interpretation of the EU law that they favour[759] or to consider the reference inadmissible[760], especially when it would be undesirable from the perspective of domestic interests to give a judgment. Written observations are also provided in order to assist the CJ by presenting the broader context of a case.[761]

c. The European Commission and Other Entities

The 'repeated player'[762] *par excellence* in asylum cases adjudicated by the CJ is the European Commission. It submits its observations systematically in all cases considered in the preliminary ruling procedure.[763] The European Commission's submissions are particularly significant as they provide the Luxembourg Court not only with the legal expertise regarding the EU law but also with the essential information regarding domestic laws and policies, as well as the factual context of a case. In consequence, the CJ is less dependent on information presented by the referring court and Member States.[764]

Article 23 of the CJ Statute allows other interested persons (i.e. institutions, bodies, offices or agencies of the EU and specified states other than

of Procedure). See e.g. CJ (GC), case C-601/15 PPU *J.N.* (2016), where the court decided not to restrict the written phase of the procedure as provided for in Article 109 of the CJ Rules of Procedure and requested written comments from multiple entities (see view of AG Sharpston delivered on 26 January 2016 in case C-601/15 PPU *J.N.*, EU:C:2016:85, points 43, 45 and note 22).

757 See CJ, case C-19/08 *Petrosian and Others* (2009); CJ (GC), case C-465/07 *Elgafaji* (2009); CJ (GC), joined cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla* (2010); CJ (GC), case C-31/09 *Bolbol* (2010); CJ (GC) joined cases C-57/09 and C-101/09 *B and D* (2010).

758 See e.g. CJ (GC), joined cases C-411/10 and C-493/10 *N.S.* and *M.E.* (2011); CJ (GC), case C-638/16 PPU *X and X* (2017).

759 See e.g. CJ (GC), case C-31/09 *Bolbol* (2010), para 47.

760 See e.g. CJ, case C-648/11 *MA and Others* (2013), paras 34-35; CJ, case C-534/11 *Arslan* (2013), para 32.

761 See e.g. CJ (GC), case C-181/16 *Gnandi* (2018), para 49. See also Granger (2004), 13, 29; opinion of AG Trstenjak delivered on 6 July 2010 in case C-137/08 *VB Pénzügyi Lízing Zrt. v Ferenc Schneider,* EU:C:2010:401, point 80.

762 For the expression, see Galanter (1974), 97.

763 See e.g. Wägenbaur (2013), 81; Barents (2016), 398; Hoevenaars (2018), 232.

764 Hoevenaars (2018), 232, 237.

Member States), to submit written observations and participate in hearings, although they take part in asylum cases rather rarely. However, in the *J.N.* and *K.* cases, the European Parliament and the Council of the EU presented their observations as the institutions that adopted the act of which the validity was contested.[765] Among non-EU states, the Swiss Confederation stands out in providing the CJ with its observations in asylum cases.[766]

2.3 Information Obtained *Proprio Motu*

In the preliminary ruling procedure, it is for a national court or tribunal, not for the Luxembourg Court, to ascertain the facts.[767] However, the CJ Statute and Rules of Procedure do provide the court with various measures of organization and inquiry. Firstly, the interested persons as referred to in Article 23 of the CJ Statute can be asked to answer some questions as well as submit information or documents.[768] Secondly, the Luxembourg Court may choose to adopt measures of inquiry specified in Article 64(2) of the CJ Rules of Procedure, including the oral testimony of a witness,[769] commissioning of an expert's report[770] or inspection of the place or thing in question. Moreover, the CJ can ask a referring court to provide some clarifications.[771]

Under Article 25 of the CJ Statute and Article 64(2) of the CJ Rules of Procedure, expert international and non-governmental organizations dealing with asylum matters can be requested to contribute to the preliminary ruling procedure.[772] Despite this, in no asylum cases to date the Luxembourg Court sought a witness or expert evidence.[773] This is regrettable, given the limited access to the preliminary ruling procedure that representatives of civil society have otherwise.[774]

However, the CJ is not left without essential insight into the views of the representatives of civil society as well as regional and international institutions.

765 CJ (GC), case C-601/15 PPU *J.N.* (2016); CJ, case C-18/16 *K.* (2017).

766 See e.g. CJ (GC), joined cases C-411/10 and C-493/10 *N.S.* and *M.E.* (2011); CJ, case C-179/11 *Cimade and GISTI* (2012); CJ, case C-648/11 *MA and Others* (2013); CJ (GC), case C-646/16 *Jafari* (2017); CJ (GC), case C-490/16 *A.S.* (2017).

767 For more see these Chapter and Title, point 2.

768 Article 24 of the CJ Statute; Articles 61-62 and 80 of the CJ Rules of Procedure.

769 See also Article 26 of the CJ Statute.

770 See also Article 25 of the CJ Statute.

771 Article 101(1) of the CJ Rules of Procedure.

772 See e.g. Hennessy (2014), 192; Baldinger (2015), 58. See also Carrera, de Somer and Petkova (2012), 20. Zwaan (2005), 65, recommended that the UNHCR should be considered by the CJ as an expert in the interpretation of the 1951 Refugee Convention.

773 See e.g. Baldinger (2015), 58; Garlick (2015) 'International Protection…', 116.

774 For more see these Chapter and Title, points 2.2(a) and 2.4.

In practice, necessary reports, guidelines and other documents are predominantly drawn to the court's attention indirectly, through the submissions of the referring court and interested persons[775] as well as the AGs' opinions and views.

The AGs are 'an integral part' of the CJ.[776] Their role is to assist the court[777], by, *inter alia,* placing its decision-making in a wider context.[778] In opinions and views delivered in asylum cases, the AGs refer to guidelines, reports and analyses of various organizations and institutions. In the opinion delivered in the case of *X and X,* the AG Mengozzi extensively referred to reports of the European Commission and seven international and non-governmental organizations, including the UNHCR, explaining the situation of civilians in Syria, refugees in Lebanon and asylum seekers that are sea-crossing to the EU. The AG clarified that he aims 'to set out the main evidence which was known to or ought to have been known to the Belgian State when it adopted the contested decisions' in order to 'give the referring court a useful and swift answer and to guide the Court in its judgment to be delivered'.[779] Despite the fact that such extensive references are rather exceptional, the above-mentioned opinion shows clearly that the AGs can and do provide the court not only with a legal assessment in relation to the preliminary questions, but also with the essential facts.[780]

2.4 Third Party Interventions

Third party interventions are not allowed in the preliminary ruling procedure. Article 40 of the CJ Statute, providing for a right to intervene, is not applicable in those proceedings. As a result, all requests for a leave to intervene submitted by natural or legal persons, regardless of how reputable and experienced in the respective field they are, are considered inadmissible.[781]

775 See e.g. opinion of AG Mengozzi delivered on 15 September 2009 in joined cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla,* EU:C:2009:551, para 32; opinion of AG Mengozzi delivered on 18 July 2013 in case C-285/12 *Diakité,* EU:C:2013:500, fn 14; CJ, case C-175/11 *H. I. D. and B. A.* (2013), para 55. See also Carrera and Petkova (2013), 256.

776 Sharpston (2008), 20.

777 Article 252 of the TFEU.

778 Sharpston (2008), 33.

779 Opinion of AG Mengozzi delivered on 7 February 2017 in case C-638/16 PPU *X and X,* EU:C:2017:93, paras 144-154.

780 See also opinion of AG Sharpston delivered on 8 June 2017 in two cases C-490/16 *A.S.* and C-646/16 *Jafari,* EU:C:2017:443, paras 6-18, where she explains the reasons and the course of the 2015/2016 'refugee crisis' in the EU.

781 See e.g. CJ, case C-73/07 *Satakunnan Markkinapörssi and Satamedia,* order (2007), paras 8-13.

Third parties, including representatives of civil society, can submit observations and take part in a hearing before the CJ, only if they are considered 'a party to the main proceedings' by a referring court (particularly when they were admitted in domestic proceedings as intervenors).[782] However, the laws and practice concerning the third party intervenors' participation in national proceedings differ significantly between the Member States, resulting in divergent access to the preliminary ruling procedure in this regard from country to country.[783] National laws may even entirely exclude intervention by third parties in some domestic proceedings.[784] Moreover, there are some other factors that avert and discourage third parties from formally intervening in national cases. For instance, the UNHCR may choose to refrain from intervening officially in a case when there is a risk that doing so would undermine its supervisory authority or when it may collide with its operational role.[785]

To deal with legal and factual constraints to the access to the preliminary ruling procedure, a practice has been established of announcing informal third party interventions. The UNHCR regularly releases public statements as regards asylum cases pending before the CJ. It has decided to take a stand not only in cases concerning its own position in asylum procedures conducted in the Member States[786] and in those directly regarding the interpretation of the 1951 Refugee Convention[787], but also in cases that fall outside the scope of the refugee definition under international refugee law[788]. The UNHCR's public statements pertain to the interpretation of international refugee law and the CEAS, and provide insight into the asylum-related case-law of other courts and institutions as well as into the respective national practices and policies. As such, those informal interventions may constitute an indispensable source of knowledge for the Luxembourg Court.

However, the real impact of the UNHCR's public statements and other informal interventions on the CJ's asylum case-law cannot be known, as the Luxembourg Court does not refer explicitly to those documents in its judgments.

782 See also these Chapter and Title, point 2.2(a).

783 Carrera, De Somer and Petkova (2012), 16, emphasized that those divergences raise concerns from the perspective of procedural fairness and equal treatment.

784 Garlick (2015) 'International Protection…', 116, 118, noticed that the rules of procedure applicable before the German Federal Administrative Court did not allow the UNHCR to intervene and that it prompted the organization to publish the public statement in joined cases C-71/11 and C-99/11 *Y and Z*. See also Gilbert (2016), 632.

785 Tsourdi (2017), 111. See also Gilbert (2016), 632–633.

786 See the UNHCR's public statement of August 2012 regarding the case C-528/11 *Halaf*.

787 See e.g. the UNHCR's public statements of October 2009 regarding the case C-31/09 *Bolbol* and of July 2009 concerning the joined cases C-57/09 and C-101/09 *B and D*.

788 See e.g. the UNHCR's public statement of January 2008 regarding the case C-465/07 *Elgafaji*.

Nevertheless, it cannot be assumed that the CJ is not aware of and taking into consideration those views. The UNHCR's public statements are in practice delivered to the court through written observations and–more importantly–the AG's opinions and views. The AGs mention the UNHCR's documents more boldly than does the CJ.[789] For example, in the opinion issued in the *Bolbol* case, the AG Sharpston explicitly wrote that she treated the UNHCR's public statement concerning this case as 'an unofficial *amicus curiae* brief'.[790] In the case of *A, B and C*, she emphasized that the UNHCR's written observations were 'helpful'.[791] The AGs' opinions are not binding but they are surely respected by the court. Thus, their appreciation of the UNHCR's views should not be overlooked.[792]

In practice, the importance of the UNHCR in the proceedings before the CJ is gradually but persistently growing.[793] The regard that the Luxembourg Court has for the UNHCR is sometimes visible in the court's reasoning. Earlier, the CJ rarely openly mentioned even general soft law instruments of the UNHCR,[794] but some change can be observed in this regard more recently.[795] Even though the court has never referred directly to the UNHCR's public statements concerning the specific preliminary questions, it occasionally reflects the organization's arguments in the judgments.[796] Moreover, in the cases of *Halaf* and *Bilali*, the court explicitly confirmed that documents from the UNHCR are 'particularly relevant' when the EU asylum law is being interpreted and applied.[797]

789 See also Reneman (2014) *EU Asylum Procedures (...)*, 66; Molnár (2019), 451-452.

790 Opinion of AG Sharpston delivered on 4 March 2010 in case C-31/09 *Bolbol*, EU:C:2010:119, para 16.

791 Opinion of AG Sharpston delivered on 17 July 2014 in joined cases C-148/13, C-149/13 and C-150/13 *A, B and C*, EU:C:2014:2111, fn 47.

792 However, the AGs do not rely on the UNHCR's views blindly. See e.g. opinion of AG Mengozzi delivered on 1 June 2010 in joined cases C-57/09 and C-101/09 *B and D*, EU:C:2010:302, para 43, where he noticed that the plethora of the UNHCR's documents, that sometimes contradict each other, made it difficult to develop uniform practice in the interpretation and application of the 1951 Refugee Convention.

793 Baldinger (2015), 62. See also Carrera, De Somer and Petkova (2012), 15, claiming that third party interventions submitted before the ECtHR, including those of the UNHCR, may have indirect impact on the CJ's case-law through Article 52(3) of the EU Charter.

794 See also Carrera, De Somer and Petkova (2012), 16; Baldinger (2015), 58; Garlick (2015) 'International Protection...', 117; Peers (2016).

795 See e.g. CJ (GC), case C-601/15 PPU *J.N.* (2016), para 63; CJ, case C-18/16 *K.* (2017), para 46; CJ, case C-369/17 *Ahmed* (2018), para 57; CJ, case C-720/17 *Bilali* (2019), para 58; CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 218-220.

796 See e.g. Carrera, De Somer and Petkova (2012), 16; Garlick (2015) 'International Protection...', 117.

797 CJ, case C-528/11 *Halaf* (2013), para 44; CJ, case C-720/17 *Bilali* (2019), para 57.

However, it is rightly argued that the preliminary ruling procedure should be formally opened for third party intervenors,[798] in particular as regards such organizations as the UNHCR[799]. In asylum cases, expert opinions of international and non-governmental organizations and institutions could provide the court with the necessary broader legal and factual background, enabling a more comprehensive and well-informed interpretation of the EU law. Moreover, those inputs, particularly from the UNHCR as the body supervising the application of the 1951 Refugee Convention and the 1967 Protocol,[800] may facilitate the court providing the interpretation that is in accordance with international refugee law, as required under Article 78(1) of the TFEU. Furthermore, interventions of non-state actors would balance the privileged position of states and EU institutions in the preliminary ruling procedure that is especially visible in asylum cases. On the one hand, asylum seekers, due to their vulnerability, face difficulties with active participation in the preliminary ruling procedure. On the other hand, due to the particular political sensitivity of asylum cases, the Member States are encouraged to engage all their resources—not available to asylum seekers—to convince the CJ to adopt the interpretation of EU asylum law that they favour.

2.5 Key Shortcomings

The Luxembourg Court gets most of the information about the factual and legal background of a case considered in the preliminary ruling procedure from a request submitted by a referring court or tribunal. Exceptionally, the information about facts and laws relating to a case can be supplemented and contested by the interested persons referred to in Article 23 of the CJ Statute, including asylum seekers. However, neither in law or practice is the particular vulnerability of this group of participants in the preliminary ruling procedure taken into account. Meanwhile, the Member States and the European Commission are particularly active in asylum cases decided by the Luxembourg Court, availing of their prioritized (especially in relation to asylum seekers) position. Their prevalence is not balanced by the participation of the representatives of civil society and other organizations in those proceedings. Third party interventions are not allowed in the preliminary ruling procedure and the court is reluctant to prescribe measures of inquiry, like hearing a witness or obtaining an expert opinion, that would allow the civil society's

798 See e.g. Carrera, De Somer and Petkova (2012), 20-21. See also Reneman (2014) *EU Asylum Procedures (...),* 68.

799 See e.g. Garlick (2015) 'International Protection...', 116-117.

800 For more see Chapter 2, Title II, point 1.

input in those proceedings. The accounts of non-governmental and international organizations are in practice delivered to the CJ only indirectly, through a request of a referring court, written and oral observations as well as the AGs' opinions and views.

The Luxembourg Court may rely on diverse sources of information in the preliminary ruling procedure. However, it is difficult to ascertain precisely what materials were in fact considered by the CJ. Requests for a preliminary ruling[801] and written or oral observations[802] are rarely made public. Only some knowledge about the contents of those submissions can be extracted from the AGs' opinions and the following judgments that summarize or refer to arguments of the national court and interested persons. Moreover, in the judgments the Luxembourg Court extremely rarely mentions materials published by non-governmental, regional or international organizations and institutions,[803] even if they were drawn to its attention by a national court, interested persons or the AG. As a result, it is difficult to assess to what extent those materials (and in fact, any materials) are taken into consideration by the CJ. This circumstance diminishes the intelligibility and transparency of the court's reasoning and may also affect the court's accountability, particularly in controversial cases,[804] such as asylum ones.

3. Comparison

Both European asylum courts must ensure that their asylum jurisprudence is well-informed and evidence-based. Meanwhile, the vulnerability and special situation of asylum seekers may hinder their efforts to provide the ECtHR and CJ with comprehensive information and evidence. However, while in the Strasbourg Court those difficulties may result in a case not being considered by the court at all, in the Luxembourg Court they are of lesser importance, as the originator of the preliminary ruling procedure is never an asylum seeker.[805] Probably due to that difference, the ECtHR is more responsive to the respective asylum seekers' problems than the CJ is. However, even in the Strasbourg Court asylum seekers are not easily excused from not presenting sufficient evidence.

The main source of information in both analysed proceedings is a letter that initiates them: an application in the ECtHR and a request for a preliminary

801 In the OJ only information about the referring court, parties to the main proceedings and questions referred is published.

802 However, the UNHCR makes its written and oral observations available to the public.

803 See e.g. CJ, case C-369/17 *Ahmed* (2018), paras 56-57.

804 Carrera and Petkova (2013), 247.

805 For more see this Chapter, Title II, point 2.

ruling in the CJ. Complementary sources of information are allowed, albeit in a different manner. As a rule, all Member States and the European Commission can participate in all preliminary ruling procedures, while in the Strasbourg Court most of the Contracting Parties and 'concerned persons', including all EU institutions, need a leave to intervene. Third party interventions are allowed in the ECtHR, while they are excluded in the preliminary ruling procedure. In consequence, representatives of civil society as well as regional and international organizations and institutions are compelled to look for other routes to take a stand in the proceedings before the CJ, for instance by publishing unofficial interventions.

The Strasbourg and Luxembourg Courts can also obtain some information *proprio motu*. In asylum cases, this possibility is particularly used by the ECtHR. The CJ has not decided to prescribe measures of inquiry, such as hearing a witness or commissioning expert evidence, in asylum cases yet. The restricted—in law and practice—investigative powers of the Luxembourg Court are to some extent balanced by the opinions and views of the AGs, who provide the court with a wider context a case by, *inter alia,* drawing to its attention essential reports and statements of the representatives of civil society.

The exclusion of third party interventions in the preliminary ruling procedure as well as the CJ's reluctance to prescribe the measures of inquiry in those proceedings raise particular concerns. The ECtHR's experience shows that interventions of non-governmental and international organizations and institutions submitted in asylum cases, especially those of repeated players such as the UNHCR, are particularly useful. They provide the court with the necessary legal expertise and factual knowledge, often saving the court's time. It is then rightly argued that the Luxembourg Court should open itself to third party intervenors, particularly in cases involving fundamental rights, i.e. also asylum cases.

Both courts struggle to ensure that the reasoning of their asylum judgments, decisions and orders is convincing and intelligible. The materials that the Strasbourg Court relies on are not always sufficiently up-to-date, comprehensive and dependable. Moreover, its approach towards the collection of information is considered inconsistent as well as lacking in transparency. In the preliminary ruling procedure, it is difficult to ascertain precisely what arguments and materials were in fact taken into account by the Luxembourg Court. Meanwhile, in cases that are as politically sensitive as the asylum ones it is particularly important to ensure that the reasoning of a judgment is comprehensible and exhaustive. Only then can the human rights standards established by both courts in asylum cases be reasonably expected to be followed by all involved actors.

V. Conclusions

Asylum seekers are vulnerable participants in the proceedings before the ECtHR and the CJ. Their vulnerability results not only from the fact that they predominantly originate from non-European countries, but also from strict laws and practices applied to this group of foreigners on a national level. Asylum seekers are deprived of legal aid and effective remedies, detained pending asylum or return proceedings and removed in haste to the countries they fear being back in. Those factors hamper the asylum seekers' access to the European asylum courts and bring about the urgency of those proceedings. Moreover, asylum cases decided by the Strasbourg and Luxembourg Courts require the gathering and assessing of information from multiple and diverse sources.

Both European asylum courts are responsive to the special needs of asylum seekers, but only to some—i.e. an insufficient—extent. Firstly, some of the respective procedural rules are interpreted by the courts too restrictively (e.g. rules on granting interim measures in the ECtHR or applying the expedited and urgent procedure in the CJ). Secondly, the courts prove to be reluctant to apply some measures that may be useful in asylum cases (e.g. indicating interim measures *proprio motu* by the Strasbourg Court or the prescription of measures of inquiry in the preliminary ruling procedure). Thirdly, in some areas (e.g. as regards language of proceedings, anonymity and legal aid in both courts; the lack of provisional measures and third party interventions in the preliminary ruling procedure), the courts are not equipped with adequate measures that would make it possible for the special needs of asylum seekers to be satisfied.

The procedural difficulties that asylum seekers face when they want to initiate, pursue or participate in the proceedings before the ECtHR or the CJ have a bearing on the courts' case-law and position. The fact that the Strasbourg and Luxembourg Courts are accessible for asylum seekers only with difficulty may leave some grave human rights violations or important preliminary questions not addressed. The same applies to situations when the courts do not react adequately to the urgency of the proceedings. Moreover, the asylum seekers' impediments to active participation in both proceedings may hamper or preclude the proper examination of their applications or preliminary questions referred in their cases. Additionally, the asylum seekers' problems providing the courts with all needed information and the courts' limitations in obtaining those materials from other sources may lead to insufficiently informed, evidence-based and justified judgments. That in turn may reduce the willingness of the Contracting Parties to the ECHR and the Member States of the EU to comply with them.

The ECtHR and the CJ are increasingly often adjudicating on asylum matters. Assuming that this trend continues, it has to be ensured—not only in law, but also in practice—that asylum seekers can initiate, pursue or participate in the proceedings before both courts. Asylum seekers must have access to justice in the Strasbourg and Luxembourg Courts that is not hampered or precluded by the rules of procedure or their restrictive interpretation. Both courts have to have the possibility to duly respond to the urgency of the proceedings in asylum cases, particularly when the principle of non-refoulement may be violated. The judgments issued in asylum cases should be particularly well-informed and evidence-based. The ECtHR and the CJ must be responsive to the special needs of asylum seekers. Only then can both European asylum courts expect that the human rights standards that they apply in asylum cases are known, understood and respected throughout Europe.

Chapter 4
Protection

I. Introduction

Reasons to depart from a country of origin and seek protection elsewhere are multifarious. Asylum may be needed, as provided for in the 1951 Refugee Convention, to flee from 'persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion'.[806] However, in practice, the motivations behind seeking protection are much more diverse and nuanced. Many foreigners are forced to run away from their country of origin due to the ongoing indiscriminate violence. Others must flee due to the consequences of climate change or prevalent poverty. Some asylum seekers are escaping ill-treatment on account of their sexual orientation or gender. Others seek protection due to the medical condition that cannot be tended to in their home state. The list of reasons that force people to seek protection outside their native countries is open and developing.

Within Europe, despite the adoption of the elaborate EU asylum law and the fact that all Member States are parties to the 1951 Refugee Convention and the ECHR, harmonized understanding of who must be protected against refoulement is continuously and persistently lacking. Some states are more acquiescent to asylum seekers' pleadings for protection than others. For instance, in 2018, the general recognition rate in first-instance decisions amounted to 90% in Switzerland and 86% in Ireland, but in Poland and the Czech Republic it was significantly lower (respectively 14% and 11%). Moreover, within Europe, some nationalities are perceived to be more in need of protection than others. In 2018, asylum seekers from certain countries could reasonably count on being given some form of protection in all Member States of the EU (e.g. Syrians). Others were confronted with the 'asylum lottery': whether or not they were granted protection was dependent on the fact that they applied for asylum in one country and not another. For instance, the recognition rates for asylum seekers from Afghanistan, Iran, Iraq and Turkey differed considerably in 2018 within the EU: from a few percent in one state to

806 See Article 1A(2) of the 1951 Refugee Convention.

fully 100% in another.[807] Furthermore, states respond diversely to the motivations leading to seeking protection expressed by asylum seekers, e.g. some states are more eager than others to grant protection to LGBTI asylum seekers or those seeking asylum due to indiscriminate violence.[808]

Asylum seekers who try to increase their chances of protection by lodging asylum applications in a Member State that is more acquiescent to their claims are often confronted with the rules arising from the Dublin III Regulation. The Dublin system—in operation under different legal acts since 1997—was established to determine the one country that is responsible for examining the asylum seeker's application for international protection. When the foreigner concerned finds himself in a state that is not responsible for his application, he may be transferred to the state responsible. In practice, in some states as many as one in three asylum seekers are subject to the Dublin procedure, mostly because they have an ongoing, abandoned or rejected application for international protection in another Member State.[809]

The Dublin system is built on the assumption that all Member States respect the principle of non-refoulement and are safe for asylum seekers.[810] For years, it has been argued that this presumption of safety is false.[811] Despite this, the Dublin system continues to operate. Furthermore, the Member States can shift the responsibility for asylum seekers not only between each other but also outside the EU. Under the 2013 Procedures Directive, they can consider an application for international protection inadmissible when a country that is not a Member State is regarded as a 'third safe country' or a 'first country of asylum' for the applicant.[812] In some states, admissibility decisions constitute as many as 17% of all decisions.[813]

Application of the 'safe third country' concepts is merely one (of many) deflecting methods used by states. Asylum seekers are not only denied access to asylum proceedings in a state of their choice, but they also are prevented

807 EASO (2019), 58-59. See also Costello (2012) 'Courting Access…', 315-316; Pollet (2016), 83-84.

808 For the states' practice as regards LGBTI asylum seekers, see Jansen and Spijkerboer (2011); ECRE (2017) 'Preliminary Deference?', 19-34, 36-52. For the states' practice in regard to indiscriminate violence, see UNHCR (2011); Lambert (2013), 215-228.

809 ECRE (2020), 3, 12-13.

810 See Recital 2 of the Preamble to the Dublin II Regulation and Recital 3 of the Preamble to the Dublin III Regulation.

811 See e.g. den Heijer, Rijpma and Spijkerboer (2016), 608-615.

812 See Article 33 of the 2013 Procedures Directive. For states' practice, see ECRE (2016) 'Admissibility…', 15-22.

813 EASO (2019), 61.

from reaching the EU territory at all.[814] In practice, legal pathways for asylum seekers to enter the EU hardly exist. In 2018, the European Parliament estimated that '90 % of those granted international protection have reached the Union through irregular means' and it reckoned 'at least 30 000 deaths at the Union's borders since 2000'.[815] In the years 2013-2016, five Member States were reported to hold humanitarian admission programmes that catered to 'very modest numbers' of asylum seekers.[816] Furthermore, those foreigners who manage to approach the EU border are often pushed back to third countries that they left in order to seek protection. Their pleadings for protection are being intentionally ignored.[817]

Domestic authorities can also decide that the asylum seeker concerned is excluded from being granted refugee status if he receives protection or assistance from organs or agencies of the UN other than the UNHCR or if he is considered 'undeserving' due to his criminal activity. National security considerations are in fact increasingly invoked in the asylum context. In the aftermath of the 'war on terror' declared by states after terrorist attacks in the EU and beyond, asylum seekers and refugees are often associated with a terrorist threat in national and international legal and political discourses.[818]

While the principle of non-refoulement is guaranteed under multiple legal instruments, including the 1951 Refugee Convention, the ECHR, the EU Charter and secondary asylum law, it is—to put it euphemistically—not always respected in practice. In Europe, asylum seekers are being pushed back, ill-treated, wrongly denied protection and refouled. The picture painted in this introduction is already bleak, and it is expected to become even bleaker.[819] It shows bluntly that cogent and coherent guidance is needed as regards the protection against refoulement from the Strasbourg and Luxemburg Courts. In this chapter, the respective case-law of both European asylum courts is scrutinized and juxtaposed (Titles II-III). This examination is preceded by introductory remarks concerning the applicable legal framework (1) and by a detailed determination of the scope of the analysis conducted in this chapter (2).

814 See e.g. den Heijer, Rijpma and Spijkerboer (2016), 618-627.

815 European Parliament (2018).

816 EPRS (2018), 16-17. See also Moreno-Lax (2018), 35, 58-62.

817 For states' practice, see ECRE (2018).

818 Singer (2019), 374-378.

819 See Simeon (2019), 206, concluding that 'the future of the principle of non-refoulement does not appear to be bright'.

1. Legal Framework

1.1 Granting Protection

The principle of non-refoulement originates from international refugee law. Pursuant to Article 33(1) of the 1951 Refugee Convention, a refugee cannot be expelled or returned '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'.[820] It is a non-derogable obligation of the Contracting States.[821] The definition of 'a refugee' is given in Article 1A(2). It is a person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'. The 1951 Refugee Convention does not give much more guidance in this regard. Some instructions can be found in the UNHCR's documents, but they are not binding.[822] In consequence, it is left to the discretion of the Contracting States to specify who fits into the definition of 'a refugee' and who is protected against refoulement. Nevertheless, it is well-established that the recognition as a refugee is only declaratory and the principle of non-refoulement protects both asylum seekers and recognized refugees.[823]

While there is no right to asylum arising from the ECHR or its Protocols,[824] the principle of non-refoulement has been derived from Article 3, which provides for the absolute prohibition of torture or inhuman or degrading treatment or punishment.[825] The ECtHR attaches special stigma to torture, defined as 'deliberate inhuman treatment causing very serious and cruel suffering'.[826] Treatment is considered 'inhuman' when it is 'premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical

820 Lauterpacht and Bethlehem (2003), 126-127, interpreted this provision broadly and suggested–against its clear wording–that too much weight should not be placed on the cause of a threat (race, religion, nationality, etc.). Cf. UNHCR, 'Handbook…', 23.

821 Article 42(1) of the 1951 Refugee Convention and Article VII(1) of the 1967 Protocol.

822 See, in particular, UNHCR, 'Handbook…'. For more on the UNHCR's role, see Chapter 2, Title I, point 1.

823 See e.g. Grahl-Madsen (1997), 135; Lauterpacht and Bethlehem (2003), 116-118.

824 See e.g. ECtHR, *Vilvarajah and Others v. the United Kingdom*, nos. 13163/87 etc. (1991), §102; ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), §113.

825 For the ECtHR's first refoulement cases, see Chapter 2, Title II, point 2.1.

826 ECtHR, *Aksoy v. Turkey*, no. 21987/93 (1996), §63.

or mental suffering'. It is 'degrading' when 'it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance'.[827] However, in the refoulement context, the court often concludes generally that the treatment was or would be contrary to Article 3 of the ECHR without specifying whether it should be qualified as torture or inhuman or degrading treatment or punishment.[828]

The importance of the principle of non-refoulement has been recognized by the Strasbourg Court in many cases. The ECtHR reiterates that

> Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (...). However, the expulsion of an alien by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the destination country. In these circumstances, Article 3 implies an obligation not to deport the person in question to that country.[829]

However, 'a mere possibility of ill-treatment, (...) is not in itself sufficient to give rise to a breach of Article 3'.[830] The foreseeable consequences of the applicant's return, in the light of the general situation in the country of destination and of his personal circumstances, must be considered.[831] The reasons why the ill-treatment is going to be inflicted may be but do not have to be intertwined with the foreigner's race, religion, nationality, membership of a particular social group or political opinion.[832] The ill-treatment, though, has to attain a minimum level of severity to fall within the scope of Article 3. This level is assessed by the court on a case-by-case basis and depends on many individual factors.[833]

827 ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §220.

828 See e.g. Schabas (2017), 195; de Weck (2017), 139.

829 ECtHR (GC), *F.G. v. Sweden*, no. 43611/11 (2016), §111.

830 ECtHR, *Vilvarajah and Others v. the United Kingdom*, nos. 13163/87 etc. (1991), §111.

831 ECtHR (GC), *F.G. v. Sweden*, no. 43611/11 (2016), §114. See also ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), §117.

832 For this reason, amongst others, the protection against refoulement offered by the ECHR is considered (albeit not unanimously) broader than the one under international refugee law. For more in this regard, see Chapter 2, Title II, point 3.

833 See e.g. ECtHR (GC), *F.G. v. Sweden*, no. 43611/11 (2016), §112.

The Strasbourg Court concentrates on the issue of 'whether effective guarantees exist that protect the applicant against arbitrary refoulement, be it direct or indirect, to the country from which he or she has fled'.[834] While Article 3 of the ECHR is most often associated with the principle of non-refoulement, Article 2 has been also found relevant in this context.[835] Some other provisions of the ECHR carry a non-refoulement potential as well, but the ECtHR's approach in this regard is extremely wary.[836]

The EU law attempts to merge together the protection against refoulement offered by the 1951 Refugee Convention[837] and by the ECHR[838]. The definition of a 'refugee' provided for in international refugee law is duplicated in Article 2(d) of the 2011 Qualification Directive.[839] The acts of and reasons for persecution are defined in Articles 9 and 10 of that directive, redressing the lack of precision that is evident under international refugee law.[840] Moreover, pursuant to the secondary asylum law, persons who do not qualify as refugees are granted subsidiary protection if upon return they would face a real risk of suffering serious harm and they are unable, or, owing to such risk, unwilling to avail themselves of the protection of that country.[841] Serious harm consists of the death penalty or execution; or torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.[842] Furthermore, the Member States are obliged to respect the principle of non-refoulement when they are implementing the Return Directive.[843]

The secondary asylum law is reinforced by the EU Charter. Pursuant to Article 18, the right to asylum shall be guaranteed with due respect for the rules

834 ECtHR (GC), *J.K. and Others v. Sweden,* no. 59166/12 (2016), §78.

835 See e.g. ECtHR, *Bader and Kanbor v. Sweden,* no. 13284/04 (2005), §48; ECtHR (GC), *F.G. v. Sweden,* no. 43611/11 (2016), §158; ECtHR, *S.K. v. Russia,* no. 52722/15 (2017), §63; ECtHR, *O.D. v. Bulgaria,* no. 34016/18 (2019), §56.

836 See Articles 4, 5, 6, 8 or 9 of the ECHR. For an overview of the respective case-law, see e.g. den Heijer (2008), 279-286; Costello (2016), 197-203.

837 For more on the relation between the 1951 Refugee Convention and EU law, see Chapter 2, Title III, point 3.

838 See in particular Article 9(1)(a) and Article 15(a-b) of the 2011 Qualification Directive.

839 See also Article 2(c) of the 2004 Qualification Directive.

840 See also Articles 9 and 10 of the 2004 Qualification Directive.

841 Article 2(f) of the 2011 Qualification Directive. See also Article 2(e) of the 2004 Qualification Directive.

842 Article 15 of the 2011 Qualification Directive. See also Article 15 of the 2004 Qualification Directive.

843 Article 5 of the Return Directive. See also Articles 4(4)(b) and 9(1)(a) of the Return Directive.

of the 1951 Refugee Convention and the 1967 Protocol and in accordance with the TFEU. According to Article 78(1) of the TFEU, the CEAS must be in compliance with the principle of non-refoulement. Article 19(2) of the EU Charter specifies that no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. The latter provision was intended to incorporate 'the relevant case-law from the European Court of Human Rights regarding Article 3 of the ECHR',[844] so it widens the personal scope of the prohibition of refoulement in comparison with the 1951 Refugee Convention.[845] It may be also considered a *lex specialis* of Article 4 of the EU Charter ('no one shall be subjected to torture or to inhuman or degrading treatment or punishment') that has the identical wording, meaning and scope as Article 3 of the ECHR.[846] While the protection against refoulement is not directly inscribed into the ECHR and had to be derived from its provisions, Article 19(2) of the EU Charter plainly confirms the applicability of this principle among the Member States.[847]

1.2 Denying Protection

Article 1 of the 1951 Refugee Convention is in fact less elaborate on the issue of who is to be declared a refugee than who shall not. Paragraphs C-F provide for extensive cassation and exclusion clauses. Pursuant to paragraph D, 'persons who are at present receiving from organs or agencies of the UN other than the UNHCR protection or assistance' cannot be considered refugees. Under paragraph F, the exclusion encompasses also persons who are considered undeserving of protection,[848] i.e.

> any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the UN.

844 Consequently, it is deemed to correspond to Article 3 of the ECHR as interpreted by the ECtHR, see 'Explanations Relating to the Charter of Fundamental Rights' (2007), 24 and 34, referring to ECtHR (Plenary), *Soering v. the United Kingdom*, no. 14038/88 (1989) and ECtHR, *Ahmed v. Austria*, no. 25964/94 (1996).

845 See also Guild (2014), 553.

846 'Explanations Relating to the Charter of Fundamental Rights' (2007), 18.

847 See also Guild (2014), 545.

848 See e.g. UNHCR (2003), 1; Guild and Garlick (2010), 73; Simeon (2013) 'Ethics…', 262.

Moreover, pursuant to Article 33(2) of the 1951 Refugee Convention, the principle of non-refoulement does not apply to 'a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'.[849] Pursuant to Article 32, a refugee can be expelled only on grounds of national security or public order.

Conversely, Article 3 of the ECHR provides for the absolute prohibition of torture or inhuman or degrading treatment or punishment[850]—also in the context of expulsions, extraditions and other removals. It is not subject to any exception. Derogation from Article 3 of the ECHR—even in times of war or other public emergency threatening the life of the nation—is not permissible.[851] Neither cessation nor exclusion clauses are to be found in the ECHR in regard to the principle of non-refoulement. Accordingly, the concept of persons 'undeserving' of the protection arising from Article 3 of the ECHR is absent from the ECtHR's jurisprudence.[852] Moreover, the Strasbourg Court reiterates that under Article 3 of the ECHR both direct and indirect refoulement are prohibited.[853]

The EU law swerves between the standards arising from the 1951 Refugee Convention and the ECHR. On the one hand, pursuant to Article 78(1) of the TFEU, the compliance of the secondary asylum law with the principle of non-refoulement is guaranteed. The EU asylum policy must be in accordance with the 1951 Refugee Convention and 1967 Protocol as well as 'other relevant treaties' (including the ECHR[854]). Moreover, the protection arising from Articles 4 (a prohibition of torture or of inhuman or degrading treatment or punishment) and 19(2) (the principle of non-refoulement) of the EU Charter must be as absolute as the protection provided for in Article 3 of the ECHR.[855] In particular,

849 See Hathaway (2005), 353, stating that refoulement may be allowed 'in only these clear and extreme cases'. No reservations to Article 33 are permissible, see Article 42(1) of the 1951 Refugee Convention and Article VII(1) of the 1967 Protocol.

850 See also Harris et al. (2018), 828, pointing out that Article 3 is one of two 'true absolute obligations' provided for in the ECHR.

851 Article 15(1) and (2) of the ECHR.

852 See also Hailbronner (2002), 11.

853 ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §129.

854 See e.g. Guild and Garlick (2010), 77; Battjes (2016) 'Piecemeal Engineering…', 198.

855 According to 'Explanations Relating to the Charter of Fundamental Rights' (2007), 18 and 24, 'the right in Article 4 is the right guaranteed by Article 3 of the ECHR' and Article 19(2) 'incorporates the relevant case-law from the European Court of Human Rights regarding Article 3 of the ECHR', e.g. the *Ahmed v. Austria* case [no. 25964/94 (1996)], where the ECtHR confirmed that the protection under Article 3 of the ECHR is absolute, even in case of convicted offenders. See also Peers (2012), 453; Nowak and

no exceptions to the principle of non-refoulement similar to the ones provided for in Article 33(2) of the 1951 Refugee Convention have been introduced to the text of the EU Charter.[856] Moreover, pursuant to Article 5 of the Return Directive, the Member States must–unconditionally–respect the principle of non-refoulement.[857]

On the other hand, the cessation and exclusion clauses provided for in international refugee law have been transferred to the secondary asylum law and taken into account within the grounds for the revocation of a refugee status.[858] Moreover, paragraphs C and F of Article 1 of the 1951 Refugee Convention clearly inspired the cessation, exclusion and revocation clauses applicable to beneficiaries of subsidiary protection.[859] Furthermore, under Article 21 of the 2011 Qualification Directive, the Member States are obliged to respect the principle of non-refoulement in accordance with their international obligations, but exceptions in this regard–that have evidently been drawn from Article 33(2) of the 1951 Refugee Convention–are permissible. The secondary asylum law also provides for the possibility to deprive a refugee of his residence permit or even his refugee status due to security considerations.[860]

The introduction of the cessation and exclusion clauses as well as the exceptions to the principle of non-refoulement brings the secondary asylum law close to the international refugee law regime. However, the EU legislator went much further than the drafters of the 1951 Refugee Convention. The EU law provides in addition for multiple avenues by which to abstain from the examination of whether the applicant qualifies for international protection.[861] Firstly, the Member State may not assess the asylum application when another state

Charbord (2014), 92-93; Guild (2014), 559-560; Boeles (2017). For the absolute character of Article 4 of the EU Charter, see also CJ (GC), joined cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* (2016), paras 85-87.

856 See also Moreno-Lax (2018), 70.

857 See also Lutz (2016), 685. Moreover, under Article 9(1)(a) of the Return Directive, a removal must be postponed when it would violate the principle of non-refoulement.

858 Articles 11, 12 and 14 of the 2004 and 2011 Qualification Directives. See also Guild and Garlick (2010), 74-75, who suggested that the timing of the 2004 Qualification Directive's negotiations (after the terrorist attacks of 11 September 2001) had affected its final text, in particular by taking the EU exclusion clauses beyond their counterparts in international refugee law, seeking to curtail the protection under Article 3 of the ECHR.

859 Articles 16, 17 and 19 of the 2004 and 2011 Qualification Directives.

860 Articles 21(3) and 24(1) of the 2004 and 2011 Qualification Directives (revocation of residence permits) and Articles 14(4-6) of the 2004 and 2011 Qualification Directives (revocation of a refugee status).

861 Article 33 of the 2013 Procedures Directive. See also Article 25 of the 2005 Procedures Directive, which provided for a more elaborate list of admissibility clauses. It was limited in order to align it with Article 18 of the EU Charter [see Vedsted-Hansen (2016) 'Asylum Procedures Directive…', 1354].

is responsible for such examination under the Dublin III Regulation. Secondly, it can rely on the admissibility grounds provided for in Article 33(2) of the 2013 Procedures Directive. Thus, states may render the application inadmissible when: another Member State has granted international protection; a country which is not a Member State is considered as a first country of asylum or a safe third country for the applicant; it is a subsequent application with no new elements or findings; or a separate examination of the respective application is unjustified in regard to the applicant's dependant.[862] Most of the admissibility grounds (subparagraphs a-c) as well as the Dublin system rest on the premise that the protection is available 'elsewhere' and make it possible to shift the responsibility for asylum seekers to another state.

2. Scope of Analysis

2.1 Granting Protection

Both European asylum courts have already provided some guidance in regard to different reasons for seeking protection in Europe, although the ECtHR's jurisprudence is definitely more all-embracing than the respective CJ case-law. Thus, the cases of the Strasbourg Court selected for examination in this chapter concern only those motivations for seeking asylum that have already been considered by the Luxembourg Court. Those pertain to personal characteristics of the applicants—their religion (Title II, point 1), sexual orientation (point 2) and health (point 4)—as well as situation in a country of destination, i.e. general situation of violence (point 3) and living conditions there (point 5).

Conversely, some CJ judgments have not been juxtaposed with the respective ECtHR jurisprudence in this chapter. In the *Abdulla and Others* case, the Luxembourg Court answered the doubts concerning the relevance of previous acts or threats when a refugee status is to be withdrawn.[863] In the *Shepherd* and *EZ* rulings, the court interpreted Article 9 of the 2004 and 2011 Qualification Directives in the context of the refusal to perform military service.[864] In the *Ahmedbekova* judgment, it examined whether an asylum seeker may rely on the fact that he is a family member of a person at risk of persecution or serious harm.[865] The asylum seekers' claims concerning the past

862 See also Articles 35 and 38 of the 2013 Procedures Directive on the concepts of 'first country of asylum' and 'safe third country'. See also Article 26 and 27 of the 2005 Procedures Directive.

863 CJ (GC), joined cases C-175/08, C-176/08, C-178/08 and C-179/08 *Abdulla and Others* (2010), paras 92-100.

864 CJ, case C-472/13 *Shepherd* (2015), paras 30-56; CJ, case C-238/19 *EZ* (2020), paras 26-61.

865 CJ, case C-652/16 *Ahmedbekova* (2018), paras 44-51.

ill-treatment,[866] desertion[867] or family ties[868] have been scrutinized by the Strasbourg Court as well. However, the above-mentioned judgments of the Luxembourg Court do not constitute sufficient material for a comparative analysis of the jurisprudence of the two European asylum courts. Firstly, the CJ approached the matters of family ties and past ill-treatment only once, and in a rather limited and selective manner. Secondly, its findings in regard to all the aforementioned issues were deeply grounded in the specific provisions of the secondary asylum law. Not once did the Luxembourg Court rely in those cases on the ECtHR's case-law, and it mentioned the ECHR and the EU Charter only incidentally.[869] Thus, the asylum seekers' claims concerning their fear of persecution or ill-treatment due to a past persecution, desertion or family ties are not analysed in more detail in this chapter.

2.2 Denying Protection

It is well beyond the scope of this thesis to analyse the ECtHR's and CJ's approach to all measures applied by states to deter asylum seekers and deny them protection. Instead, the chapter focusses on the selected practices that can be considered the most controversial. Firstly, the issue of humanitarian visas is examined. Both European asylum courts were recently challenged with the question of whether respect for the principle of non-refoulement obliges states to issue visas to presumptive asylum seekers (Title III, point 1). Secondly, measures enabling states to shift the responsibility for asylum seekers to other states or entities are scrutinized. The Dublin Regulations and the 'safe third country' and 'first country of asylum' concepts are based on the assumption that protection is already available elsewhere, so applications for international protection do not have to be considered on the merits and the persons concerned may be removed to another state. The presumption of safety in those countries of destination has been heatedly discussed by both courts (point 2.1). Next, the possibility of excluding Palestinian refugees from the protection offered by international refugee law, the ECHR and EU law, because they are entitled to the assistance or protection of the UNRWA in Jordan, Lebanon, Syria, the Gaza Strip and the West Bank, is analysed. Article 1D of the 1951 Refugee Convention relies on the 'protection elsewhere' assumption like the above-mentioned measures, albeit in the very particular context

866 See e.g. ECtHR (GC), *J.K. and Others v. Sweden,* no. 59166/12 (2016), §§99-102.

867 See e.g. ECtHR, *Said v. the Netherlands,* no. 2345/02 (2005), §§54-55; ECtHR, *O.D. v. Bulgaria,* no. 34016/18 (2019), §§54-55.

868 See e.g. ECtHR, *J.H. v. the United Kingdom,* no. 48839/09 (2011), §§57-67; ECtHR, *M.S. v. Slovakia and Ukraine*, no. 17189/11 (2020), §§122-124.

869 CJ, case C-472/13 *Shepherd* (2015), paras 23, 25; CJ, case C-238/19 *EZ* (2020), paras 20, 22.

of the Israeli-Palestinian conflict (point 2.2). Lastly, removals of undesirable asylum seekers and refugees, that is, criminal offenders or persons who are deemed to constitute a threat to national security or public order, are examined. While under the 1951 Refugee Convention such persons can be excluded from protection or refouled, the last section focusses on the question of whether the ECHR or EU law can act as a 'safety net' that would preclude the refoulement of those 'undeserving' asylum seekers (point 3).

In regard to the last point, one more comment is essential. The section concentrates on the scope of protection against refoulement offered to offenders or persons considered a national security threat rather than on answering the question of who is covered by the exclusion clauses and exceptions to the principle of non-refoulement provided for in international refugee law or EU law. The latter question has been repeatedly considered before the Luxembourg Court.[870] For instance, in the *B and D* case, the court decided whether persons who have been members of the organizations that were involved in terrorist acts were covered by the exclusion clauses expressed in Article 12(2)(b) and (c) of the 2004 Qualification Directive.[871] In the *T.* ruling, the CJ interpreted the notion of 'compelling reasons of national security or public order'.[872] Meanwhile, the Strasbourg Court clearly states in its jurisprudence concerning Article 3 of the ECHR that it is no part of its function to assess whether the applicant is in fact a threat to national security: 'its only task is to consider whether that individual's deportation would be compatible with his or her rights under the Convention'.[873] Accordingly, notions such as 'serious non-political crime', 'acts contrary to the purposes and principles of the UN' or 'compelling reasons of national security or public order' are not analysed by the ECtHR in its case-law concerning the principle of non-refoulement.[874] Hence, taking into account the purpose of this study, the scope of the exclusion and revocation clauses provided for in international refugee law and secondary asylum law is not examined in more detail in this chapter.

870 See e.g. CJ (GC), case C-573/14 *Lounani* (2017); CJ, case C-369/17 *Ahmed* (2018).

871 CJ (GC), joined cases C-57/09 and C-101/09 *B and D* (2010), paras 79-105.

872 CJ, case C-373/13 *T.* (2015). For the interpretation of the notion of 'risk to public policy' provided for in the Return Directive, see CJ, case C-554/13 *Zh. and O.* (2015).

873 See e.g. ECtHR, *Othman (Abu Qatada) v. the United Kingdom,* no. 8139/09 (2012), §184; ECtHR, *X. v. Germany,* no. 54646/17, dec. (2017), §27; ECtHR, *X v. Sweden,* no. 36417/16 (2018), §46. See also ECtHR, *Auad v. Bulgaria,* no. 46390/10 (2011), §101.

874 Notions of 'national security', 'public safety' or 'prevention of disorder or crime' are however interpreted by the court under Articles 8(2), 10(2), 11(2) of the ECHR, Article 2(3) of the Protocol no. 4 and Article 1(2) of the Protocol no. 7.

II. Granting Protection

In this subchapter, the ECtHR's approach to five reasons for seeking protection expressed in its abundant case-law is examined and juxtaposed with the respective jurisprudence of the CJ. The following question is answered: whether and in what circumstances—under the case-law of the Strasbourg and Luxembourg Courts—foreigners must be granted protection against refoulement due to their religion, sexual orientation or state of health, or on account of the general situation of violence or living conditions in the country of destination.

Religion-based persecution (point 1) is the only ground within this section that is directly mentioned in both the 1951 Refugee Convention and the 2011 Qualification Directive. The sexual orientation of the applicant (point 2) is not explicitly enumerated as a reason for persecution in international refugee law, although it is commonly accepted that the LGBTI persons may constitute 'members of a particular social group' within the meaning of Article 1A(2) of the 1951 Refugee Convention.[875] Such an approach has also found its reflection in the secondary asylum law. While a general situation of violence (point 3) may be taken into account only to some extent under international refugee law,[876] it has been explicitly mentioned as a ground for being eligible for subsidiary protection in the EU law. Under the 1951 Refugee Convention, socio-economic circumstances can be considered when a person concerned would be deprived of adequate standard of living or medical assistance upon removal,[877] but only if this treatment is inflicted due to his race, religion, nationality, membership of a particular social group or political opinion. However, in exceptional circumstances, the health of the applicant (point 4) or the living conditions in the destination country (point 5) may bar a return or Dublin transfer under the EU law. While the above-mentioned reasons for seeking protection are diversely embedded in international refugee law and EU law, Article 3 of the ECHR embraces them all.

1. Religion

Religion-based persecution is explicitly mentioned in Article 1A(2) of the 1951 Refugee Convention. This provision was later duplicated in Article 2(d) of the

875 See e.g. UNHCR (2008), 6, 15; Edwards (2014), 2; Hathaway and Foster (2014), 442-444; Kogovšek Šalamon (2017), 208.

876 See e.g. UNHCR 'Handbook…', 38; UNHCR (2011), 16-17.

877 See e.g. Hathaway and Foster (2014), 228-238, with regard to the notion of 'persecution'. For the comprehensive analysis, see Foster (2007).

2011 Qualification Directive.[878] The risk of ill-treatment after a removal due to the religious beliefs of a returnee is also often invoked before the ECtHR and considered by the court under Article 3 of the ECHR. Nowadays, it does not seem to be contentious, at least in general terms, that the faith of an asylum seeker may constitute a valid reason to prevent his expulsion or extradition. However, it is still unclear in what specific circumstances the protection from refoulement on account of religion is in fact required under the EU and international law.

The Strasbourg Court applies a two-stage examination in this regard. Firstly, it determines whether the religious community that the applicant is a member of is a group that is systematically exposed to a practice of ill-treatment in the destination country. In those circumstances, 'the requirement (...), that an asylum-seeker is capable of distinguishing his or her situation from the general perils in the country of destination is relaxed, in order not to render illusory the protection offered by Article 3'.[879] In practice, the ECtHR considers diverse factors in this regard.[880] In particular, it assesses whether members of the concerned group are being abused, harassed, attacked or persecuted in a different manner by state authorities or other actors; whether authorities of the destination country provide at least some protection against those acts; whether being a follower of the religion in question is criminalized; and whether places of worship are available and the members of the group in question can practise their faith publicly.[881] The general situation of violence in the destination country is also taken into account, especially when it 'makes it more likely that the authorities (or any persons or group of persons where the danger emanates from them) will systematically ill-treat the group in question'.[882] The cumulative effect of being a member of

878 See also Article 2(c) of the 2004 Qualification Directive.

879 ECtHR, *A.S.N. and Others v. the Netherlands*, nos. 68377/17 and 530/18 (2020), §107. See also ECtHR (GC), *J.K. and Others v. Sweden*, no. 59166/12 (2016), §§103-105.

880 The court is in fact 'quite strict' in this regard, see de Weck (2017), 307. See also Boeles et al. (2014), 350. Cf. ECtHR, *Muminov v. Russia*, no. 42502/06 (2008), §§94-96; ECtHR, *Yakubov v. Russia*, no. 7265/10 (2011), §§88-92, and ECtHR, *T.M. and Others v. Russia*, nos. 31189/15 etc. (2017), §§19-20, 27-29, where the court found that persons accused of religious extremism should be considered a group that is systematically exposed to a practice of ill-treatment in Uzbekistan.

881 See e.g. ECtHR, *Z. and T. v. the United Kingdom*, no. 27034/05, dec. (2006), §1; ECtHR, *F.H. v. Sweden*, no. 32621/06 (2009), §97; ECtHR, *Al Hanchi v. Bosnia and Herzegovina*, no. 48205/09 (2011), §44; ECtHR, *M.E. v. France*, no. 50094/10 (2013), §50; ECtHR, *M.Y.H. and Others v. Sweden*, no. 50859/10 (2013), §§60-61; ECtHR, *N.K. v. France*, no. 7974/11 (2013), §42; ECtHR, *A.A. v. Switzerland*, no. 32218/17 (2019), §50; ECtHR, *A.S.N. and Others v. the Netherlands*, nos. 68377/17 and 530/18 (2020), §110.

882 See e.g. ECtHR, *NA. v. the United Kingdom*, no. 25904/07 (2008), §117; ECtHR, *A.S.N. and Others v. the Netherlands*, nos. 68377/17 and 530/18 (2020), §107. For more on general situation of violence, see these Chapter and Title, point 3.

a certain religious group and another group (e.g. of single women) is considered as well.[883]

Secondly, when the Strasbourg Court reaches the conclusion that the group in question is not systematically exposed to a practice of ill-treatment, it requires the applicants to show that further special distinguishing features exist that place them at real risk of ill-treatment in the destination country due to their religious beliefs.[884] In this regard, it seems to be of great importance whether the religion of the applicant is known (e.g. because he experienced the ill-treatment on this account in the past[885]) or may be easily revealed by the state or other persecuting actors (e.g. when it is inscribed in an identity document[886]). In the case of *M.E. v. France,* the ECtHR concluded that the fact that the asylum seeker (a Coptic Christian) had been convicted in absentia of proselytism in Egypt and would face three years of imprisonment after a removal was not enough in itself to attain the minimum level of severity required under Article 3 of the ECHR. However, the court decided that the applicant, as a recognized and convicted proselyte, could have been a prime target of persecution and violence on the part of Muslim fundamentalists and he could not count on the protection of the state in this regard. Accordingly, the court found a violation of Article 3 of the ECHR.[887]

Even if the applicant's religion is not known to prospective persecutors, the question remains whether the Contracting States can expect a foreigner to conceal his beliefs after a removal to avoid ill-treatment. The 'discretion' requirement–often relied on by domestic asylum authorities–is accepted by the ECtHR, but only to some extent.[888]

When private manifestations of religion–in contrast to the public ones–do not attract the attention of the respective authorities in the country of destination, the Strasbourg Court considers it indispensable for asylum authorities to determine how the asylum seeker concerned practises his faith in the hosting country and how he would practise it after a removal. When a foreigner manifests his religious beliefs only in private, he can be expected to

883 See e.g. ECtHR, *W.H. v. Sweden,* no. 49341/10 (2014), §§65-67 (later struck out of the list of cases by the Grand Chamber).

884 See e.g. ECtHR, *A.S.N. and Others v. the Netherlands,* nos. 68377/17 and 530/18 (2020), §112, see also §§122-128.

885 See e.g. ibid., §§114-117.

886 See e.g. ECtHR, *F.H. v. Sweden,* no. 32621/06 (2009), §97.

887 ECtHR, *M.E. v. France,* no. 50094/10 (2013), §§51-53. See also ECtHR, *N.K. v. France,* no. 7974/11 (2013), §46.

888 See also Spijkerboer (2018), 225, 230, claiming that the ECtHR 'implicitly relied on discretion reasoning' already in ECtHR, *Z. and T. v. the United Kingdom,* no. 27034/05, dec. (2006).

continue such behaviour upon return. For instance, in the case of *H.A. and H.A. v. Norway,* it was established that the Buddhist asylum seekers of Iranian nationality prayed and had religious symbols only at home. The Strasbourg Court agreed with the Norwegian authorities that the discreet way in which the applicants practised their faith would not put them at risk of being subjected to treatment contrary to Articles 2 or 3 of the ECHR upon removal. Thus, their complaints were considered manifestly ill-founded.[889] In another case concerning expulsion to Iran, *A. v. Switzerland,* the ECtHR determined that only a public manifestation of religion was considered a threat by the Iranian authorities. The applicant was an ordinary member of a Christian community and the respective authorities in Iran were not aware of his conversion. Thus, he would be able to practise his faith in private after a removal. The applicant did not state before the Strasbourg Court that he wished to practise his faith publicly. Thus, as the ECtHR noticed, the circumstances of the case at hand differed from the ones of the *Y and Z* case adjudicated by the CJ (examined below), where the asylum seekers were deeply committed to their faith and they considered the public practice essential to preserve their religious identity. The Strasbourg Court concluded that the applicant's expulsion to Iran would not give rise to a violation of Articles 2 and 3 of the ECHR.[890]

In the *F.G. v. Sweden* case, judges Zupančič, Power-Forde and Lemmens expressed an opposition to the above-mentioned line of reasoning. The majority stated that the applicant would not be ill-treated after a removal, because he 'kept his faith a private matter'.[891] The minority held that the Chamber implicitly accepted the 'discretion' requirement applied by the Swedish authorities. Meanwhile, in the *Y and Z* ruling the CJ concluded that the fact that the asylum seeker could avoid persecution by refraining from certain religious practices 'is, in principle, irrelevant'. The dissenting judges stressed that the views of the Strasbourg and Luxembourg Courts in this regard should be the same, thus 'national authorities cannot reasonably expect from an applicant that he or she abstain from the exercise of the fundamental right to religious freedom and conscience in order to avoid treatment prohibited under Article 3'.[892] The case was subsequently referred to the Grand Chamber, but it did not decide to include such a bold and straightforward statement in its

889 ECtHR, *H.A. and H.A. v. Norway,* no. 56167/16, dec. (2017), §§33-35, 37.

890 ECtHR, *A. v. Switzerland,* no. 60342/16 (2017), §§43-46, referring to CJ (GC), joined cases C-71/11 and C-99/11 ***Y and Z*** (2012). See also, critically on the real possibility of practising faith in private by A., Thebault and Rose (2018), 545-548.

891 ECtHR, *F.G. v. Sweden,* no. 43611/11 (2014), §41.

892 Dissenting opinion of judges Zupančič, Power-Forde and Lemmens in the case of *F.G. v. Sweden,* no. 43611/11 (2014) referring to CJ (GC), joined cases C-71/11 and C-99/11 ***Y and Z*** (2012). See also Reid (2019), 807 fn 114.

reasoning. Instead, it explicitly held that the national authorities should have determined in the *F.G.* case 'the way he manifested his Christian faith in Sweden, and how he intended to manifest it in Iran if the removal order were to be executed', highlighting the relevancy of those findings. The lack of such *ex nunc* assessment prompted the ECtHR to find a violation of the procedural limb of Article 3 of the ECHR in this case.[893]

Similar conclusions were reached in the case of *A.A. v. Switzerland*, concerning an Afghan national who converted from Islam to Christianity. The Swiss authorities had not investigated how the applicant had practised his new faith in Switzerland and how he had planned to practise it in Afghanistan, so the court concluded that the procedural limb of Article 3 of the ECHR was violated. However, it seems that the Strasbourg Court went a little step further in this case than in the previously mentioned judgments. It directly stated that, upon return, the applicant would be forced to modify his social behaviour so as to confine his new faith to a strictly private domain. The court stressed that concealing his faith would force him into living a lie and—possibly—forgoing all contact with other Christians for fear of being discovered. It might constitute unbearable mental pressure. In consequence, asylum authorities cannot impose on the applicant the obligation to be discreet about his faith upon removal. They must rigorously assess how he intends to manifest his religion in the country of destination and what risks such manifestation will entail there.[894]

Thus, it seems that the approach of the Strasbourg Court to a 'discretion' requirement is nuanced. When a foreigner expresses his faith publicly and considers doing so indispensable for his religious identity, he should not be forced to act differently after a removal. When he manifests his faith only in private, he can be expected to continue such behaviour in the country of destination.

Rigorous scrutiny is required from national authorities in regard to asylum seekers' claims that their removal would expose them to a real risk of suffering treatment contrary to Article 3 of the ECHR due to religious beliefs.[895] The competent authorities cannot refuse to examine those risks, even when the asylum seeker himself initially did not intend to invoke his religion as a ground for protection, but subsequently changed his mind.[896] The assessment of the

893 ECtHR (GC), *F.G. v. Sweden,* no. 43611/11 (2016), §§156-158.

894 ECtHR, *A.A. v. Switzerland,* no. 32218/17 (2019), §§52-58.

895 See e.g. ECtHR, *Z.N.S. v. Turkey,* no. 21896/08 (2010), §§46-50; ECtHR, *Singh and Others v. Belgium,* no. 33210/11 (2012), §§103-105; ECtHR, *N.K. v. France,* no. 7974/11 (2013), §45; ECtHR, *T.M. and Others v. Russia,* nos. 31189/15 etc. (2017), §§24-26; ECtHR, *A.A. v. Switzerland,* no. 32218/17 (2019), §53.

896 ECtHR (GC), *F.G. v. Sweden,* no. 43611/11 (2016), §§148-158. For more on the rigorous scrutiny and *ex nunc* assessment, see Chapter 6, Title III, point 3.

applicant's credibility is of great importance.[897] Moreover, with regard to the asylum seeker's conversion, in particular if it occurred *sur place,* the court reiterates that domestic authorities must 'assess whether the applicant's conversion was genuine and had attained a certain level of cogency, seriousness, cohesion and importance (...) before assessing whether the applicant would be at risk of treatment contrary to Articles 2 and 3 of the Convention' when removed to the country of destination.[898]

Article 9 of the ECHR concerning the freedom of thought, conscience and religion can also raise an issue in the context of expulsion or extradition.[899] However, in the case of *Z. and T. v. the United Kingdom* the ECtHR clearly stated that the standard arising from Article 9 of the ECHR applies 'first and foremost' in the Contracting States. In addition, those states have obligations under the 1951 Refugee Convention and accordingly

> protection is offered to those who have a substantiated claim that they will either suffer persecution for, inter alia, religious reasons or will be at real risk of death or serious ill-treatment, and possibly flagrant denial of a fair trial or arbitrary detention, because of their religious affiliation (as for any other reason). Where however an individual claims that on return to his own country he would be impeded in his religious worship in a manner which falls short of those proscribed levels, the Court considers that very limited assistance, if any, can be derived from Article 9 by itself. Otherwise it would be imposing an obligation on Contracting States effectively to act as indirect guarantors of freedom of worship for the rest of world.[900]

Only in exceptional circumstances might the responsibility of a returning state be engaged under Article 9 of the ECHR, i.e. merely in the case of a real risk of a flagrant violation of that Article in the receiving state. In such a situation, however, in the court's view, the return of the person concerned would most probably be in violation of Article 3 of the ECHR as well.[901]

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897 See e.g. ECtHR, *Y. v. Russia,* no. 20113/07 (2008), §§87-88; ECtHR, *N.K. v. France,* no. 7974/11 (2013), §45; ECtHR, *T.M. and Y.A. v. the Netherlands,* no. 209/16, dec. (2016), §§26-29; ECtHR, *H.A. and H.A. v. Norway,* no. 56167/16, dec. (2017), §§34-35.

898 ECtHR (GC), *F.G. v. Sweden,* no. 43611/11 (2016), §144. See also ECtHR, *A.A. v. Switzerland,* no. 32218/17 (2019), §49. Cf. Thebault and Rose (2018), 545-548.

899 See e.g. ECtHR, *Nolan and K. v. Russia,* no. 2512/04 (2009), §§61-75, where the court found a violation of Article 9 of the ECHR in regard to the exclusion from Russia that had been imposed on the applicant in connection with his religious activities.

900 ECtHR, *Z. and T. v. the United Kingdom,* no. 27034/05, dec. (2006), §1.

901 Ibid. Cf. ECtHR, *Razaghi v. Sweden,* no. 64599/01, dec. (2003). For the reluctance of the ECommHR and ECtHR to apply Article 9 in the refoulement context, see also Schabas (2017), 434-435.

The right to religious freedom arising from Article 10(1) of the EU Charter corresponds to the right provided for in Article 9 of the ECHR.[902] In the case of *Y and Z*, the CJ was challenged with the preliminary question of whether any interference with this right constitutes an 'act of persecution' within the meaning of Article 9(1)(a) of the 2004 Qualification Directive.[903] The Luxembourg Court stressed that 'freedom of religion is one of the foundations of a democratic society and is a basic human right'. However, it cannot be concluded that every infringement of this right constitutes an act of persecution. In fact, Article 9(1) of the 2004 Qualification Directive required that 'there must be a 'severe violation' of religious freedom having a significant effect on the person concerned in order for it to be possible for the acts in question to be regarded as acts of persecution'.[904] In particular, an act that violates Article 10(1) of the EU Charter, but 'whose gravity is not equivalent to that of an infringement of the basic human rights from which no derogation can be made by virtue of Article 15(2) of the ECHR' (*inter alia* Articles 2 and 3), cannot be considered an 'act of persecution' within the meaning of Article 9(1) of the 2004 Qualification Directive.[905]

In order to determine which acts are severe enough to constitute persecution, it is 'unnecessary to distinguish acts that interfere with the 'core areas' ('forum internum') of the basic right to freedom of religion, which do not include religious activities in public ('forum externum'), from acts which do not affect those purported 'core areas''. It would be against the broad definition of 'religion' provided for in Article 10(1)(b) of the 2004 Qualification Directive, which encompassed both public and private as well as collective or individual expressions of faith. Thus, serious interferences with the asylum seeker's freedom both to practise his religion in private circles and to live that faith publicly may constitute an act of persecution. The decisive factor is not which aspect of the freedom is affected, but what measures and sanctions will be adopted against the person concerned due to his religion.[906]

902 'Explanations Relating to the Charter of Fundamental Rights' (2007), 21; CJ (GC), joined cases C-71/11 and C-99/11 *Y and Z* (2012), para 56.

903 Also within the meaning of Article 9(1)(a) of the 2011 Qualification Directive, which has the same wording, i.e. 'Acts of persecution within the meaning of article 1 A of the Geneva Convention must be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of' the ECHR.

904 CJ (GC), joined cases C-71/11 and C-99/11 *Y and Z* (2012), paras 57-59.

905 Ibid., para 61. See also, critically in this regard, Leboeuf and Tsourdi (2013), 411; Lehmann (2014), 78-79; Bank (2015), 226.

906 CJ (GC), joined cases C-71/11 and C-99/11 *Y and Z* (2012), paras 62-66. See also, critically in this regard, Taylor (2014) 'The CJEU…', 83, and, praising, Rodrigues Araújo (2014), 554-555. See also CJ, case C-56/17 *Fathi* (2018), paras 78-82.

In regard to a public expression of faith, the Luxembourg Court clarified that

> (g)iven that the concept of 'religion' as defined in Article 10(1)(b) of the Directive also includes participation in formal worship in public, either alone or in community with others, the prohibition of such participation may constitute a sufficiently serious act within the meaning of Article 9(1)(a) of the Directive and, therefore, persecution where, in the country of origin concerned, it gives rise to a genuine risk that the applicant will, inter alia, be prosecuted or subject to inhuman or degrading punishment (...).[907]

In this regard, national asylum authorities must consider whether practising in public a faith that is restricted in the country of origin of the applicant is 'of particular importance to the person concerned in order to preserve his religious identity'. This requirement is maintained 'even if the observance of such a religious practice does not constitute a core element of faith for the religious community concerned'.[908]

Lastly, the CJ considered in the *Y and Z* case whether the asylum seeker's fear of being persecuted is wellfounded when he can avoid persecution by forbearing from certain religious practices in the country of origin. At first, the court held that such a possibility might be important only when the applicant had not been persecuted in the past on account of his religion. Nevertheless, none of the rules arising from the 2004 Qualification Directive concerning the risk assessment gives a ground for domestic authorities to consider the possibility of abstaining from religious practices.[909] The applicant's fear is well-founded, if

> in the light of the applicant's personal circumstances, the competent authorities consider that it may reasonably be thought that, upon his return to his country of origin, he will engage in religious practices which will expose him to a real risk of persecution. In assessing an application for refugee status on an individual basis, those authorities cannot reasonably expect the applicant to abstain from those religious practices.[910]

907 CJ (GC), joined cases C-71/11 and C-99/11 *Y and Z* (2012), para 69.

908 Ibid., para 70. Such public religious practice may include proselytizing, see Berlit, Doerig and Storey (2015), 660. See also Bank (2015), 234, critically on the 'importance' requirement.

909 CJ (GC), joined cases C-71/11 and C-99/11 *Y and Z* (2012), paras 74-78.

910 Ibid., para 80. See also Leboeuf and Tsourdi (2013), 414, claiming that such approach is coherent with 'the humanitarian character' of the 1951 Refugee Convention.

Thus, the fact that an asylum seeker can escape persecution by refraining from certain religious practices 'is, in principle, irrelevant'.[911]

The CJ's ruling in the case of *Y and Z* has occasionally been invoked to contrast it with the ECtHR's jurisprudence on the 'discretion' requirement.[912] However, the juxtaposition of the *Y and Z* judgment with the respective case-law of the Strasbourg Court shows that the views of the two courts in this regard are in fact not so different.[913] The Luxembourg Court did reject the possibility of domestic authorities expecting that the asylum seeker would abstain from certain religious practices to avoid persecution upon return.[914] However, that possibility is excluded only when national authorities reasonably think that the applicant 'will engage in religious practices which will expose him to a real risk of persecution'.[915] Thus, it must be established how the asylum seeker concerned will practise his religion after a removal and whether this manifestation of faith can entail persecution. *Ipso facto,* the CJ–like the ECtHR–finds the manner in which the person concerned manifests his religious beliefs to be relevant in the assessment of the risks upon return.[916] Moreover, the Luxembourg Court stated in the *Y and Z* ruling that subjective elements have to be determined as well, i.e. whether public expression of faith, which is limited or prohibited in the country of origin, is 'of particular importance to the person concerned in order to preserve his religious identity'.[917] Thus, it can be assumed that neither court would oppose the national authorities' expectation that the asylum seeker will continue to be discreet about his faith in a country of destination where private expressions of religion do not entail a real risk of persecution, if he normally does not manifest his faith in public and does not consider participation in public worship to be important for his religious identity.[918] The courts seem to agree as well that asylum seekers cannot be forced to manifest their faith differently

911 CJ (GC), joined cases C-71/11 and C-99/11 *Y and Z* (2012), para 79. See also, in regard to the 1951 Refugee Convention, Hathaway and Foster (2014), 403.

912 See e.g. dissenting opinion of judges Zupančič, Power-Forde and Lemmens in the case of *F.G. v. Sweden,* no. 43611/11 (2014).

913 See also den Heijer (2014), 1231.

914 In fact, the ECtHR provided for a similar rule in the case of *A.A. v. Switzerland,* no. 32218/17 (2019), §55.

915 CJ (GC), joined cases C-71/11 and C-99/11 *Y and Z* (2012), para 80.

916 As later confirmed in CJ, case C-56/17 *Fathi* (2018), para 88.

917 CJ (GC), joined cases C-71/11 and C-99/11 *Y and Z* (2012), para 70.

918 See ECtHR, *A. v. Switzerland,* no. 60342/16 (2017), §44, for the similar understanding of the *Y and Z* ruling. Cf. Leboeuf and Tsourdi (2013), 414, claiming that the CJ rejected 'any requirement of discretion'.

than hitherto (e.g. privately instead of publicly) after a removal in order to avoid ill-treatment.[919]

The Luxembourg Court did not refer in the *Y and Z* judgment to the case-law of the Strasbourg Court, even though it directly stated that Article 10(1) of the EU Charter corresponds to Article 9 of the ECHR.[920] In particular, it did not mention the ECtHR's decision issued in the case of *Z. and T. v. the United Kingdom* that had been at the heart of the AG Bot's opinion.[921] The relation between the *Y and Z* ruling and the above-mentioned decision has been construed diversely in the literature. On the one hand, Costello claimed that the CJ had taken a more protective approach to the interpretation of Article 10(1) of the EU Charter in the context of the principle of non-refoulement, when compared with the ECtHR's findings concerning Article 9 of the ECHR expressed in the *Z. and T. v. the United Kingdom* case. In her opinion, the Luxembourg Court went beyond the flagrant breach approach adopted by the Strasbourg Court, and accordingly the notion of 'persecution' under the EU law must also cover some acts that would not pass the flagrant denial test.[922] Leboeuf and Tsourdi reached similar conclusions. In particular, they claimed that the CJ had proposed a different test in this regard than had the ECtHR that focussed on the consequences of practising religion in a chosen manner in a country of origin.[923] On the other hand, the Luxembourg Court had been criticized for putting too much strain on the ECHR and ECtHR's jurisprudence in the *Y and Z* ruling, while it should be focussing on the 1951 Refugee Convention.[924]

In fact, it is conceivable that the CJ has been influenced by the *Z. and T. v. the United Kingdom* decision, even though it does not explicitly rely on it.[925] The two courts agree that not every interference with the right to freedom of religion is of importance in the refoulement context, but only those that are

919 See also opinion of AG Mengozzi in case C-56/17 *Fathi*, delivered on 25 July 2018, EU:C:2018:621, para 63.

920 Velluti (2014), 94–95, noticed that the lack of any reference to the ECtHR's case-law (and the *Z. and T. v. the United Kingdom* case in particular) in the *Y and Z* ruling was surprising and confirmed the general reluctance of the CJ in this regard.

921 Opinion of AG Bot in joined cases C-71/11 and C-99/11 *Y and Z*, delivered on 19 April 2012, EU:C:2012:224, paras 71–86.

922 Costello (2015) *The Human Rights…*, 203, 205; Costello (2016), 201. Cf. Zalar (2013), 379.

923 Leboeuf and Tsourdi (2013), 409, see also 407, where they claimed that the CJ had reached a different conclusion from the ECtHR on how the right to freedom of religion could be invoked in refoulement cases.

924 See e.g. Lehmann (2014), 72–73, 79, 81, who claimed that, as a result, the CJ had endorsed in the *Y and Z* ruling 'a very narrow, conceptually vague human rights approach to the notion of persecution'. See also Taylor (2014) 'The CJEU…', 84; Bank (2015), 226.

925 See also Rodrigues Araújo (2014), 551–553, who claimed that the *Y and Z* ruling 'reaffirmed key elements' of the ECtHR's case-law about religious freedom. However, she did not analyze the *Z. and T. v. the United Kingdom* case in this regard.

sufficiently severe or constitute a flagrant denial of this right[926] (although the threshold seems to be lower under the CJ's jurisprudence). Moreover, in the *Y and Z* ruling the Luxembourg Court echoes the Strasbourg Court's views on two points. Firstly, when it excluded from the acts of persecution those acts that breach Article 10(1) of the EU Charter, but 'whose gravity is not equivalent to that of an infringement of the basic human rights from which no derogation can be made by virtue of Article 15(2) of the ECHR' (*inter alia* the prohibition of torture or inhuman or degrading treatment arising from Article 3).[927] In the *Z. and T. v. the United Kingdom* the ECtHR held that 'it would be difficult to visualise a case in which a sufficiently flagrant violation of Article 9 would not also involve treatment in violation of Article 3 of the Convention'.[928] The profound influence of the Strasbourg Court in this regard may be also confirmed by the fact that the above-mentioned conclusion of the CJ seems to be at odds with the direct wording of Article 9(1)(a) of the 2004 Qualification Directive.[929] Secondly, the Luxembourg Court stressed in the *Y and Z* ruling that

> a violation of the right to freedom of religion may constitute persecution within the meaning of Article 9(1)(a) of the Directive where an applicant for asylum, as a result of exercising that freedom in his country of origin, runs *a genuine risk of, inter alia, being prosecuted or subject to inhuman or degrading treatment or punishment* by one of the actors referred to in Article 6 of the Directive.[930]

It is difficult not to see here the resemblance to the AG's interpretation of the notion of 'acts of persecution' that was based on the ECtHR's jurisprudence, in particular the *Z. and T. v. the United Kingdom* case.[931] In that decision, the Strasbourg Court concluded that protection against refoulement is offered under the ECHR in case of 'persecution, prosecution, deprivation of liberty or ill-treatment' due to religious beliefs.[932]

926 See also Spijkerboer (2018), 230.

927 CJ (GC), joined cases C-71/11 and C-99/11 *Y and Z* (2012), para 61.

928 ECtHR, *Z. and T. v. the United Kingdom,* no. 27034/05, dec. (2006), §1.

929 Article 9(1)(a) of the 2004 Qualification Directive refers to severe violations of basic human rights, *in particular* non-derogable rights enumerated in Article 15(2) of the ECHR. See also Bank (2015), 226.

930 CJ (GC), joined cases C-71/11 and C-99/11 *Y and Z* (2012), para 67 (emphasis added), see also paras 69, 72. See also CJ, case C-56/17 *Fathi* (2018), para 95. Cf. Leboeuf and Tsourdi (2013), 411.

931 Opinion of AG Bot in joined cases C-71/11 and C-99/11 *Y and Z,* delivered on 19 April 2012, EU:C:2012:224, para 86. See also Taylor (2014) 'The CJEU…', 84, who claimed that the CJ's reasoning in this regard brought in mind the ECtHR's reasoning in the cases *M.E. v. France*, no. 50094/10 (2013) and *N.K. v. France,* no. 7974/11 (2013).

932 ECtHR, *Z. and T. v. the United Kingdom,* no. 27034/05, dec. (2006), §1.

The ambiguity of the *Y and Z* ruling has not been clarified in the subsequent case concerning persecution on grounds of religion. The CJ omitted Articles 3 and 9 of the ECHR in the reasoning of the *Fathi* judgment.[933] The court examined there how asylum seekers should prove their claims based on religious beliefs. Firstly, it concluded that an applicant for international protection 'cannot be required to make statements or produce documents concerning each of the components covered by Article 10(1)(b) of Directive 2011/95 in order to substantiate his religious beliefs'.[934] However, an applicant for international protection must prove his claims concerning conversion. His testimony in this regard constitutes merely the starting point in the process of assessment of the facts and circumstances envisaged under Article 4 of the 2011 Qualification Directive. The credibility of the asylum seeker is of great importance.[935] Moreover, the Luxembourg Court stressed that

> account must be taken, in addition to the individual position and personal circumstances of the applicant, of, inter alia, his religious beliefs and how he developed such beliefs, how he understands and lives his faith or atheism, its connection with the doctrinal, ritual or prescriptive aspects of the religion to which he states he is affiliated or from which he intends to distance himself, his possible role in the transmission of his faith or even a combination of religious factors and factors regarding identity, ethnicity or gender.[936]

The CJ did not see a reason to conclude that methods used by domestic authorities to obtain the above-mentioned information could be inconsistent with the right to respect for private and family life.[937]

Lastly, the Luxembourg Court pointed out in the *Fathi* ruling that the Iranian law on apostasy imposes the death penalty or imprisonment. In the court's view, such a punishment is 'capable, in itself, of constituting an 'act of persecution', within the meaning of Article 9(1) of Directive 2011/95, provided that such penalties are actually applied in the country of origin which adopted such legislation'. These penalties are disproportionate or discriminatory within the meaning of Article 9(2)(c) of the 2011 Qualification Directive.[938] The

933 However, the jurisprudence concerning Article 3 of the ECHR was analysed by AG Mengozzi, see his opinion in case C-56/17 *Fathi,* delivered on 25 July 2018, EU:C:2018:621, paras 62-63.

934 CJ, case C-56/17 *Fathi* (2018), para 82.

935 Ibid., paras 84-87, 90.

936 Ibid., para 88.

937 Ibid., para 89. Cf. CJ (GC), joined cases C-148/13, C-149/13 and C-150/13 *A, B and C* (2014), see also these Chapter and Title, point 2.

938 CJ, case C-56/17 *Fathi* (2018), paras 96-98, 101.

obligation of national asylum authorities to ascertain whether the death penalty or imprisonment is applied in practice draws from the previous case-law of the CJ concerning persecution due to sexual orientation[939] and seems to be coherent–at least in general terms–with the ECtHR's jurisprudence. However, it must be remembered that in the case of *M.E. v. France,* the Strasbourg Court explicitly stated that the three-year imprisonment that had been pronounced on the asylum seeker in absentia for proselytism was not enough to attain the minimum level of severity required under Article 3 of the ECHR.[940] In this regard, the Luxembourg Court seems to take a more protective approach.

2. Sexual Orientation

The removal of a person to a country where homosexual acts are criminalized may raise an issue under Article 3 of the ECHR.[941] However, the respective case-law of the ECtHR is rather scanty and consists mostly of decisions on admissibility or striking out. As shown below, the court is consistent and persistent in maintaining its strict approach to the refoulement of homosexuals.[942]

The mere existence of legislation criminalizing homosexual activities is not sufficient to prevent a removal under Article 3 of the ECHR. The Strasbourg Court requires it to be proved that the authorities in a country of destination actively prosecute or convict persons for homosexual acts.[943] In the case of *M.B. v. the Netherlands,* the court agreed with the Dutch authorities that in Guinea 'an active prosecution policy' was not pursued and that there was no other 'practical enforcement of the legislation criminalising homosexual activities'. It was also not shown that 'this criminalisation had such consequences that the social position of homosexuals was untenable'. The court stressed that it seemed that the respective legislation was not 'systematically applied' in Guinea. Accordingly, the application was considered

939 For more on CJ, joined cases C-199/12, C-200/12 and C-201/12 *X, Y and Z* (2013), see these Chapter and Title, point 2.

940 ECtHR, *M.E. v. France,* no. 50094/10 (2013), §51.

941 All judgments analysed in this section concern gay men, thus, the term 'homosexuals' is used throughout this section. However, the findings of the ECtHR and CJ concerning the refoulement of gay men must be considered applicable to all sexual orientations [although some commentators point out that it is unclear whether intersex asylum seekers are protected under the EU law, see Tsourdi (2015), 254]. For more on the absence of lesbian, bisexual, trans and intersex asylum seekers' cases in national adjudication, see Jansen and Spijkerboer (2011), 19-20, and before the ECtHR, see Mrazova (2019), 198-199.

942 See also Johnson and Falcetta (2018), 178-181, claiming that the court's approach in this regard is 'static' and results rather from politics than law, 'leaving a major gap in the protection offered to sexual minorities by the Convention system'.

943 See, critically in this regard, Johnson and Falcetta (2018), 178-179.

inadmissible.[944] In the case of *F. v. the United Kingdom*, the ECtHR also rejected the asylum seeker's claims that he would be executed or ill-treated in Iran due to his homosexuality. The court concluded that there were no recent, confirmed reports of criminal trials conducted in that country that were based solely on the grounds of being involved in a consensual and private homosexual relationship. In Iran, a high burden of proof was required in such cases. In practice, despite the 'very draconian punishment' provided for homosexual acts there, they were to some extent tolerated.[945] In the case of *I.I.N. v. the Netherlands*, which offers a very similar reasoning, the Strasbourg Court stressed in addition that even though the applicant had been arrested for kissing a man in Iran, there was no indication that any criminal proceedings had been initiated on this account.[946]

In some judgments the ECtHR seems to suggest that it is acceptable to remove a foreigner to a country where he would have to conceal his sexual orientation in order to avoid criminal proceedings. In the cases of *F. v. the United Kingdom* and *I.I.N. v. the Netherlands* the court put emphasis on the fact that private homosexual relationships were not prosecuted in practice and that the Iranian authorities were 'more concerned with public immorality and not what goes on in the privacy of the home'.[947] In the former case, it also stressed that the applicant did not manage to convince the court that he would fall foul of the authorities on the ground of his homosexual activities. His accounts that he had been arrested, detained and ill-treated before fleeing from Iran due to the accusation of being homosexual were not considered credible.[948] Thus, it seems that the court concluded that there was no reason

944 ECtHR, *M.B. v. the Netherlands*, no. 63890/16, dec. (2017), §36. See also ECtHR, *A.N. v. France*, no. 12956/15, dec. (2016), §41; ECtHR, *I.K. v. Switzerland*, no. 21417/17, dec. (2017), §25; ECtHR, *B and C v. Switzerland*, nos. 889/19 and 43987/16 (2020), §59. In the latter case the court emphasized the consistency of its views with the CJ's jurisprudence.

945 ECtHR, *F. v. the United Kingdom*, no. 17341/03, dec. (2004), §1. See also ECtHR, *M.E. v. Sweden*, no. 71398/12 (2014), §87 (later struck out of the list of cases by the Grand Chamber).

946 ECtHR, *I.I.N. v. Netherlands*, no. 2035/04, dec. (2004). See also ECtHR, *I.K. v. Switzerland*, no. 21417/17, dec. (2017), §28.

947 ECtHR, *F. v. the United Kingdom*, no. 17341/03, dec. (2004), §1; ECtHR, *I.I.N. v. the Netherlands*, no. 2035/04, dec. (2004).

948 ECtHR, *F. v. the United Kingdom*, no. 17341/03, dec. (2004), §1. See also Ducoulombier (2015), 210–211, finding that the approaches of the ECtHR to the discreet life of homosexuals in a country of origin expressed in this case and in the case of *M.K.N. v. Sweden*, no. 72413/10 (2013) were contradictory: in the first case the applicant could be removed because he could live discreetly in Iran, in the second case the fact that the applicant had lived and would live after removal in such a manner in Iraq undermined his credibility. She concluded that the ECtHR 'does not seem particularly sympathetic to the difficulty for migrants to be forthcoming about their sexual orientation'.

to believe that the applicant would be of interest to national authorities after the removal and that it might be assumed that the situation would stay that way as long as he was discreet about his sexual orientation.[949]

The possibility of the concealment of a sexual orientation after a return was also taken into account in the case of *M.E. v. Sweden,* which concerned a Libyan asylum seeker who had married another man in Sweden. The applicant's family in Libya was informed about the marriage but the spouse was presented as a woman. The Strasbourg Court concluded that 'the applicant has made an active choice to live discreetly and not reveal his sexual orientation to his family in Libya—not because of fear of persecution but rather due to private considerations'. Next, the court found that the applicant had a passport, so he did not have to contact Libyan authorities. Moreover, his return would be temporary (for approximately four months)—only until the Swedish authorities granted his application for the family reunion.[950] The court stressed in this regard that

> this must be considered a reasonably short period of time and, even if the applicant would have to be discreet about his private life during this time, it would not require him to conceal or suppress an important part of his identity permanently or for any longer period of time. Thus, it cannot by itself be sufficient to reach the threshold of Article 3 of the Convention.[951]

Thus, the expulsion of the applicant to Libya did not give rise to a violation of Article 3 of the ECHR. Judge Power-Forde strongly dissented. In her view, the fact that the applicant could avoid prosecution by being discreet about his homosexuality was not a factor that should be taken into account. Referring to the national jurisprudence, UNHCR guidelines and CJ's judgment in the case of *X, Y and Z* (examined below), the dissenting judge concluded that the majority's decision 'does not 'fit' the current state of international and European law' in this regard. In particular, the 'duration test' introduced in the case of *M.E. v. Sweden* is in her view unknown in the comparative European law.[952]

949 See also, for the same interpretation of the *F.* and *I.I.N.* decisions, dissenting opinion of judge Power-Forde in ECtHR, *M.E. v. Sweden,* no. 71398/12 (2014). See also Costello (2016), 199; Bianku (2016), 67. Cf. den Heijer (2014), 1229-1230, who argues—with reference to those decisions but relying mostly on the jurisprudence concerning the concealment of religious beliefs—that the Strasbourg Court 'does not require discretion, but examines, objectively, how an applicant will behave upon return'. For the 'discretion' requirement, see also these Chapter and Title, point 1.

950 ECtHR, *M.E. v. Sweden,* no. 71398/12 (2014), §§86, 88, 90 (later struck out of the list of cases by the Grand Chamber).

951 Ibid., §88.

952 Dissenting opinion of judge Power-Forde in ECtHR, *M.E. v. Sweden,* no. 71398/12 (2014).

The *M.E. v. Sweden* judgment was understood by most as the ECtHR's consent for expulsions of homosexual foreigners to countries where they would not be ill-treated as long as they hid their sexual orientation.[953] However, it may be also derived from this ruling that a permanent or long-lasting need to conceal a sexual orientation may be found unacceptable under Article 3 of the ECHR.[954] This matter could have been clarified by the Grand Chamber, but the *M.E. v. Sweden* case was struck out of its list of cases as the applicant had eventually been granted a residence permit in Sweden.[955] However, more recently, in the decision on admissibility issued in the case of *I.K. v. Switzerland,* the Strasbourg Court expressly admitted that sexual orientation is a fundamental aspect of human identity and, consequently, asylum seekers should not be expected to conceal it after a removal in order to avoid persecution.[956] This line of reasoning was followed in the *B and C v. Switzerland* judgment.[957]

The ECtHR does not offer much guidance on how to assess the claims of homosexual foreigners that their removal would be against the principle of non-refoulement arising from Article 3 of the ECHR. It notices that questions relating to the person's sexuality are of a sensitive nature and that it is difficult to substantiate all the facts in those cases.[958] Thus, the credibility of homosexual applicants is of utmost importance. It may be undermined by, *inter alia,* contradictory statements, changes in testimony or the delayed submission of evidence and information.[959] Late disclosure of a homosexual orientation during national proceedings–without a reasonable explanation for the delay–may also contribute to the conclusion that this information is not credible.[960]

953 See e.g. Spijkerboer (2018), 227; Johnson and Falcetta (2018), 180; Mrazova (2019), 201; Reid (2019), 807.

954 See also de Weck (2017), 397.

955 ECtHR (GC), *M.E. v. Sweden,* no. 71398/12 (2015), §§34-38. See also, critically in this regard, Mrazova (2019), 201.

956 ECtHR, *I.K. v. Switzerland,* no. 21417/17, dec. (2017), §24.

957 ECtHR, *B and C v. Switzerland,* nos. 889/19 and 43987/16 (2020), §57.

958 ECtHR, *A.N. v. France,* no. 12956/15, dec. (2016), §44; ECtHR, *I.K. v. Switzerland,* no. 21417/17, dec. (2017), §28.

959 See e.g. ECtHR, *F. v. the United Kingdom,* no. 17341/03, dec. (2004), §1; ECtHR, *M.K.N. v. Sweden,* no. 72413/10 (2013), §43; ECtHR, *M.E. v. Sweden,* no. 71398/12 (2014), §84 (later struck out of the list of cases by the Grand Chamber); ECtHR, *H.A. and H.A. v. Norway,* no. 56167/16, dec. (2017), §§35-36.

960 See e.g. ECtHR, *M.K.N. v. Sweden,* no. 72413/10 (2013), §43; ECtHR, *M.E. v. Sweden,* no. 71398/12 (2014), §84 (later struck out of the list of cases by the Grand Chamber). See also, critically, Mrazova (2019), 193-195.

In the Strasbourg Court's jurisprudence concerning removals of homosexual asylum seekers it is discernible that the court relies heavily on the credibility assessment conducted by national authorities.[961] In its opinion, they are in a better position to carry out this examination because they have had the opportunity to see the applicant (and witnesses), to hear him and to evaluate his behaviour.[962] When it is concluded that the domestic authorities took into account all the information and evidence given by the applicant and thoroughly assessed the general situation in the country of destination and the personal circumstances of the applicant, the court normally does not see a reason to depart from the national authorities' findings.[963] However, when an assessment conducted on the domestic level is not sufficient, the court may find the procedural limb of Article 3 of the ECHR to be breached. In the case of *B and C v. Switzerland*, the court noticed that 'widespread homophobia and discrimination against LGBTI persons' by non-state actors had been reported in Gambia. Despite this, 'the domestic courts did not sufficiently assess the risks of ill-treatment for the first applicant as a homosexual person in the Gambia and the availability of State protection against ill-treatment emanating from non-State actors'. Accordingly, the court decided 'that the first applicant's deportation to the Gambia, without a fresh assessment of these aspects, would give rise to a violation of Article 3 of the Convention'.[964]

The *B and C v. Switzerland* judgment must be highlighted as it is the only refoulement case concerning asylum-seeking homosexuals in which the court found a violation of Article 3 of the ECHR. Apart from that case, inadmissibility decisions prevail. In some cases, the respective legislation was considered not to be implemented in practice. In others, the credibility of the applicants was undermined. Moreover, the Strasbourg Court suggested that it accepts the national authorities' requirement that asylum seekers should conceal their sexual orientation upon removal to be safe in the country of origin. However, the court's approach to the 'discretion' requirement is in fact uncertain: while the requirement might have been implicitly recognized before, nowadays it seems to be—to say the least—questioned.

961 See also Begazo (2019), 178.

962 ECtHR, *M.B. v. the Netherlands*, no. 63890/16, dec. (2017), §35. See also ECtHR, *F. v. the United Kingdom*, no. 17341/03, dec. (2004), §1; ECtHR, *A.N. v. France*, no. 12956/15, dec. (2016), §43; ECtHR, *I.K. v. Switzerland*, no. 21417/17, dec. (2017), §27; ECtHR, *B and C v. Switzerland*, nos. 889/19 and 43987/16 (2020), §58.

963 See e.g. ECtHR, *M.B. v. the Netherlands*, no. 63890/16, dec. (2017), §§36-38; ECtHR, *A.N. v. France*, no. 12956/15, dec. (2016), §§43-44; ECtHR, *I.K. v. Switzerland*, no. 21417/17, dec. (2017), §§27-28.

964 ECtHR, *B and C v. Switzerland*, nos. 889/19 and 43987/16 (2020), §§61-63.

The CJ's jurisprudence appears to be more favourable for asylum seekers fearing prosecution in their country of origin on the ground of their sexual orientation. In the case of *X, Y and Z*, the court first clarified that homosexuals may be regarded as forming 'a particular social group' under the definitions of a 'refugee' provided for in Article 1(A)(2) of the 1951 Refugee Convention and Article 2(c) of the 2004 Qualification Directive. Pursuant to Article 10(1)(d) of the 2004 Qualification Directive,[965] two conditions must be met for a group to be considered a 'particular social group'[966] and both requirements are satisfied in the case of homosexuals whose activities may be criminalized in their country of origin. The court considered sexual orientation to be 'a characteristic so fundamental' to a person's 'identity that he should not be forced to renounce it' and pointed out that 'the existence of criminal laws (...) which specifically target homosexuals, supports a finding that those persons form a separate group which is perceived by the surrounding society as being different'.[967]

Next, the Luxembourg Court explained that 'not all violations of fundamental rights suffered by a homosexual asylum seeker' would necessarily reach the demanded level of seriousness. Pursuant to Article 9(1)(a) of the 2004 Qualification Directive, acts of persecution within the meaning of Article 1(A) of the 1951 Refugee Convention must 'be *sufficiently serious* by their nature or repetition as to constitute a *severe* violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2)' of the ECHR.[968] Oddly, the Luxembourg Court enumerated only two fundamental rights that in its view are 'specifically linked to the sexual orientation' of the asylum seekers: the right to private and family life (Article 8 of the ECHR and Article 7 of the EU Charter) and the prohibition of discrimination (Article 14 of the ECHR and Article 21(1) of the EU Charter).[969] Those rights are derogable,

965 See also the very similar wording of Article 10(1)(d) of the 2011 Qualification Directive.

966 See also CJ, case C-652/16 *Ahmedbekova* (2018), para 89. Cf. Begazo (2019), 172-173, arguing that those criteria should be applied alternatively rather than cumulatively. See also ICommJ (2014), 11-12; Tsourdi (2015), 253-254; Battjes (2016) 'Piecemeal Engineering...', 215-216.

967 CJ, joined cases C-199/12, C-200/12 and C-201/12 *X, Y and Z* (2013), paras 46-48. See also CJ, case C-473/16 *F.* (2018), para 30. See also den Heijer (2014), 1223-1224, explaining that the CJ did not mean to suggest that the existence of the law criminalizing homosexual acts is a condition to be met under the 'particular social group' definition.

968 Emphasis added. Article 9(1)(a) of the 2011 Qualification Directive has the same wording.

969 See, critically on this narrow understanding of the rights that are 'specifically linked to the sexual orientation', ICommJ (2014), 13-14. Article 1 of the EU Charter may be considered to have been added later to this list, see CJ (GC), joined cases C-148/13, C-149/13 and C-150/13 *A, B and C* (2014), para 72. However, in CJ, case C-473/16 *F* (2018), para 70, the CJ decided not to interpret Article 4 of the 2011 Qualification Directive in the light of Article 1 of the EU Charter. See also Ferri (2018), 882.

thus, the mere existence of legislation criminalizing homosexual acts is not enough to constitute, alone, 'persecution' within the meaning of Article 9(1) of the 2004 Qualification Directive.[970] However,

> the term of imprisonment which accompanies a legislative provision which (...) punishes homosexual acts is capable, in itself of constituting an act of persecution within the meaning of Article 9(1) of the Directive, provided that it is actually applied in the country of origin which adopted such legislation.[971]

Thus, the CJ–like the ECtHR–requires it to be shown that the laws criminalizing homosexual acts are enforced in practice in the asylum seeker's country of origin. However, the Luxembourg Court does not consider all criminalizing legislations equally important in this regard. Only legislation that entails the term of imprisonment is mentioned by the court as violating fundamental rights in a manner that is sufficiently serious.[972] In the court's opinion, such punishment breaches Article 8 of the ECHR, to which Article 7 of the EU Charter corresponds, and constitutes a sanction which is 'disproportionate or discriminatory within the meaning of Article 9(2)(c) of the Directive'.[973]

Lastly, the Luxembourg Court approached the matter of avoiding persecution by living discreetly and stressed that

> requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it.[974]

Moreover, the fact that the asylum seeker 'could avoid the risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account in that respect'. Therefore, national asylum authorities cannot reasonably expect that the applicant for international protection

970 CJ, joined cases C-199/12, C-200/12 and C-201/12 *X, Y and Z* (2013), paras 51-55. For critical comments, see e.g. ICommJ (2014), 13-17; Edwards (2014), 4; Ducoulombier (2015), 212; Tsourdi (2015), 248; Kogovšek Šalamon (2017), 212; Khan (2019), 315-323. See also separate opinion of judge De Gaetano in ECtHR, *M.E. v. Sweden,* no. 71398/12 (2014), §4.

971 CJ, joined cases C-199/12, C-200/12 and C-201/12 *X, Y and Z* (2013), para 56.

972 See Kogovšek Šalamon (2017), 212, arguing that also a death penalty for homosexual acts must be considered sufficiently serious punishment for this purpose.

973 CJ, joined cases C-199/12, C-200/12 and C-201/12 *X, Y and Z* (2013), para 57.

974 Ibid., para 70. See, similarly, UNHCR (2008), 8, 12-13; Hathaway and Foster (2014), 445. See also Edwards (2014), 5-6, praising this approach, and Spijkerboer (2018), 231-232, claiming that the statements of the CJ in this regard were inconclusive and made only a small difference in the following national practices. Cf. ECRE (2017) 'Preliminary Deference?', 28-30.

would conceal his sexual orientation or exercise reserve in its expression to avoid being persecuted after the return to his country of origin.[975]

The *X, Y and Z* ruling by the CJ only touched upon the scrutiny required in proceedings concerning homosexuals seeking asylum.[976] The court held that the national authorities must examine the criminalizing legislation and the manner in which it is implemented in the asylum seeker's country of origin. In particular, they must establish whether in practice homosexuals are imprisoned there.[977] More detailed guidance on the credibility assessment, permissible evidence and methods used by the authorities to determine the sexual orientation of an applicant was given in the *A, B and C* and *F* judgments.

In the case of *A, B and C,* the Grand Chamber stated at first that the applicants' declarations concerning their sexual orientation were 'merely the starting point in the process of assessment of the facts and circumstances envisaged under Article 4 of Directive 2004/83'. Asylum seekers are in fact 'best placed to provide evidence to establish' their own sexual orientation, but national authorities should cooperate with them in this effort.[978] The methods used by authorities to assess the statements and proofs submitted in asylum proceedings must be in accordance not only with the secondary asylum law but also with the EU Charter, in particular Articles 1 (right to respect for human dignity) and 7 (right to respect for private and family life). Accordingly, those methods have to be adapted to 'the specific features of each category of application for asylum' so as to guarantee the observance of the rights guaranteed in the EU Charter.[979]

The CJ excluded almost all methods invoked in the preliminary questions, but it did not explain what probative measures can be used.[980] First, in regard to the questioning based on stereotypes concerning homosexuals (e.g. questions about LGBTI organizations) the court stated that it may be 'a useful

975 CJ, joined cases C-199/12, C-200/12 and C-201/12 *X, Y and Z* (2013), paras 75-76. See also CJ, case C-563/10 *Khavand,* order (2011).

976 See CJ, joined cases C-199/12, C-200/12 and C-201/12 *X, Y and Z* (2013), para 73, where the court called attention to the 'vigilance and care' requirement. For more on the required scrutiny, see Chapter 6, Title III.

977 CJ, joined cases C-199/12, C-200/12 and C-201/12 *X, Y and Z* (2013), paras 58-59.

978 See Dunne (2015), 414-415, noticing that the rejection of the self-identification argument was considered 'the most controversial aspect' of the CJ's ruling, but also seeing compelling reasons (legal and policy) to support the Grand Chamber's conclusions in this regard.

979 CJ (GC), joined cases C-148/13, C-149/13 and C-150/13 *A, B and C* (2014), paras 49-56. See also CJ, case C-473/16 *F.* (2018), paras 28-29, 35-36, 49-50, with regard to the 2011 Qualification Directive. See also Costello (2015) *The Human Rights…*, 206, where she opined that the *A, B and C* case 'is one of the few cases where the impact of the Charter is palpable'.

980 See also Dunne (2015), 421; Gomez (2016), 485-486; Mrazova (2019), 191. For an analysis of the methods that arguably can be used after the exclusions made by the CJ in the A, B and C ruling, see Berlit, Doerig and Storey (2015), 661-665; Gomez (2016), 489-492.

element at the disposal of competent authorities' but it should not be the sole method used to assess the application for international protection, because 'it does not allow those authorities to take account of the individual situation and personal circumstances of the applicant for asylum concerned'. The fact that the applicant is unable to answer those questions cannot, in itself, lead to the conclusion that he is not credible.[981] Second, the Luxembourg Court clearly excluded the possibility of asking questions about the details of the sexual practices of the concerned asylum seeker as such questions are contrary to the fundamental rights provided for in the EU Charter, in particular in Article 7. For the same reason, asylum authorities can neither accept nor demand as proof the performance of homosexual acts, 'the submission of the applicants to possible 'tests' in order to demonstrate their homosexuality or even the production by those applicants of evidence such as films of their intimate acts'. Such evidence 'of its nature' infringes the human dignity guaranteed under Article 1 of the EU Charter.[982]

Lastly, the CJ addressed the states' practice of finding a lack of credibility of applicants for international protection because they did not express the fear of persecution due to their sexual orientation at the very beginning of the asylum proceedings.[983] It highlighted that

> having regard to the sensitive nature of questions relating to a person's personal identity and, in particular, his sexuality, it cannot be concluded that the declared sexuality lacks credibility simply because, due to his reticence in revealing intimate aspects of his life, that person did not declare his homosexuality at the outset.[984]

The applicant cannot be considered not credible 'merely because he did not reveal his sexual orientation on the first occasion that he was given to set out the grounds of persecution'.[985]

The evidentiary difficulties in cases concerning homosexual asylum seekers have been further examined by the Luxembourg Court in the case of *F.* Firstly, the CJ pointed out that a credibility assessment of the applicant is

981 CJ (GC), joined cases C-148/13, C-149/13 and C-150/13 *A, B and C* (2014), paras 60-63. See also, critically on the court's partial acceptance for questioning based on stereotypes, see Gomez (2016), 495-496. See also Kogovšek Šalamon (2017), 218.

982 CJ (GC), joined cases C-148/13, C-149/13 and C-150/13 *A, B and C* (2014), paras 64-66. See also, praising such approach, Kogovšek Šalamon (2017), 217-218.

983 For the practice in this regard before and after the *A, B and C* judgment, see ECRE (2017) 'Preliminary Deference?', 39-41, 48-50. See also Dunne (2015), 416.

984 CJ (GC), joined cases C-148/13, C-149/13 and C-150/13 *A, B and C* (2014), para 69.

985 Ibid., paras 70-71. See also praising, Dunne (2015), 417.

not always needed in asylum proceedings.[986] Next, it addressed the crux of the case. The referring court was not sure whether expert reports may be relied on in asylum proceedings related to the sexual orientation of the applicant. The Luxembourg Court found that it is conceivable that certain forms of such reports 'may prove useful' and may be 'prepared without prejudicing the fundamental rights' of the concerned asylum seeker. For instance, national authorities may need to seek such expertise in order to obtain more detailed relevant information about the situation in the country of origin of the applicant.[987] However, the CJ also stipulated that relying on expert reports is acceptable

> provided that the procedures for such a report are consistent with the fundamental rights guaranteed by the Charter, that that authority and those courts or tribunals do not base their decision solely on the conclusions of the expert's report and that they are not bound by those conclusions when assessing the applicant's statements relating to his sexual orientation.[988]

Thus, the court again highlighted that the way in which asylum proceedings are conducted must be consistent with the fundamental rights, in particular–in the context of an asylum application based on the fear of persecution due to sexual orientation–the right to respect for human dignity and the right to respect for private and family.[989] Accordingly, the Luxembourg Court excluded the possibility of commissioning and using–in order to provide an indication of the applicant's sexual orientation–psychologists' expert reports based on projective personality tests.[990]

Neither in the *A, B and C* judgment nor in the *F* ruling does the CJ refer to the ECHR. That is not particularly surprising taking into account that the matters adjudicated on in those cases are inherently procedural and the ECtHR's jurisprudence on the refoulement of homosexuals does not offer much guidance in this regard. In the case of *X, Y and Z*, the Luxembourg Court, curiously, relies only on Articles 8 and 14 of the ECHR as identifying 'the fundamental

986 CJ, case C-473/16 *F* (2018), paras 31-33, regarding Article 4(5) of the 2011 Qualification Directive. See also CJ (GC), joined cases C-148/13, C-149/13 and C-150/13 *A, B and C* (2014), paras 51, 58. See also Ferreira and Venturi (2018), appreciating the emphasis that the CJ put on the overall credibility of asylum seekers in the *F* case, but also regretting that the court did not rely more extensively on the applicants' sexual self-identification and that it did not refer to the principle of the benefit of the doubt in this regard.

987 CJ, case C-473/16 *F* (2018), paras 37-38.

988 Ibid., para 46.

989 See also ibid., paras 35-36.

990 Ibid., paras 47-71. See Mrazova (2019), 193, noticing that other psychiatric and psychological tests may be permissible. See also, critically, Ferri (2018), 881-882.

rights specifically linked to the sexual orientation'. Article 3 of the ECHR was omitted, arguably to avoid comparisons with the respective jurisprudence of the Strasbourg Court that was—especially at that time—considered to diverge from the CJ's approach to the 'discretion' requirement.[991] However, nowadays, the contradiction in this regard is no longer evident.[992] The ECtHR's judgment in the *M.E. v. Sweden* case can be understood as invoking that a permanent or long-lasting need to conceal a sexual orientation may be found unacceptable under Article 3 of the ECHR. More importantly, in the recent decision issued in the case of *I.K. v. Switzerland,* the Strasbourg Court expressly stated that asylum seekers should not be expected to conceal their sexual orientation after a removal.[993] This line of reasoning was followed in the *B and C v. Switzerland* judgment.[994]

Some authors point out that the approach of the two courts to the late disclosure of sexual orientation is also incompatible.[995] However, it must be remembered that the Luxembourg Court held that an asylum seeker cannot be considered to lack the credibility '*merely* because he did not reveal his sexual orientation on the first occasion that he was given to set out the grounds of persecution'.[996] Thus, the CJ did not entirely exclude the late disclosure of sexual orientation as a factor to be considered within the credibility assessment. It only stated that it cannot be the sole reason for finding the foreigner not credible. Meanwhile, in neither of the examined judgments or decisions did the ECtHR conclude that the applicant lacked credibility solely because he had revealed his orientation later in the proceedings; other factors were also taken into account by the court in this regard.[997]

Interestingly, the Strasbourg and Luxembourg Courts do agree that the legislation criminalizing homosexual acts must be actively enforced to prevent a removal,[998] even though diverse approaches are identified in this regard

991 See e.g. den Heijer (2014), 1232. Cf. Dunne (2015), 412, pointing out that the CJ, in the *X, Y and Z* ruling, followed 'a growing judicial trend across the EU' in this regard, arguably referring to national courts' jurisprudence only.

992 Cf. Mrazova (2019), 202-204.

993 ECtHR, *I.K. v. Switzerland,* no. 21417/17, dec. (2017), §24.

994 ECtHR, *B and C v. Switzerland,* nos. 889/19 and 43987/16 (2020), §57.

995 See e.g. Dunne (2015), 422; Mrazova (2019), 195, 202-204.

996 CJ (GC), joined cases C-148/13, C-149/13 and C-150/13 *A, B and C* (2014), para 71 (emphasis added).

997 See e.g. ECtHR, *M.K.N. v. Sweden,* no. 72413/10 (2013), §43; ECtHR, *M.E. v. Sweden,* no. 71398/12 (2014), §84 (later struck out of the list of cases by the Grand Chamber). See also Jansen (2013), 18. Cf. ECtHR (GC), *F.G. v. Sweden,* no. 43611/11 (2016), §124, where the ECtHR refers to the CJ's views on the late disclosure expressed in the *A, B and C* case.

998 See ECtHR, *B and C v. Switzerland,* nos. 889/19 and 43987/16 (2020), §59, where the ECtHR emphasized the consistency of the views of the two courts in this regard.

among the states and in the literature[999]. The CJ stressed, relying on the derogability of the rights provided for in Article 8 of the ECHR and Article 7 of the EU Charter, that 'the mere existence of legislation criminalising homosexual acts cannot be regarded as an act *affecting the applicant in a manner so significant that it reaches the level of seriousness* necessary for a finding that it constitutes persecution within the meaning of Article 9(1) of the Directive'.[1000] The ECtHR referred to this conclusion in the Chamber's judgment delivered in the case of *M.E. v. Sweden,*[1001] but judge De Gaetano stated an opposition to this mention in the separate opinion. In his view, such reference

> could be seen as somehow undermining the standards set by the Court as far back as the 1980's in connection with the criminalisation of homosexual acts and the resulting violation of Article 8 (...) and the consequent irrelevance, for the purpose of a violation of fundamental human rights, of whether or not such laws are in fact applied or applied sporadically.[1002]

Judge De Gaetano alluded to the landmark cases of *Dudgeon v. the United Kingdom*[1003] and *Norris v. Ireland* in which the Strasbourg Court found that the mere existence of legislation criminalizing homosexual acts in the Contracting States violated the applicants' right to respect for private life under Article 8 of the ECHR. The court highlighted there 'the detrimental effects which *the very existence of the legislative provisions* in question can have on the life of a person of homosexual orientation like the applicant'.[1004] At first sight, the tension between those findings and the approach of the Strasbourg Court to the refoulement of homosexuals is apparent.[1005] However, in the case of *F. v. the United Kingdom* the court addressed this discrepancy. The ECtHR explained that: 'On a purely pragmatic basis, it cannot be required that an expelling

999 See e.g. Jansen (2013), 7; Chelvan (2013), 5-8; Taylor (2014) 'The CJEU...', 86; Edwards (2014), 2-4; den Heijer (2014), 1224; ECRE (2017) 'Preliminary Deference?', 27-28. See, in particular Khan (2019), 316-323, arguing against the 'enforcement approach'. See also UNHCR (2008), 10-11. Cf. Drywood (2014), 1116-1117, who claimed that the CJ in the *X, Y and Z* case had to find a middle ground between two needs: to observe the 1951 Refugee Convention and not to affect national asylum systems in an unpopular way. In her view, it succeeded by applying the 'enforced laws' requirement.

1000 CJ, joined cases C-199/12, C-200/12 and C-201/12 *X, Y and Z* (2013), paras 54-55 (emphasis added).

1001 ECtHR, *M.E. v. Sweden,* no. 71398/12 (2014), §50 (later struck out of the list of cases by the Grand Chamber).

1002 Separate opinion of judge De Gaetano in ECtHR, *M.E. v. Sweden,* no. 71398/12 (2014), §4.

1003 ECtHR (Plenary), *Dudgeon v. the United Kingdom,* no. 7525/76 (1981).

1004 ECtHR (Plenary), *Norris v. Ireland,* no. 10581/83 (1988), §46 (emphasis added).

1005 See also Spijkerboer (2018), 233-234.

Contracting State only return an alien to a country which is in full and effective enforcement of all the rights and freedoms set out in the Convention'. The responsibility of the states–in the context of expulsion–arising from Articles 2 or 3 of the ECHR, which are of 'fundamental importance' and must be rendered effective in practice, differs from the responsibility placed on states under Article 8 of the ECHR, which guarantees less essential rights. Thus, the latter provision may be found to be violated by the removal to a country where homosexual acts are criminalized only when it would be 'established that the applicant's moral integrity would be *substantially affected to a degree* falling within the scope of Article 8'.[1006] However, the threshold in this regard is set extremely high, as no such case has been identified.

Therefore, it must be concluded that the CJ–with its reliance in the case of *X, Y and Z* on the derogability of the rights guaranteed under Article 8 of the ECHR–endorses the ECtHR's jurisprudence on removals of homosexuals rather than draws from the standards established in the *Dudgeon* and *Norris* cases. In this regard, it seems to be following the AG Sharpston's view that the aim of the secondary asylum law is not to 'export' the standards arising from the ECHR (including the ones established in the *Dudgeon* and *Norris* cases to which the AG refers directly) and the EU Charter, but to give protection 'to those individuals who may be exposed to a serious denial or systemic infringement of their most fundamental rights, and whose life has become intolerable in their country of origin'.[1007] The analysis of the European asylum courts' jurisprudence clearly shows that living in a country where legislation criminalizing homosexual acts exists but is not enforced in practice is considered tolerable enough to allow for the removal of a homosexual asylum seeker there.

3. General Situation of Violence

The general situation of violence in a state where a foreigner was or is going to be deported is rigorously assessed by the ECtHR.[1008] As early as the case of *Vilvarajah and Others v. the United Kingdom*, the Strasbourg Court stressed that refoulement cases demand a thorough examination of the foreseeable

1006 ECtHR, *F. v. the United Kingdom*, no. 17341/03, dec. (2004), §3 (emphasis added). See also, critically, Jansen (2013), 9.

1007 Opinion of AG Sharpston in joined cases C-199/12, C-200/12 and C-201/12 *X, Y and Z* delivered on 13 July 2013, EU:C:2013:474, para 41, adding in fn 33 that: 'Such an export might indeed be regarded as a form of human rights or cultural imperialism'. Cf. Chelvan (2013), 8.

1008 See e.g. ECtHR, *NA. v. the United Kingdom*, no. 25904/07 (2008), §113; ECtHR, *S.A. v. the Netherlands*, no. 49773/15 (2020), §62.

consequences of the removal in the light of the general situation in the destination country and the applicants' personal circumstances.[1009] However, it also concluded there that even though the situation in Sri Lanka had still been 'unsettled' at the time of the expulsion, the applicants' position had not been 'any worse than the generality of other members of the Tamil community or other young male Tamils who were returning to their country'. The court did not find in the applicants' cases any 'special distinguishing features' that would have enabled the national authorities to foresee their ill-treatment after the return.[1010] The approach taken by the ECtHR in this case has been understood as excluding the possibility that a grave security and human rights situation in a destination country in itself, thus irrespective of any individual characteristics of a returnee, may constitute a real risk that prevents a foreigner's removal under the ECHR.[1011]

The scope of individualization required under Article 3 of the ECHR was discussed again in the case of *Salah Sheekh v. the Netherlands*.[1012] The court decided that the applicant and his family had been targeted in Somalia due to their affiliation to the Ashraf minority and for that reason they had had no means of protection. It highlighted that 'the applicant cannot be required to establish the existence of further special distinguishing features concerning him personally in order to show that he was, and continues to be, personally at risk'. In the court's opinion, requiring such features from the applicant who has already proved that he belongs to the minority that was at risk may render the protection offered by Article 3 of the ECHR illusory.[1013] Thus, as was summarized afterwards, the protection offered by this provision may exceptionally

1009 ECtHR, *Vilvarajah and Others v. the United Kingdom*, nos. 13163/87 etc. (1991), §108. See also ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), §117. General situation in a country of destination must be assessed *proprio motu*, see e.g. ECtHR, *M.A. v. Belgium*, no. 19656/18 (2020), §§82, 89–91.

1010 ECtHR, *Vilvarajah and Others v. the United Kingdom*, nos. 13163/87 etc. (1991), §§111–112.

1011 See e.g. Weissbrodt and Hortreiter (1999), 35; Lambert (2013), 229; Baumgärtel (2019), 15. See also ECtHR, *Y. v. Russia*, no. 20113/07 (2008), §79, where the court stated with reference to the *Vilvarajah* case: 'the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3'. Cf. ECtHR, *Ahmed v. Austria*, no. 25964/94 (1996), §§44–47, and Alleweldt (1993), 369, with regard to ECommHR's decisions; Vedsted-Hansen (2010), 276–277.

1012 In the literature, the opinions about the relation between the *Vilvarajah* and *Salah Sheekh* cases varied. While some commentators found the *Salah Sheekh* case to be 'a shift' in the court's jurisprudence, others considered it only an 'adoption' (rather than a 'change') of its case-law [see e.g. Hurwitz (2009), 193; Vedsted-Hansen (2010), 278; Lambert (2013), 229; Costello (2015) *The Human Rights…*, 194].

1013 ECtHR, *Salah Sheekh v. the Netherlands*, no. 1948/04 (2007), §148. See also Hurwitz (2009), 193, suggesting that this 'jurisprudential shift' might have been influenced by the adoption of the 2004 Qualification Directive, in particular Article 15.

enter into play when a foreigner shows that there are serious reasons to believe that he is a member of a particular group that is systematically exposed to a practice of ill-treatment in his country of return.[1014]

Despite being landmark cases, the *Vilvarajah* and *Salah Sheekh* judgments did not provide a clear and unequivocal answer to the question of whether under the ECHR a general situation of violence, in itself, may prevent a foreigner's removal.[1015] In fact, the two judgments prompted contradicting interpretations from domestic authorities and academics. Only the case of *NA. v. the United Kingdom* brought in a needed clarification. The Strasbourg Court stated there that 'a general situation of violence will not normally in itself entail a violation of Article 3 in the event of an expulsion'.[1016] Nevertheless, the ECtHR also stressed that it

> has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.[1017]

Thus, only a severe enough general situation of violence can bring about a prohibition of refoulement arising from the ECHR. In the circumstances of the *NA.* case, the situation in Sri Lanka was not considered sufficiently grave.

In the case of *Sufi and Elmi v. the United Kingdom,* the ECtHR pointed out that it is irrelevant whether the risk of being subjected to a treatment contrary to Article 3 of the ECHR due to a removal 'emanates from a general situation of violence, a personal characteristic of the applicant, or a combination of the two'; it is only important that such real risk exists.[1018] Next, it emphasized

1014 See e.g. ECtHR (GC), *Saadi v. Italy,* no. 37201/06 (2008), §132; ECtHR (GC), *Hirsi Jamaa and Others v. Italy,* no. 27765/09 (2012), §119; ECtHR (GC), *J.K. and Others v. Sweden,* no. 59166/12 (2016), §§103-105; ECtHR, *M.A. v. Belgium,* no. 19656/18 (2020), §81. However, as noticed by de Weck (2017), 316, 'the cases in which the Court has *explicitly* recognized that certain groups are systematically exposed to ill treatment are exceptional'. See also these Chapter and Title, point 1.

1015 See also de Weck (2017), 300.

1016 ECtHR, *NA. v. the United Kingdom,* no. 25904/07 (2008), §114. Cf. ECtHR, *Ahmed v. Austria,* no. 25964/94 (1996), §§44-47.

1017 ECtHR, *NA. v. the United Kingdom,* no. 25904/07 (2008), §115. See also ECtHR, *A.A. and Others v. Sweden,* no. 14499/09 (2012), §75; ECtHR, *L.M. and Others v. Russia,* nos. 40081/14, 40088/14 and 40127/14 (2015), §119.

1018 ECtHR, *Sufi and Elmi v. the United Kingdom,* nos. 8319/07 and 11449/07 (2011), §218. See also ECtHR (GC), *F.G. v. Sweden,* no. 43611/11 (2016), §116.

that not every security situation entails a violation of the above-mentioned provision and gave some guidance on the proper assessment of its gravity. It recommended that the following factors should be considered:

> whether the parties to the conflict were either employing methods and tactics of warfare which increased the risk of civilian casualties or directly targeting civilians; secondly, whether the use of such methods and/or tactics was widespread among the parties to the conflict; thirdly, whether the fighting was localised or widespread; and finally, the number of civilians killed, injured and displaced as a result of the fighting.[1019]

According to the court, those criteria are not exhaustive but may create 'an appropriate yardstick' by which to assess the security situation in a destination country in some cases.[1020] In the case under consideration, the ECtHR decided that the level of violence in Mogadishu in Somalia was 'of sufficient intensity to pose a real risk of treatment reaching the Article 3 threshold to anyone in the capital'.[1021]

The Strasbourg Court reiterates that only in 'the most extreme cases of general violence' in the country of return may Article 3 of the ECHR be found to be breached, and in fact its case-law clearly shows that it is difficult to attain the level of severity required by the court in this regard. In many cases the ECtHR has decided that the general situation of violence in the destination country was not severe enough to prevent, as such, the applicants' removal.[1022] In the cases where the court did conclude that the security situation was of sufficient intensity to reach the threshold required under Article 3 of the ECHR, it rarely truly based its conclusions only on this finding. In the above-mentioned case of *Sufi and Elmi v. the United Kingdom,* the court did find that the general situation in Mogadishu, the capital city of Somalia, was so severe 'that anyone in the city, except possibly those who are exceptionally well-connected to "powerful actors", would be at real risk of treatment prohibited by Article 3 of the Convention'. However, it subsequently considered whether the

1019 ECtHR, *Sufi and Elmi v. the United Kingdom,* nos. 8319/07 and 11449/07 (2011), §241.

1020 Ibid.

1021 Ibid., §248. Cf. ECtHR, *K.A.B. v. Sweden,* no. 886/11 (2013), §§86-91, and ECtHR, *R.H. v. Sweden,* no. 4601/14 (2015), §§65-68. See also, critically on the *Sufi and Elmi* case, Bossuyt (2012), 220-221, 224.

1022 See e.g. ECtHR, *A.A. and Others v. Sweden,* no. 14499/09 (2012), §76 (Yemen); ECtHR, *M.E. v. Denmark,* no. 58363/10 (2014), §52 (Syria); ECtHR (GC), *F.G. v. Sweden,* no. 43611/11 (2016), §130 (Iran); ECtHR, *M.R.A. and Others v. the Netherlands,* no. 46856/07 (2016), §112 (Afghanistan); ECtHR (GC), *J.K. and Others v. Sweden,* no. 59166/12 (2016), §110 (Iraq); ECtHR, *R.K. v. Russia,* no. 30261/17 (2019), §51 (the Democratic Republic of the Congo); ECtHR, *S.A. v. the Netherlands,* no. 49773/15 (2020), §65 (Sudan).

applicants' removal to other parts of Somalia would involve any risks and, in this assessment, the personal circumstances of both applicants (in particular, the existence of family ties and the recent experience of living in Somalia) played a decisive role.[1023]

Moreover, despite the continuously unstable and extremely violent situation in Syria, the ECtHR did not dare to rely solely on this ground when it found violations of Articles 2 and 3 of the ECHR in the cases of *L.M. and Others v. Russia* and *O.D. v. Bulgaria*. In the first case, the court pointed to the heavy fights in Aleppo and Damascus, but also took into account that the relatives of one of the applicants had been killed by armed militia; that the second applicant was a stateless Palestinian, and this group was considered by the UNHCR to be particularly affected by the conflict; and that the applicants were young men who were especially prone to be detained and ill-treated in Syria.[1024] In the more recent case of *O.D. v. Bulgaria,* the court again analysed the security and humanitarian situation in Syria, but it did not–at least explicitly–claim that the situation of general violence there reached such a level of intensity as to prevent by itself the applicant's removal. Instead, the ECtHR concentrated on the real risk of ill-treatment arising from the applicant's desertion from the Syrian army.[1025]

In fact, only one case has been identified where the Strasbourg Court seems to find a violation of Articles 2 and 3 of the ECHR relying solely on a situation of general violence in a destination country. In the case of *S.K. v. Russia,* the court noticed that the security and humanitarian situation in Syria had been deteriorating for years. Even though an agreement on the cessation of hostilities had been signed in 2016, methods and tactics of warfare were still being employed that increased the risk of civilian casualties or directly targeted civilians. Indiscriminate use of force and attacks against civilian targets were reported. The court also stressed that the Russian Government had not presented any proof that the applicant would be safe in Damascus or that he could travel from there to a safe area in Syria.[1026] Importantly, despite the fact that the concerned foreigner did rely–in addition to the security situation–on his

1023 ECtHR, *Sufi and Elmi v. the United Kingdom,* nos. 8319/07 and 11449/07 (2011), §§293-296, 301-304; 309-312. See also Bossuyt (2012), 220, stating that: 'Despite its ambition to adopt a lead judgment applicable to the many thousands of Somali asylum seekers present in the territory of the 47 States parties to the Convention, the judgment invokes also arguments very specific to the two applicants and not likely to be transposed to most other Somali asylum seekers'.

1024 ECtHR, *L.M. and Others v. Russia,* nos. 40081/14, 40088/14 and 40127/14 (2015), §124. See also Hamdan (2016), 224. Cf. de Weck (2017), 304-305, 343.

1025 ECtHR, *O.D. v. Bulgaria,* no. 34016/18 (2019), §§53-56.

1026 ECtHR, *S.K. v. Russia,* no. 52722/15 (2017), §§60-63.

fears of being drafted into active military service, the court did not analyse whether a real risk of ill-treatment in this regard existed and concentrated solely on the general situation of violence in Syria. However, as has been shown above, such an approach is an extremely rare find in the court's jurisprudence.

The ECtHR needed some time to confirm that the principle of non-refoulement derived from Article 3 of the ECHR prevents the removal of a foreigner to a country where the level of violence is sufficiently high, and even more time to find a violation on this basis. Meanwhile, since the adoption of the 2004 Qualification Directive, 'a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict' is one of the reasons to grant a subsidiary protection.[1027] The idea that on the EU level there must be an explicit rule that persons fleeing indiscriminate violence should be protected is surely commendable, but the wording of Article 15(c)—which is clearly a result of a difficult compromise between the Member States[1028]—has been widely criticized.[1029] The notions of an 'individual threat', 'indiscriminate violence' and 'international or internal armed conflict' are ambiguous. The pairing of an 'individual threat' and 'indiscriminate violence', which seem to be overtly contradictory, also led to considerable confusion in the Member States. Moreover, the relation with point (b), which replicates the wording of Article 3 of the ECHR, is unclear, in particular taking into account the subsequent development of the ECtHR's jurisprudence on a general situation of violence. In consequence, the interpretation and application of Article 15(c) vary—sometimes considerably—between the Member States.[1030]

Unsurprisingly, one of the first asylum cases considered by the CJ concerned the interpretation of Article 15(c) of the 2004 Qualification Directive.[1031] In the case of *Elgafaji*, the Luxembourg Court aimed at explaining the scope of individualization required under this provision. The court stated that Article 15(c) concerned a more general risk of harm than the ones enumerated in points (a) and (b)[1032] and that

1027 See the identical wording of Article 15(c) of the 2004 Qualification Directive and Article 15(c) of the 2011 Qualification Directive. This lack of change during the recast process has been both criticized [see e.g. Velluti (2014), 53-54] and vindicated [see e.g. Garlick (2017), 265].

1028 See e.g. Boutruche Zarevac (2010), 58-59; Tsourdi (2014), 274-275; Storey (2016), 1235-1237; Garlick (2017), 244.

1029 See e.g. McAdam (2007), 72-74, 77-78; Errera (2010), 104; Boutruche Zarevac (2010), 58; Jaquemet (2014), 96.

1030 For the comprehensive study on those divergencies, see UNHCR (2011).

1031 Article 15(c) of the 2011 Qualification Directive has the same wording.

1032 CJ (GC), case C-465/07 *Elgafaji* (2009), paras 32-34.

> the word 'individual' must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place (...) reaches such *a high level* that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, *solely on account of his presence* on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive.[1033]

It is clear though that the Luxembourg Court allows for the possibility that the general situation of violence in a country of return may justify granting subsidiary protection irrespective of the applicant's individual characteristics. Accordingly, under point (c) 'the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances'.[1034]

However, the court also stressed that as a consequence of the wording of Recital 26 of the Preamble to the directive[1035] and 'the broad logic of Article 15', domestic authorities should provide protection on the sole basis of the ongoing indiscriminate violence in a country of return only in exceptional circumstances, i.e. in case of 'such a high degree of risk that substantial grounds would be shown for believing that that person would be subject individually to the risk in question'.[1036] When the level of violence is–in itself–insufficient to grant subsidiary protection, foreigners can find themselves eligible for this protection due to the combination of factors: the lesser degree of violence in their country of origin and a specific risk resulting from their personal circumstances.[1037]

While the level of violence was considered decisive, the court did not explain sufficiently how it should be assessed.[1038] It stated only that 'the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate

1033 Ibid., para 35 (emphasis added). See also CJ, case C-285/12 *Diakité* (2014), para 30.

1034 CJ (GC), case C-465/07 *Elgafaji* (2009), para 43.

1035 It states: 'Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm'. See also, with the same wording, Recital 35 of the Preamble to the 2011 Qualification Directive.

1036 CJ (GC), case C-465/07 *Elgafaji* (2009), paras 36-37.

1037 See Storey (2016), 1238.

1038 See also e.g. Tsourdi (2014), 278; Moreno-Lax (2014), 337; Matera (2015), 17; Garlick (2017), 252; Baumgärtel (2019), 18-19.

violence required for him to be eligible for subsidiary protection'.[1039] Accordingly, the worse the situation of violence in a destination country, the less significance should be attached to personal circumstances. Unfortunately, it is impossible to derive from the Luxembourg Court's judgment where 'a breaking point' should be, i.e. when the level of indiscriminate violence must be considered so high that personal circumstances become irrelevant–those considerations have been left for national authorities.[1040] What the court suggests though, by referring to the exceptional nature of this situation,[1041] is that this level is not easily attained.

In the *Elgafaji* case, the CJ did not dispel the doubts surrounding the terms used in Article 15(c) of the directive. It only stated that 'indiscriminate violence' 'implies that it may extend to people irrespective of their personal circumstances'.[1042] However, later on, the court was challenged with the question of the proper interpretation of the notion of 'internal armed conflict'. In the case of *Diakité*, the Luxembourg Court has distanced itself from international humanitarian law, which was used by the Member States to elucidate the obscure terms of Article 15(c),[1043] and decided that the notion of 'internal armed conflict' should be understood by taking into account its usual meaning in everyday language, thus as 'a situation in which a State's armed forces confront one or more armed groups or in which two or more armed groups confront each other'.[1044] The court stressed that under Article 15(c) of the directive it must be established that the armed conflict exists and the level of violence it entails must be assessed, but–in contrast to international humanitarian law–'the intensity of the armed confrontations, the level of organisation of the armed forces involved or the duration of the conflict' need not be determined.[1045] Accordingly, a broader definition of an 'internal armed conflict' was secured under Article 15(c) of the directive than pursuant to international humanitarian law.[1046]

1039 CJ (GC), case C-465/07 *Elgafaji* (2009), para 39. See also CJ, case C-285/12 *Diakité* (2014), para 31.

1040 See also e.g. Lenaert (2010), 297; Lambert (2013), 214; Bank (2015), 235. For domestic practices following the *Elgafaji* case, see Lambert (2013), 215-228, and Baumgärtel (2019), 19-21.

1041 CJ (GC), case C-465/07 *Elgafaji* (2009), paras 37-38. See also Garlick (2017), 255-257, relying *inter alia* on UNHCR (2011), 32-33, pointing out that the 'exceptionality' invoked by the court has met with divergent interpretations on a national level.

1042 CJ (GC), case C-465/07 *Elgafaji* (2009), para 34.

1043 See e.g. UNHCR (2011), 67-71; Jaquemet (2014), 86-87; Storey (2016), 1239.

1044 CJ, case C-285/12 *Diakité* (2014), paras 26-28

1045 Ibid., paras 32-35.

1046 Bauloz (2014), 843, who opined that it 'undoubtedly' increased 'the protective reach of subsidiary protection'. Battjes (2016) 'Piecemeal Engineering…', 234, claimed that the

While the relation between Article 15(c) of the directive and international humanitarian law has been clarified–at least to some extent[1047]–in the case of *Diakité,* the connection between point (c) and Article 3 of the ECHR is still unclear.[1048] The CJ stressed in the *Elgafaji* ruling that only point (b) corresponds, in essence, to Article 3 of the ECHR and the content of point (c) differs from 'that of Article 3 of the ECHR, and the interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR'.[1049] Interestingly, the Luxembourg Court reached this conclusion even though it was aware of the above-mentioned ECtHR judgment in the case of *NA. v. the United Kingdom*.[1050] Subsequently, in the case of *Sufi and Elmi v. the United Kingdom,* the Strasbourg Court disputed the CJ's conclusion on the distinctiveness of the two provisions. Relying on the interpretation of Article 15(c) of the directive provided for in the *Elgafaji* ruling, the court stated that it was

> not persuaded that Article 3 of the Convention, as interpreted in *NA*, does not offer comparable protection to that afforded under the Directive. In particular, it notes that the threshold set by both provisions may, in exceptional circumstances, be attained in consequence of a situation of general violence of such intensity that any person being returned to the region in question would be at risk simply on account of their presence there.[1051]

Thus, the courts disagree on the relation between Article 3 of the ECHR and Article 15(c) of the directive. Even though the passage cited above could be considered a clear message sent to the CJ to reconsider its stand,[1052] the Luxembourg Court did not engage in a dialogue with the ECtHR in this regard in the following cases, including *Diakité*.

CJ–with that broader definition–'secured compatibility with Article 3' of the ECHR. See also Tsourdi (2014), 293; Matera (2015), 15; Storey (2016), 1239.

1047 See e.g. Storey (2016), 1241-1242, pointing to the persisting terminological uncertainty after the *Diakité* ruling in regard to the notions of 'civilian' or 'life or person'.

1048 See also, for this conclusion, UNHCR (2011), 55; Tiedemann (2012), 138; Lambert (2013), 233; Storey (2016), 1234-1235; Garlick (2017), 264; de Weck (2017), 58, 303.

1049 CJ (GC), case C-465/07 *Elgafaji* (2009), para 28. See also CJ (GC), case C-542/13 *M'Bodj* (2014), para 38. For more on this case, see these Chapter and Title, point 4.

1050 The CJ refers to this judgment in paras 27 and 44.

1051 ECtHR, *Sufi and Elmi v. the United Kingdom,* nos. 8319/07 and 11449/07 (2011), §226. See also Bianku (2016), 58-59, stating that the protection offered by the two provisions overlaps 'to a certain extent'. Judge Bianku also noticed that it had taken four years to give a judgment in the case of *Sufi and Elmi,* because the ECtHR had been waiting for the national authorities to complete their examination that was in turn dependent on the outcome of the preliminary ruling procedure in the case of *Elgafaji*.

1052 Tsourdi (2014), 285.

The CJ's insistence on the differentiation between the content of Article 15(c) of the Qualification Directive and Article 3 of the ECHR may seem surprising considering the similarity of the respective approaches in the jurisprudence of the two European asylum courts. Both courts claim that a general situation of violence in a country of return may justify providing the protection to a foreigner on the sole basis that he would be 'exposed to such violence' (ECtHR) or 'solely on account of his presence' in this country (CJ). That is possible only when 'a sufficient level of intensity' (ECtHR) or 'a high level' of indiscriminate violence (CJ) is reached in a destination country, thus 'only in the most extreme cases' (ECtHR) or in 'an exceptional situation' (CJ).[1053] Both courts are also of the opinion that when the level of indiscriminate violence is not enough to constitute by itself the ground for protection, personal circumstances must be considered. The convergence of those findings is apparent and explicitly confirmed by both courts in their case-law.[1054]

However, the *Elgafaji* ruling becomes less startling when it is put into context. At the time of the adoption of the 2004 Qualification Directive, the protection offered by Article 15(c) in conjunction with Article 2(n) was in fact a novelty on a regional level.[1055] At the time, the (unclear) approach taken by the Strasbourg Court in the case of *Vilvarajah and Others v. the United Kingdom* still prevailed.[1056] Only in 2008, half a year before the *Elgafaji* ruling, in the case of *NA. v. the United Kingdom*, did one of the Chambers of the ECtHR (not the Grand Chamber) explicitly admit that a general situation of violence in a country of destination may—exceptionally—entail that any removal there would breach Article 3 of the ECHR.[1057] Thus, at the time of the *Elgafaji* judgment, the rule in this regard had already been voiced, but there was not even one case where the Strasbourg Court would find a violation on this basis.

1053 ECtHR, *NA. v. the United Kingdom*, no. 25904/07 (2008), §115; CJ (GC), case C-465/07 *Elgafaji* (2009), paras 35, 37. See also Mink (2012), 144, claiming that the two courts interpret identically the term 'individual threat', but the CJ 'failed to give full credit to the ECtHR' when it emphasized that Article 15(c) of the directive and Article 3 of the ECHR differ.

1054 CJ (GC), case C-465/07 *Elgafaji* (2009), para 44; ECtHR, *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07 (2011), §226. See also Boeles et al. (2014), 360. Cf. Vedsted-Hansen (2010), 281-282.

1055 See also Cherubini (2015), 206; Garlick (2017), 243-244. The 1951 Refugee Convention is applicable to persons fleeing armed conflicts, but many states interpret it restrictively and refuse to grant refugee status to such persons due to the insufficient individualization of a threat of persecution for reasons listed in Article 1A(2) [for more, see Holzer (2017)].

1056 Storey (2016), 1235, noticed that this judgment had been taken into account in the drafting process of point (c) when the notion of an 'individual threat' was added.

1057 ECtHR, *NA. v. the United Kingdom*, no. 25904/07 (2008), §115.

Thus, the comparability of the protection offered under Article 3 of the ECHR and Article 15(c) of the directive might have been considered not as evident then as it is nowadays.

However, the Luxembourg Court did not engage in such deliberations in the *Elgafaji* ruling. It only mentioned the *NA. v. the United Kingdom* case and did not discuss it in more detail.[1058] It seems that it preferred to focus on the language and structure of Article 15. The fact that point (b) uses similar terms to Article 3 of the ECHR implies that point (c)—if it is not to be considered superfluous or void—must concern something different (or more) than the protection offered under the ECHR.[1059] Moreover, it is clearly visible in the *Elgafaji* and *Diakité* rulings that the Luxembourg Court strives to establish an autonomous meaning of the terms provided for in the secondary EU law.[1060] While it may broaden the scope of protection, like in the *Diakité* case, it may also—taking into account the insufficiency of the CJ's guidance on the interpretation of Article 15(c)—leave national authorities without any point of reference.[1061]

As the ECtHR holds on to the rules established in the *NA.* and *Sufi and Elmi* cases,[1062] it seems that the relation between Article 3 of the ECHR and Article 15(c) of the 2011 Qualification Directive should be reconsidered by the Luxembourg Court. The scope of application of those provisions is overlapping. The CJ will face a particularly difficult task in providing an interpretation of Article 15(c) that does not ignore the evolution of the ECtHR's case-law and that at the same time does not render point (c) redundant.[1063] Until then, the

1058 See Tsourdi (2014), 279, claiming that it made the court's examination in this regard 'somewhat superficial' and leaving 'much to be desired'.

1059 See Lenaerts (2010), 296, stating that the CJ's approach rendered 'subsidiary protection effective by interpreting article 15(c) as offering supplementary protection to that guaranteed by article 3 ECHR'. See also Vedsted-Hansen (2010), 280; Lambert (2013), 229, 233-234; Tsourdi (2014), 286; Moreno-Lax (2014), 337; Costello (2015) *The Human Rights…*, 221. Cf. Cherubini (2015), 206-207.

1060 See e.g. Errera (2010), 97-98; Garlick (2017), 260.

1061 In particular, domestic authorities could draw from the *Sufi and Elmi* judgment to determine the criteria needed to assess the level of indiscriminate violence [see also Ippolito and Velluti (2014), 179; Jaquemet (2014), 89; Storey (2016), 1241]. The CJ's approach to the relation between Article 15(c) of the directive and Article 3 of the ECHR may exclude such reliance. Moreover, as those criteria are inspired by international humanitarian law [see Moreno-Lax (2014), 336-337; Tsourdi (2014), 291; Jaquemet (2014), 88], it is not clear after the *Diakité* case whether they can and should be used. See also Matera (2015), 20.

1062 See e.g. ECtHR, *L.M. and Others v. Russia*, nos. 40081/14, 40088/14 and 40127/14 (2015), §§119-122; ECtHR (GC), *F.G. v. Sweden*, no. 43611/11 (2016), §116; ECtHR, *S.K. v. Russia*, no. 52722/15 (2017), §55; ECtHR, *O.D. v. Bulgaria*, no. 34016/18 (2019), §50.

1063 Cf. Tiedemann (2012), 138, concluding that Article 15(c) of the directive is 'ultimately superfluous' as it is either no novelty in comparison to point (b) or it is 'void for lack of sufficient precision'.

Strasbourg Court's jurisprudence on a general situation of violence should be taken into account under point (b) of this provision, which corresponds to Article 3 of the ECHR.[1064] However, it should not be forgotten that the ECtHR reiterates that a security situation in a destination country, in itself, entails a breach of this provision only in very exceptional circumstances, thus extremely rarely.

4. Health

The issue of whether a returnee's medical condition and the insufficiency of available treatment in the destination country may entail the prohibition of refoulement under Article 3 of the ECHR has been and remains contentious. Initially, the ECtHR's approach was so strict that almost no ill foreigners could rely on the protection offered by this provision in the expulsion context. In those days, in only one case did the court find a violation of Article 3 on this account.[1065] In the landmark case of *D. v. the United Kingdom*,[1066] the Strasbourg Court opened the door for the possibility that the state of health of the applicant may be so grave (in the case at hand, the applicant was in critical condition due to AIDS) and the accompanying circumstances so compelling, that his removal would constitute a breach of Article 3 of the ECHR. The court took into account that the foreigner's expulsion to St Kitts would hasten his death and may 'subject him to acute mental and physical suffering' due to the insufficiency of medical care in his country of origin and the uncertainty of family or other support after return. Meanwhile, the applicant was 'psychologically prepared for death in an environment which is both familiar and compassionate'. Thus, the ECtHR held that 'although it cannot be said that the conditions which would confront him in the receiving country are themselves a breach of the standards of Article 3 (...), his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment'.[1067]

On the one hand, the Strasbourg Court highlighted that the absolute character of Article 3 of the ECHR demands that the applicant's claim must

1064 See also Tiedemann (2012), 129.

1065 Cf. ECtHR, *Aswat v. the United Kingdom*, no. 17299/12 (2013), §57, in the specific context of the detention conditions following the extradition.

1066 Foster (2007), 187, claimed that the *D. v. the United Kingdom* case is 'one of the most significant jurisprudential developments to date'. Cf. Hailbronner (2002), 7-8, who stated that the *D.* case blurred the lines of the notion of 'inhuman or degrading treatment or punishment'.

1067 ECtHR, *D. v. the United Kingdom*, no. 30240/96 (1997), §§51-53.

be considered also when 'the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article'.[1068] On the other hand, the court ensured that the *D.* case would be seen as an exception rather than a rule. It found that 'aliens who (...) are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State'.[1069] Moreover, it stressed that the circumstances of the case at hand were 'exceptional', the state of applicant had been already 'critical' at the time of the judgment and 'the compelling humanitarian considerations' were at stake.[1070] The wary wording of the *D.* judgment prompted the restrictive interpretation applied in the following medical cases.[1071]

The (even more[1072]) exceptional character of the protection offered by Article 3 of the ECHR to seriously ill returnees was confirmed in the case of *N. v. the United Kingdom*. Drawing on the *D.* judgment, the court stressed that

> (t)he fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but *only in a very exceptional case,* where the humanitarian grounds against the removal are compelling.[1073]

1068 Ibid., §49.

1069 Ibid., §54. See also ECtHR (GC), *N. v. the United Kingdom,* no. 26565/05 (2008), §42.

1070 ECtHR, *D. v. the United Kingdom,* no. 30240/96 (1997), §§53-54.

1071 See the overview of the relevant case-law in ECtHR (GC), *N. v. the United Kingdom,* no. 26565/05 (2008), §§34-41; and ECtHR (GC), *Paposhvili v. Belgium,* no. 41738/10 (2016), §179. See also ECtHR, *Karim v. Sweden,* no. 24171/05, dec. (2006); ECtHR, *Goncharova and Alekseytsev v. Sweden,* no. 31246/06, dec. (2007); ECtHR, *Kochieva and Others v. Sweden,* no. 75203/12, dec. (2013).

1072 See also Bauloz (2016), 414-416, claiming that the protection against refoulement in medical cases has gained the status of the 'exceptional exception' in the *N.* case. See also ECtHR, *Ahorugeze v. Sweden,* no. 37075/09 (2011), §89, where the court held that 'the threshold for a medical condition to raise an issue under Article 3 is (...) a very high one'.

1073 ECtHR (GC), *N. v. the United Kingdom,* no. 26565/05 (2008), §42 (emphasis added). See also ECtHR, *Tatar v. Switzerland,* no. 65692/12 (2015), §43.

In the Grand Chamber's opinion, the high threshold set in the case-law hitherto must be maintained, taking into account that the alleged future harm emanates 'not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country'.[1074] While the level of medical assistance in the countries around the world varies, 'Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States'.[1075] Thus, a serious illness of a foreigner can prevent a removal under Article 3 of the ECHR 'only in very exceptional cases'. The court specified that it could apply

> in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which may cause suffering, pain and reduced life expectancy and require specialised medical treatment which may not be so readily available in the applicant's country of origin or which may be available only at substantial cost.[1076]

In the case at hand, concerning the expulsion to Uganda of a woman afflicted with AIDS-defining illnesses, the ECtHR did not find 'very exceptional circumstances' that would prevent her removal under Article 3 of the ECHR. In particular, she was not critically ill, her state was stable and she was fit to travel.[1077] However, it cannot be overlooked that, as noted later by judge Pinto de Albuquerque, the applicant died shortly after her expulsion to Uganda.[1078]

1074 ECtHR (GC), *N. v. the United Kingdom,* no. 26565/05 (2008), §43. See also ECtHR, *I.K. v. Austria,* no. 2964/12 (2013), §85.

1075 ECtHR (GC), *N. v. the United Kingdom,* no. 26565/05 (2008), §44. See also ECtHR, *Yoh-Ekale Mwanje v. Belgium*, no. 10486/10 (2011), §82. See joint dissenting opinion of judges Tulkens, Bonello and Spielmann in *N. v. the United Kingdom* case, §8, suggesting that the 'floodgate' argument was a decisive one for the court. See also Goodwin-Gil and McAdam (2007), 315; Mantouvalou (2009), 825–826; Da Lomba (2014), 155, 157–158.

1076 ECtHR (GC), *N. v. the United Kingdom,* no. 26565/05 (2008), §45.

1077 Ibid., §§50–51. See Mantouvalou (2009), 819, who stated that the *D.* case concerned the issue of whether the United Kingdom 'had a duty to let the applicant stay to die' and the *N.* case concentrated on the question 'whether it had a duty to let her stay and live a decent life'. Judges Tulkens, Bonello and Spielmann considered the distinction between the cases made by the majority 'misconceived' (see joint dissenting opinion in *N. v. the United Kingdom* case, §25). See also ECtHR, *Yoh-Ekale Mwanje v. Belgium*, no. 10486/10 (2011), §§83–85; ECtHR, *Ghali v. Sweden,* no. 74467/12, dec. (2013), §34.

1078 See dissenting opinion in ECtHR (GC), *S.J. v. Belgium,* no. 70055/10, (2015), §2. Cf. Dembour (2015), 240 fn 182, noticing that the treatment of the applicant in the *D. v. the United Kingdom* case was 'successful over many years'.

The restrictive–'near-to-death'–approach continued after the *N.* judgment, albeit not without resistance from some judges[1079] and criticism from academics[1080]. Medical cases were often considered inadmissible by the Strasbourg Court.[1081] On merits, the court rejected seriously ill applicants' claims that their removal would violate Article 3 of the ECHR because they were not in a critical condition and were fit to travel.[1082] The factors of the applicant's having family ties in the destination country and his previous access to medical care there were also considered decisive.[1083] In the case of *Tatar v. Switzerland,* the Strasbourg Court concluded that the applicant could benefit from adequate medical assistance in Turkey. It highlighted that 'the mere fact that the circumstances concerning treatment for his long-term illness in Turkey would be less favourable than those enjoyed by him in Switzerland is not decisive from the point of view of Article 3 of the Convention'.[1084]

The overly restrictive interpretation of the principle of non-refoulement in medical cases was noticed and rethought by the Grand Chamber in the case of Paposhvili v. Belgium. Firstly, the court explained that, in addition to the humanitarian considerations as compelling as in the *D.* case,

> the "other very exceptional cases" within the meaning of the judgment in *N. v. the United Kingdom* (§43) which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, *although not at imminent risk of dying,* would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being

1079 Medical cases prompted multiple separate opinions [see also Brems (2015)], see e.g. *N. v. the United Kingdom*, *S.H.H. v. the United Kingdom*, *Tatar v. Switzerland* and *M.T. v. Sweden*. In partly concurring opinion in ECtHR, *Yoh-Ekale Mwanje v. Belgium*, no. 10486/10 (2011), §6, six out of seven judges expressed a hope that the ECtHR would one day be able to review its case-law in this regard. See also dissenting opinion of judge Pinto de Albuquerque in ECtHR (GC), *S.J. v. Belgium,* no. 70055/10 (2015), §5.

1080 See e.g. Smet (2013), 287-289; Da Lomba (2014), 156-160; Bauloz (2016), 413-414, 419-427; De Weck (2017), 174.

1081 ECtHR (GC), *Paposhvili v. Belgium*, no. 41738/10 (2016), §179. See also Mantouvalou (2009), 827.

1082 ECtHR, *Yoh-Ekale Mwanje v. Belgium*, no. 10486/10 (2011), §§81-85. See also ECtHR, *Ghali v. Sweden*, no. 74467/12, dec. (2013), §§33-36. See also, in regard to the 'fit to travel' requirement, Bauloz (2016), 418-419.

1083 ECtHR, *S.H.H. v. the United Kingdom,* no. 60367/10 (2013), §93. See also ECtHR, *M.T. v. Sweden,* no. 1412/12 (2015), §§58-59.

1084 ECtHR, *Tatar v. Switzerland*, no. 65692/12 (2015), §§46-50. See also, in the context of Dublin transfers to Italy, ECtHR, *A.S. v. Switzerland*, no. 39350/13 (2015), §§35-38.

> exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy.[1085]

Thus, it is not only applicants in a critical condition who are to be protected under Article 3 of the ECHR. The notion of 'other very exceptional cases' has been opened up (albeit only slightly as the threshold remains high)[1086] and finally gained some substance.

Secondly, the ECtHR specified procedural obligations of states in medical cases. It pointed out that the claims that the removal of an ill foreigner would breach the principle of non-refoulement demand a 'close scrutiny'.[1087] Domestic authorities must assess general sources, including reports of international and non-governmental organizations, as well as what impact a removal would have on a particular foreigner; thus, his state of health prior to and after a removal to a receiving state must be compared.[1088] The Strasbourg Court also specified that 'the authorities in the returning State must verify on a case-by-case basis whether the care generally available in the receiving State is *sufficient and appropriate in practice* for the treatment of the applicant's illness so as to prevent him or her being exposed to treatment contrary to Article 3'. It stressed that '(t)he benchmark is not the level of care existing in the returning State'. It is not enough that the needed medical care is available in the country of destination; it has to be accessible for the applicant as well.[1089]

Next, the ECtHR, drawing on the *Tarakhel v. Switzerland* case,[1090] established that when the examination of the personal circumstances and the general situation in the destination country does not dispel all doubts about the impact of the removal on the seriously ill foreigner 'the returning State must obtain individual and sufficient assurances from the receiving State, as

1085 ECtHR (GC), *Paposhvili v. Belgium*, no. 41738/10 (2016), §183 (emphasis added). See also ECtHR, *A.S.N. and Others v. the Netherlands*, nos. 68377/17 and 530/18 (2020), §129.

1086 Stoyanova (2017), 583; Peroni and Peers (2017); Cornelisse (2019), 109-110. See also joint dissenting opinion of judges Kjølbro, Motoc and Mourou-Vikström in ECtHR, *Savran v. Denmark*, no. 57467/15 (2019), §9.

1087 Cf. Stoyanova (2017), 611-612, noticing that some rules that the ECtHR normally invokes in relation to the 'rigorous scrutiny standard' are absent in the *Paposhvili* reasoning. For more on this standard, see Chapter 6, Title III.

1088 ECtHR (GC), *Paposhvili v. Belgium*, no. 41738/10 (2016), §§187-188. See also §§200-201, 205-206. See also, critically on the establishment of those procedural obligations in medical cases, Bossuyt (2020), 320-321.

1089 ECtHR (GC), *Paposhvili v. Belgium*, no. 41738/10 (2016), §§189-190 (emphasis added).

1090 ECtHR (GC), *Tarakhel v. Switzerland*, no. 29217/12 (2014). For more on this case, see these Chapter and Title, point 5, and Chapter 6, Title III, point 2.

a precondition for removal, that appropriate treatment will be available and accessible to the persons concerned so that they do not find themselves in a situation contrary to Article 3'.[1091]

While the *Paposhvili v. Belgium* judgment aspired to clarify the respective standards,[1092] the subsequent case of *Savran v. Denmark* has shown that this goal has not been achieved.[1093] In this case, which concerned the expulsion of a Turkish citizen suffering from a paranoid schizophrenia, the majority, relying on the reasoning in the *Paposhvili* case, concluded that to remove the applicant without obtaining specified assurances would be in violation of Article 3 of the ECHR.[1094] Judges Kjølbro, Motoc and Mourou-Vikström strongly dissented. They emphasized that the majority did not 'faithfully' follow the *Paposhvili* judgment but instead broadened the scope of Article 3, 'pushing wide open the door that the Grand Chamber deliberately and for sound legal and policy reasons decided only to open slightly compared to the previous strict case-law'.[1095] The case has been referred to the Grand Chamber to address those doubts. In the eagerly awaited judgment, the Grand Chamber will hopefully elucidate how far the change in the court's case-law that was brought in by the *Paposhvili* case was supposed to reach.

Much is still to be clarified by the ECtHR in regard to the applicability of the principle of non-refoulement in medical cases, but it is clear that pursuant to Article 3 of the ECHR, even though the threshold remains high, removals of some ill foreigners are prohibited. A cursory reading of Article 15(b) in conjunction with Article 2(f) of the 2011 Qualification Directive[1096] leads to the conclusion that certain seriously ill third-country nationals should be granted subsidiary protection. A person is eligible for this protection when he does not

1091 ECtHR (GC), *Paposhvili v. Belgium*, no. 41738/10 (2016), §191. The requirement to obtain such assurances in medical cases was previously invoked by dissenting judges in ECtHR, *M.T. v. Sweden*, no. 1412/12 (2015), §5 (judge De Gaetano), and ECtHR, *Tatar v. Switzerland*, no. 65692/12 (2015), §4 (judge Lemmens). See also, in favour of this solution, Brems (2015) and Stoyanova (2017), 608-610. Cf. Klaassen (2019).

1092 See also ECtHR (GC), *Paposhvili v. Belgium*, no. 41738/10 (2016), §192, where the court explained that the responsibility of a state under Article 3 of the ECHR is triggered by the expulsion itself, not by 'the lack of medical infrastructure in the receiving State', addressing the uncertainty that arose from the previous judgments [see e.g. Webster (2013); Costello (2015) *The Human Rights…*, 187].

1093 For the same conclusion, see the comprehensive analysis of the *Paposhvili v. Belgium* judgment in Stoyanova (2017).

1094 ECtHR, *Savran v. Denmark*, no. 57467/15 (2019), §§61-67.

1095 Joint dissenting opinion of judges Kjølbro, Motoc and Mourou-Vikström in ECtHR, *Savran v. Denmark*, no. 57467/15 (2019), §9.

1096 The same is true of Article 15(b) in conjunction with Article 2(e) of the 2004 Qualification Directive that had the same wording.

qualify as a refugee and there are substantial grounds for believing that, when removed to his country of origin, he would face a real risk of suffering serious harm. 'Serious harm' is defined in Article 15 of the Qualification Directive, and point (b) specifies that it consists of 'torture or inhuman or degrading treatment or punishment of an applicant in the country of origin'. In the case of *Elgafaji*, the Luxembourg Court stated that Article 15(b) of the 2004 Qualification Directive 'corresponds, in essence, to Article 3 of the ECHR'.[1097] However, it is well known that the addition of the geographical limitation in point (b) was aimed at excluding 'medical cases', such as the ECtHR's case of *D. v. the United Kingdom,* from the scope of this provision.[1098] This understanding was confirmed by the CJ in the case of *M'Bodj*.

The Luxembourg Court highlighted there, relying on the text of the 2004 Qualification Directive,[1099] that subsidiary protection must be granted only when ill-treatment occurs in the applicant's country of origin. Serious harm must be inflicted by a third party and 'it cannot therefore simply be the result of general shortcomings in the health system of the country of origin'.[1100] Moreover

> the risk of deterioration in the health of a third country national suffering from a serious illness as a result of the absence of appropriate treatment in his country of origin is not sufficient, unless that third country national is intentionally deprived of health care, to warrant that person being granted subsidiary protection.[1101]

A person may find himself eligible for subsidiary protection only when the inhuman or degrading treatment he would be subjected to after a return results from the intentional deprivation of health care in the country of origin. The scope of the directive does not extend to persons allowed to stay in the Member States 'on a discretionary basis on compassionate or humanitarian grounds'.[1102] In the court's view, the fact that Article 15(b) of the directive

1097 CJ (GC), case C-465/07 *Elgafaji* (2009), para 28. For more on this case, see these Chapter and Title, point 3. See also CJ (GC), case C-542/13 *M'Bodj* (2014), para 38.

1098 Opinion of AG Bot in case C-562/13 *Abdida*, delivered on 4 September 2014, EU:C:2014:2167, para 82. See also Battjes (2006), 236-237; McAdam (2007), 69; Moreno-Lax and Garlick (2015), 136; Costello (2015) *The Human Rights…*, 217; Storey (2016), 1234. Cf. Bauloz (2016), 432-433.

1099 See Articles 6 and 15 as well as Recitals 5, 6, 9, 24 and 26 in the preamble to the 2004 Qualification Directive.

1100 CJ (GC), case C-542/13 *M'Bodj* (2014), paras 33, 35

1101 Ibid., para 36. See also CJ (GC), case C-353/16 *MP* (2018), paras 51, 58.

1102 CJ (GC), case C-542/13 *M'Bodj* (2014), paras 37, 41.

corresponds to Article 3 of the ECHR, does not impugn those findings. The CJ acknowledged that in line with the ECtHR's jurisprudence a removal of a seriously ill foreigner 'may raise an issue under Article 3 ECHR in very exceptional cases, where the humanitarian grounds against removal are compelling'. However, as stressed by the Luxembourg Court, even in those special circumstances, the Strasbourg Court does not require the granting of a residence permit to the seriously ill foreigner, but only refraining from removing him.[1103]

Hence, it is not a coincidence that on the same day as the *M'Bodj* judgment was issued, the case of *Abdida* was adjudicated by the Grand Chamber as well. The latter concerned the return of a third-country national who had been refused a leave to remain on medical grounds. The Luxembourg Court noticed that return proceedings must be in accordance with the EU Charter, including Article 19(2), which provides for the principle of non-refoulement. Interpreting this provision, the court took into account the jurisprudence of the ECtHR, in particular the case of *N. v. the United Kingdom*.[1104] The CJ concluded that

> (i)n the very exceptional cases in which the removal of a third country national suffering a serious illness to a country where appropriate treatment is not available would infringe the principle of non-refoulement, Member States cannot therefore, as provided for in Article 5 of Directive 2008/115, taken in conjunction with Article 19(2) of the Charter, proceed with such removal.[1105]

Thus, exceptionally, a return of a seriously ill third-country national to a state where appropriate medical care is not offered may be in violation of Article 5 of the Return Directive, which provides for the respect for the principle of non-refoulement in return proceedings. The court stressed that 'those very exceptional cases are characterised by the seriousness and irreparable nature of the harm'.[1106] Moreover, in the *Abdida* ruling the Luxembourg Court provided ill returnees with important procedural and humanitarian safeguards.[1107]

1103 Ibid., paras 39-40. See also CJ (GC), case C-353/16 *MP* (2018), para 46.

1104 CJ (GC), case C-562/13 *Abdida* (2014), para 47.

1105 Ibid., para 48. See also CJ (GC), case C-353/16 *MP* (2018), paras 43-44. See also CJ, case C-249/13 *Boudjlida* (2014), para 49, where the court held that 'when the competent national authority is contemplating the adoption of a return decision, that authority must necessarily observe the obligations imposed by Article 5 of Directive 2008/115 and hear the person concerned on that subject'.

1106 CJ (GC), case C-562/13 *Abdida* (2014), paras 49, 50.

1107 Ibid., paras 50, 62. For more see Chapter 6, Title IV, point 2.1.

The approach of the Luxembourg Court in the cases of *M'Bodj* and *Abdida* did not avoid criticism.[1108] Costello considered the CJ's conclusion that only an inhuman or degrading treatment resulting from the intentional deprivation of health care may be qualified as serious harm within the meaning of Article 15(b) of the Qualification Directive to be 'a particularly retrograde move' that makes the Luxembourg Court' approach 'even more restrictive' than the ECtHR's. She stressed that the Strasbourg Court established in the *N. v. the United Kingdom* case an 'unreachable standard' that was subject to criticism within the ECtHR itself.[1109] While those arguments are surely apt, it is not surprising that the CJ chose the *N.* judgment to refer to and rely on in the abovementioned rulings. At the time, it was the leading case of the Strasbourg Court on the refoulement of seriously ill foreigners. In fact, the Luxembourg Court referred to the standard established there cautiously and with restraint, leaving out the 'near-to-death' approach that could have been derived from the *N.* case and that was confirmed in the following case-law of the ECtHR. However, the CJ also clearly instructed national authorities that the jurisprudence of the Strasbourg Court on refoulement of ill foreigners must be taken into account in the interpretation of Article 5 of the Return Directive in conjunction with Article 19(2) of the EU Charter.[1110] In this sense, the CJ's rulings, in particular *Abdida,* were not only in line with the case-law of the Strasbourg Court[1111] but indeed bolstered it[1112].

Interestingly, in the dissenting opinion attached to the ECtHR's judgment rendered in the *S.J. v. Belgium* case, judge Pinto de Albuquerque determined that the *M'Bodj* and *Abdida* rulings are 'unbalanced' and 'demonstrate a contradictory approach to the issue of the protection of seriously ill foreign nationals, by providing them with reasonable procedural guarantees and at the same time depriving them of the most elementary substantive guarantees'. He expressed the view that the asylum case-law of the Strasbourg Court was tainted with the same defect: the procedural protection is highlighted, while almost no substantive protection is offered. He concluded that '(t)he messy state of the European case-law, with its flagrant internal contradictions, makes it even more urgent to review the standard set out in N. in the light of

1108 See e.g. Peers (2014) 'Could EU law…'; Bauloz (2016), 432-438.

1109 Costello (2016), 196-197.

1110 CJ (GC), case C-562/13 *Abdida* (2014), paras 47-48.

1111 See e.g. Peers (2015) 'Irregular Migrants…', 301; Battjes (2016) 'Piecemeal Engineering…', 231; Molnár (2019), 451; Cornelisse (2019), 116.

1112 Costello (2016), 197. See also Krommendijk (2015), 820-821, noticing that the examination and citation of the ECtHR's case-law was considered inevitable by the CJ in the *M'Bodj* and *Abdida* cases.

international refugee law and international migration law'.[1113] The *Paposhvili v. Belgium* judgment of the Grand Chamber did bring in a change, as explained above; however, an emphasis on the procedural obligations of the states was again stressed there.[1114]

The *Paposhvili v. Belgium* case was taken into account by the CJ in the cases of *C.K. and Others* and *MP*. In the latter case, the Luxembourg Court concluded that the approaches of the two European asylum courts to refoulement of seriously ill third-country nationals are similar. It pointed out that under the ECHR such removal is prohibited when the applicant is 'at risk of imminent death' or 'would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of suffering a serious, rapid and irreversible decline in his state of health resulting in intense suffering or to a significant reduction in life expectancy'.[1115] Meanwhile,

> *(s)imilarly,* Article 4 of the Charter must be interpreted as meaning that the removal of a third country national with a *particularly serious* mental or physical illness constitutes inhuman and degrading treatment, within the meaning of that article, where such removal would result in *a real and demonstrable risk of significant and permanent deterioration* in the state of health of the person concerned (...). The same conclusion can be drawn as regards the application of Article 19(2) of the Charter (...).[1116]

Accordingly, such removal is precluded under Articles 4 and 19(2) of the EU Charter, interpreted in the light of Article 3 of the ECHR, in particular when the deterioration in the state of health of a returnee would endanger his life.

In the *MP* ruling, the Luxembourg Court maintained the distinction established in the *Abdida* and *M'Bodj* cases between the protection against refoulement under Article 3 of the ECHR (and Article 5 of the Return Directive) and the eligibility for subsidiary protection under Article 15(b) of the 2004 Qualification Directive. The *MP* case did not concern protection against removal, but 'the separate issue': a qualification for subsidiary protection. In this regard, the Luxembourg Court confirmed the *M'Bodj* findings that Article 15(b) of the Qualification Directive demands that the deprivation of health care in the country of origin must be intentional. The deterioration of

1113 Dissenting opinion of judge Pinto de Albuquerque in ECtHR (GC), *S.J. v. Belgium*, no. 70055/10 (2015), §§4-5.

1114 See also Stoyanova (2017), 615.

1115 CJ (GC), case C-353/16 *MP* (2018), paras 38-40, where the CJ summarized the interpretation provided for in ECtHR (GC), *Paposhvili v. Belgium*, no. 41738/10 (2016), §§178, 183.

1116 CJ (GC), case C-353/16 *MP* (2018), para 41 (emphasis added).

a person's medical condition after a removal 'cannot, in itself, be regarded as inhuman or degrading treatment inflicted on that third-country national in his country of origin, within the meaning of Article 15(b) of that directive'.[1117]

However, the CJ also acknowledged the difference in circumstances in the two cases: M'Bodj's illness resulted from an assault in the Member State, while MP's medical condition was a consequence of being tortured in his country of origin.[1118] Thus, in the *MP* case, both the acts of torture inflicted on him in the past and the possible aggravation of his mental health disorders after his return were 'relevant factors to be taken into account when interpreting Article 15(b)'.[1119] National authorities must consider—taking into account 'all current and relevant information, in particular reports by international organisations and non-governmental human rights organisations'—whether in the country of origin the ill foreigner would face a risk of being intentionally deprived of appropriate care for the physical and mental after-effects resulting from the past torture. The court specified that such

> will be the case, inter alia, if, in circumstances where, (...) a third country national is at risk of committing suicide because of the trauma resulting from the torture he was subjected to by the authorities of his country of origin, it is clear that those authorities, notwithstanding their obligation under Article 14 of the Convention against Torture, are not prepared to provide for his rehabilitation. There will also be such a risk if it is apparent that the authorities of that country have adopted a discriminatory policy as regards access to health care, thus making it more difficult for certain ethnic groups or certain groups of individuals, (...) to obtain access to appropriate care for the physical and mental after-effects of the torture perpetrated by those authorities.[1120]

The *MP* ruling offers a needed clarification in regard to the notion of 'intentional deterioration of health care' determined in the *M'Bodj* case. Peers concluded that the former judgment ensured greater protection for torture victims.[1121] However, it cannot be overlooked that the *MP* case concerned a

1117 Ibid., paras 45-46, 49, 51.

1118 Ibid., para 47. The asylum seeker suffered severe psychological after-effects of torture that he had been subjected to in his country of origin (post-traumatic stress disorder, depression, suicidal tendencies).

1119 CJ (GC), case C-353/16 *MP* (2018), para 48.

1120 Ibid., para 57. Under Article 14(1) first sentence of the CAT: Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.

1121 Peers (2018).

rather exceptional scenario, and, thus, not many foreigners would benefit from this protection.

In regard to return proceedings, it is worth noticing that while in the *Abdida* ruling the connection between Article 5 of the Return Directive in conjunction with Article 19(2) of the EU Charter and the ECtHR's jurisprudence on Article 3 of the ECHR has been close and emphasized,[1122] in the *MP* case it has been loosened. The CJ refers there to the case-law of the Strasbourg Court, in particular to the *Paposhvili v. Belgium* case (in fact, quite extensively in comparison to the references to the Strasbourg Court's case-law in the previous rulings), but it then gives its own interpretation of Article 4 of the EU Charter, which differs slightly from the understanding of Article 3 of the ECHR determined in the *Paposhvili* case.[1123] Arguably, the Luxembourg Court aimed at establishing an autonomous interpretation of the EU law that would not be dependent on changes in the ECtHR's jurisprudence.[1124] Irrespective of the court's motives, it made clear that the approaches of the two European asylum courts to the refoulement of seriously ill foreigners are similar, but not identical.[1125]

While in the *MP* case the connection with Article 3 of the ECHR has been loosened, in the *C.K. and Others* ruling the Luxembourg Court took another–more ECHR-based–approach. The CJ pointed out that 'the transfer of an asylum seeker within the framework of the Dublin III Regulation can take place only in conditions which preclude that transfer from resulting in a real risk of the person concerned suffering inhuman or degrading treatment, within the meaning of Article 4 of the Charter'. The ECtHR's jurisprudence relating to Article 3 of the ECHR must be taken into account in the interpretation of this provision. Referring to the *Paposhvili v. Belgium* judgment, the Luxembourg Court stressed that suffering flowing from naturally occurring illness that attains a minimum level of severity and is exacerbated by a treatment by national authorities (e.g. by expulsion) may entail the responsibility under Article 3 of the ECHR. In the court's opinion, 'taking account of the general and absolute nature of Article 4 of the Charter, *those points of principle* are also relevant in the context of the Dublin system'.[1126]

1122 See CJ (GC), case C-562/13 *Abdida* (2014), paras 47-50.

1123 CJ (GC), case C-353/16 *MP* (2018), paras 37-43. Cf. Peers (2018), claiming that the CJ 'explicitly adopts the revised interpretation of Article 3 ECHR' provided for in the *Paposhvili v. Belgium* case.

1124 See also, in regard to the *M'Bodj* case, Bauloz (2016), 441.

1125 CJ (GC), case C-353/16 *MP* (2018), para 41.

1126 CJ, case C-578/16 PPU *C.K. and Others* (2017), paras 65-69 (emphasis added). See also Sadowski (2019), 49.

The case of *C.K. and Others* concerned the Dublin transfer from Slovenia of an asylum-seeking woman suffering mental disorders. In Croatia, she would be provided with adequate medical care, but it was questioned whether the transfer, in itself, would not constitute inhuman or degrading treatment. The CJ held that it could not be ruled out.[1127] It stressed that

> (i)n that context, it must be held that, in circumstances in which the transfer of an asylum seeker with a particularly serious mental or physical illness would result in a real and proven risk of a significant and permanent deterioration in his state of health, that transfer would constitute inhuman and degrading treatment, within the meaning of that article.[1128]

In consequence, national authorities are obliged to examine the impact of the transfer on the state of health of the concerned foreigner. In particular, it must be determined 'whether the state of health of the person at issue may be protected appropriately and sufficiently by taking the precautions envisaged by the Dublin III Regulation'.[1129] Here again the Luxembourg Court sought guidance from the Strasbourg Court. First, the CJ pointed out that pursuant to the ECtHR's case-law, the removal can be implemented when a person 'is fit to travel and provided that the necessary appropriate measures, adapted to the person's state of health, are taken in that regard'. Second, the fact that a third-country national threatens to kill himself 'does not require the contracting State to refrain from enforcing the envisaged measure, provided that concrete measures are taken to prevent those threats from being realised'.[1130] The Luxembourg Court set forth those measures and concluded that when all those precautions prove to be insufficient to preclude the deterioration of the state of health of a transferee, the transfer should be suspended until the foreigner would be fit for its implementation. The Member States can—albeit are not obliged to—decide to make use of the 'discretionary clause' provided for in Article 17(1) of the Dublin III Regulation, if 'the state of health of the asylum seeker concerned is not expected to improve in the short term' or when 'the suspension of the procedure for a long period would risk worsening the condition of the person concerned'.[1131]

1127 CJ, case C-578/16 PPU *C.K. and Others* (2017), paras 70-73.

1128 Ibid., para 74.

1129 Ibid., paras 75-77. See also CJ (GC), case C-353/16 *MP* (2018), para 42.

1130 CJ, case C-578/16 PPU *C.K. and Others* (2017), paras 78-79, referring *inter alia* to ECtHR, *Karim v. Sweden*, no. 24171/05, dec. (2006); ECtHR, *Kochieva and Others v. Sweden*, no. 75203/12, dec. (2013).

1131 CJ, case C-578/16 PPU *C.K. and Others* (2017), paras 80-89.

It is clear from the analysis conducted in this section that the jurisprudence in medical cases of the two European asylum courts is closely intertwined. Both the ECtHR and CJ maintain that in some, exceptional, circumstances a removal of a seriously ill foreigner may constitute inhuman or degrading treatment. It seems that, with time, 'less exceptional' cases than before are being considered as entailing the responsibility of the states in this regard. This is apparent from the *Paposhvili v. Belgium* judgment,[1132] but also the *C.K. and Others* and *MP* rulings show some signs of a more protective approach to removals of ill third-country nationals. However, in regard to both Strasbourg and Luxembourg Courts, it must be concluded that they are willing to open doors to protection against refoulement for seriously ill returnees but merely slightly and only (small) step by (small) step.

5. Living Conditions

The ECtHR's jurisprudence regarding removals to countries with poor living conditions falls 'somewhere in between' the 'lines of the Court's case-law' concerning a grave security situation in a destination country and the medical cases, examined in the two previous sections.[1133] It has been shown there that either a general situation of violence or the health of the applicant is capable of barring expulsions only in exceptional circumstances.[1134] Thus, it is not surprising that removals to a country with poor living conditions also rarely attain the level of severity required under Article 3 of the ECHR.

The famous *M.S.S. v. Belgium and Greece* case, which concerned an Afghan national who had been transferred from Belgium to Greece under the Dublin II Regulation, heads the list of such exceptional cases. The ECtHR first considered whether the situation of extreme material poverty that the asylum seeker had suffered in Greece for months could raise an issue under Article 3 of the ECHR. It noted that this provision cannot be understood as obliging the Contracting States to 'provide everyone within their jurisdiction with a home' or to grant financial allowance to asylum seekers that would 'enable them to

1132 See also Harris et al. (2018), 249, or Reid (2019), 795-796. The latter author stated that after the *Paposhivili* judgment 'European countries can no longer wash their hands of unwanted, seriously-ill persons by sending them somewhere else to die naturally, or to die naturally more quickly'.

1133 The phrase used in joint dissenting opinion of judges Ziemele, Thór Björgvinsson and De Gaetano in ECtHR, *S.H.H. v. the United Kingdom*, no. 60367/10 (2013), §3, with regard to the facts of the case.

1134 For more see these Chapter and Title, points 3 and 4.

maintain a certain standard of living'.[1135] However, the Strasbourg Court took into account that the requirements concerning reception conditions for asylum seekers were provided for in the EU and Greek law, and that the applicant, as an asylum seeker, was 'a member of a particularly underprivileged and vulnerable population group in need of special protection'.[1136] The court stated that the '(...) State responsibility [under Article 3] could arise for 'treatment' where an applicant, in circumstances wholly dependent on State support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity'.[1137] The applicant had been unable to satisfy his most basic needs, i.e. food, hygiene and accommodation. He felt constant fear of being attacked or robbed and his situation was not likely to change. The Greek authorities did not try to improve the situation of the concerned asylum seeker. Moreover, at the respective time, the circumstances described by the applicant had existed on a large scale in Greece.[1138] The court concluded that

> the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention.[1139]

Accordingly, the Grand Chamber found that Article 3 of the ECHR had been violated by Greece because of the degrading living conditions there.[1140]

With regard to Belgium, the Strasbourg Court found that 'by transferring the applicant to Greece the Belgian authorities knowingly exposed him to conditions of detention and living conditions that amounted to degrading

1135 ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §249, referring *inter alia* to ECtHR, *Müslim v. Turkey,* no. 53566/99 (2005).

1136 ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §§250-251.

1137 Ibid., §253.

1138 Ibid., §§254-262.

1139 Ibid., §263.

1140 Ibid., §264. See also ECtHR, *Rahimi v. Greece*, no. 8687/08 (2011), §§87-94; ECtHR, *S.G. v. Greece*, no. 46558/12 (2017), §§36-40; ECtHR, *N.H. and Others v. France*, nos. 28820/13, 75547/13 and 13114/15 (2020), §§184-186. Cf. ECtHR, *Hunde v. the Netherlands*, no. 17931/16, dec. (2016), §§55-60; ECtHR, *J.W. v. the Netherlands*, no. 16177/14, dec. (2017), §33; ECtHR, *N.T.P. and Others v. France,* no. 68862/13 (2018), §§45-49; ECtHR, *H.A. and Others v. Greece,* no. 19951/16 (2019), §§171-175. For an overview of the court's case-law in this regard, see Slingenberg (2019), 298-311.

treatment'. The information about those conditions had been easily accessible at the time when the decision about the transfer was made. Accordingly, the Grand Chamber found that there had been 'a violation by Belgium of Article 3 of the Convention because, by sending him back to Greece, the Belgian authorities exposed the applicant to detention and living conditions in that State that were in breach of that Article'.[1141]

The above-mentioned approach was both praised and criticized.[1142] Many questions were left unanswered.[1143] In particular, it was not clear whether a cumulative effect of degrading detention and living conditions was needed to reach the level of severity required under Article 3 of the ECHR or if poor living conditions alone could preclude a Dublin transfer.[1144] The question was also raised whether only systematic deficiencies in a national reception system might bar a removal.[1145] Moreover, it was ambiguous whether the respective findings of the *M.S.S.* case were applicable in regard to the living conditions in non-EU countries of destination.[1146] Subsequent case-law answered those doubts to some extent.

1141 ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §§366-368. Cf. ECtHR, *Safaii v. Austria*, no. 44689/09 (2014), §§45-51.

1142 For praise, see e.g. Mallia (2011), 125-128; Costello (2012) 'Courting Access…', 321; Lenart (2012), 16; Dembour (2015), 406-407; Baumgärtel (2019), 52, 54. Critically, see e.g. partly concurring and partly dissenting opinion of judge Sajó, points II and IV, and partly dissenting opinion of judge Bratza annexed to the *M.S.S.* judgment; Bossuyt (2012), 216-218; Brandl and Czech (2015), 257; Bossuyt (2020), 318-319.

1143 See also Pergantis (2019), 417.

1144 In the *M.S.S.* case the ECtHR analysed those matters—in the context of the prohibition of refoulement—cumulatively. In the case of *Mohammed v. Austria*, no. 2283/12 (2013), §§103-106, concerning a Dublin transfer to Hungary, the court focussed on the detention conditions in the destination country, even though the applicant invoked also the worrying reception conditions for asylum seekers there. See also, similarly, ECtHR, *Mohammadi v. Austria*, no. 71932/12 (2014), §§68-70, 74.

1145 The 'systematic deficiencies' criterion is absent from the court's reasoning in the *M.S.S.* judgment. However, it emerged in the following jurisprudence [see e.g. ECtHR, *Hussein Diirshi and Others v. the Netherlands and Italy*, nos. 2314/10 etc., dec. (2013), §138; ECtHR, *Mohammed Hassan and Others v. the Netherlands and Italy*, nos. 40524/10 etc., dec. (2013), §176].

1146 In the *M.S.S.* judgment the court assigned great importance to the fact that Greece was bound by the 2003 Reception Directive [see also, praising such approach, Brandl and Czech (2015), 260-261; Vedsted-Hansen (2016) 'Reception Conditions…', 328; critically, de Weck (2017), 188-189]. It was not clear, however, to what extent this finding was decisive for the court's conclusions that Greece and Belgium breached Article 3 of the ECHR by exposing the applicant to degrading living conditions. For more, see Clayton (2011), 767-769; Slingenberg (2014), 346-348; Baumgärtel (2019), 54; Slingenberg (2019), 303; Cornelisse (2019), 114.

In the *Tarakhel v. Switzerland* judgment, the Strasbourg Court considered whether a Dublin transfer to Italy of the family with six minor children could raise an issue under Article 3 of the ECHR due to the reception conditions for asylum seekers there. In regard to the overall situation in Italy the ECtHR concluded that it was not as grave as that in Greece examined in the *M.S.S.* ruling, but 'the possibility that a significant number of asylum seekers removed to that country may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions' could not be disregarded.[1147] With respect to the applicants' individual situation the court emphasized that asylum-seeking children, even when they are accompanied, are especially vulnerable: due to their age and specific needs as minors and on the ground of their particular vulnerability as asylum seekers.[1148] Thus,

> the reception conditions for children seeking asylum must be adapted to their age, to ensure that those conditions do not "create … for them a situation of stress and anxiety, with particularly traumatic consequences" (…). Otherwise, the conditions in question would attain the threshold of severity required to come within the scope of the prohibition under Article 3 of the Convention.[1149]

Taking that into account, the Strasbourg Court concluded that the Swiss authorities should have obtained 'assurances from their Italian counterparts that on their arrival in Italy the applicants will be received in facilities and in conditions adapted to the age of the children, and that the family will be kept together'. Accordingly, it was found that a transfer without such 'individual guarantees' would constitute a violation of Article 3 of the ECHR.[1150]

While the *Tarakhel* judgment was not free from ambiguity and left a lot of questions unanswered,[1151] it clarified that living conditions in a state responsible for examining an asylum application under the Dublin II Regulation are—by themselves—of importance when the principle of non-refoulement arising from Article 3 of the ECHR is being applied. Moreover, the *Tarakhel* judgment elucidated that the systemic deficiencies in the reception of asylum

1147 ECtHR (GC), *Tarakhel v. Switzerland,* no. 29217/12 (2014), §120, see also §§106-115.

1148 Ibid., §§99, 119.

1149 Ibid., §119.

1150 Ibid., §§120-122.

1151 See e.g. the questions posed by judges Casadevall, Berro-Lefèvre and Jäderblom in their joint partly dissenting opinion annexed to the *Tarakhel* judgment. See also Costello and Mouzourakis (2014), 410; de Weck (2017), 182-183; Reid (2019), 802. For the diverse national practices following the *Tarakhel* judgment, see ECRE/ELENA (2015), 7-17; ECRE (2020), 23-25.

seekers are not the only reason for barring removals to the concerned state under Article 3 of the ECHR.[1152]

However, the threshold for precluding Dublin transfers due to living conditions in a state responsible remains particularly high. Analysis of the subsequent jurisprudence of the Strasbourg Court proves unequivocally that the reception conditions in a state responsible for examining an asylum application under the Dublin II Regulation or Dublin III Regulation may bar a transfer thereto, but only in extremely exceptional circumstances.[1153] Most of the post-*Tarakhel* applications of Dublin transferees that rely on the poor reception conditions in a receiving state have been considered manifestly ill-founded, thus inadmissible, if not struck out of the list of cases.[1154] This results from the restrictive interpretation of the *M.S.S.* and *Tarakhel* rulings within the court. Firstly, the situation in no EU Member State has been so far considered by the Strasbourg Court as grave as the situation in Greece examined in the *M.S.S.* case that resulted in barring all transfers there.[1155] Secondly, while the obligation to obtain individual guarantees before a Dublin transfer holds, it seems to have dwindled, as it is clearly applied only to families with children, not to all asylum seekers.[1156] Thirdly, the ECtHR accepted diverse assurances given by the states responsible under the Dublin II or III Regulations, even when those guarantees were in fact not individual but applied to all asylum-seeking families arriving in the concerned state.[1157] In consequence, since the *Tarakhel* judgment, the Strasbourg Court has not considered any Dublin transfer

1152 See also Costello and Mouzourakis (2014), 408; Peers (2014) 'Tarakhel…'; Taylor (2014) 'Tarakhel…'; Battjes and Brouwer (2015), 191; Vicini (2015), 64; Maiani (2016) 'The Dublin III Regulation…', 137-138; Vedsted-Hansen (2016) 'Reception Conditions…', 349-350; Hruschka and Maiani (2016), 1499; de Weck (2017), 181; Baumgärtel (2019), 64.

1153 See also Bianku (2016), 63.

1154 See also Slingenberg (2019), 307.

1155 See e.g. in regard to Malta, ECtHR, *Ojei v. the Netherlands*, no. 64724/10, dec. (2017), §§38-40; and Italy, ECtHR, *Hussein Diirshi and Others v. the Netherlands and Italy*, nos. 2314/10 etc., dec. (2013), §§138-142; ECtHR, *H. and Others v. Switzerland*, no. 67981/16, dec. (2018), §§19-22.

1156 Many commentators interpreted the *Tarakhel* judgment as establishing the obligation to obtain individual guarantees in the case of all (or at least vulnerable) asylum seekers, see e.g. Costello and Mouzourakis (2014), 410; Taylor (2014) 'Tarakhel…'; de Weck (2017), 182. However, the ECtHR explicitly differentiated between the situation of families with minors and the situation of able adults, in particular young men, with no dependents (even if they were vulnerable), and applied the individual assurances requirement only to a former group, see e.g. ECtHR, *A.M.E. v. the Netherlands*, no. 51428/10, dec. (2015), §§34-37; ECtHR, *A.S. v. Switzerland*, no. 39350/13 (2015), §§35-38; ECtHR, *Ali and Others v. Switzerland and Italy*, no. 30474/14, dec. (2016), §36.

1157 See e.g. ECtHR, *Ali and Others v. Switzerland and Italy*, no. 30474/14, dec. (2016), §§33-37; ECtHR, *N.A. and Others v. Denmark*, no. 15636/16, dec. (2016), §§27-33; ECtHR, *M.A.-M. and Others v. Finland*, no. 32275/15, dec. (2016), §§24-29; ECtHR, *H. and Others v. Switzerland*, no. 67981/16, dec. (2018), §§19-22.

to have been enforced in violation of Article 3 of the ECHR due to degrading reception conditions in a receiving state.

However, the ECtHR, inspired by the *M.S.S. v. Belgium and Greece* judgment,[1158] did find that the specific living conditions in Somalia precluded expulsion there. In the case of *Sufi and Elmi v. the United Kingdom,* the Strasbourg Court decided that the applicants could not have been removed to Mogadishu, due to the general situation of violence there, or to the other areas of Somalia that were under the al-Shabaab's control, due to their personal circumstances. Thus, it was likely that upon expulsion they would have to seek refuge in the settlements for internally displaced persons or refugee camps in Somalia.[1159] However, in the court's view, the conditions in those locations were 'sufficiently dire to amount to treatment reaching the threshold of Article 3' of the ECHR. Inhabitants of those camps faced major difficulties with accessing water, food, accommodation and sanitary facilities. Overcrowding in the Dadaab camps was of great proportion. The inhabitants were also 'vulnerable to violent crime, exploitation, abuse and forcible recruitment' and had 'very little prospect of their situation improving within a reasonable timeframe'. Thus, the 'dire humanitarian conditions' in those camps attained the level of severity required under Article 3 of the ECHR and the internal flight alternative therein was not a viable possibility for the applicants.[1160]

In the *Sufi and Elmi* case, the Strasbourg Court rejected the Government's argument, which relied on the case of *N. v. the United Kingdom,*[1161] that humanitarian conditions would reach the threshold arising from Article 3 of the ECHR only in very exceptional cases where the grounds against removal were compelling. The court indicated that the standard established in the *N.* case would be appropriate only when 'the dire humanitarian conditions in Somalia were solely or even predominantly attributable to poverty or to the State's lack of resources to deal with a naturally occurring phenomenon, such as a drought'. However, in the case at hand, 'it is clear that while drought has contributed to the humanitarian crisis, that crisis is predominantly due to the direct and

1158 See also ECommHR, *Fadele v. the United Kingdom*, no. 13078/87, dec. (1990), where the applicants' claims under Article 3 of the ECHR that concerned living conditions in Nigeria were considered admissible.

1159 ECtHR, *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07 (2011), §§293-296, 301-304, 309-312. See also this Chapter, Title II, point 3, and Title III, point 2.1.

1160 Ibid., §§284-292. See also ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), §125, where the court mentions 'particularly precarious living conditions' in Libya and the fact that irregular immigrants 'were destined to occupy a marginal and isolated position in Libyan society, rendering them extremely vulnerable to xenophobic and racist acts.'

1161 ECtHR (GC), *N. v. the United Kingdom,* no. 26565/05 (2008). For more see these Chapter and Title, point 4.

indirect actions of the parties to the conflict'. Thus, the approach taken in the *M.S.S.* judgment was found to be more appropriate in the *Sufi and Elmi* case.[1162] Later, the ECtHR explained that those remarkable findings resulted from 'the exceptional and extreme conditions' in Somalia and the fact that the parties to the ongoing conflict in that country had significantly contributed to the humanitarian crisis.[1163] In its following rulings, the court did not reach similar conclusions in regard to any other country of destination.[1164] Thus, the test established in the *M.S.S.* judgment, requiring a regard for 'an applicant's ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame', was not applied again in the context of expulsion.[1165] In fact, the court relies instead on the demanding *N. v. the United Kingdom* test in this regard.[1166] Thus, the humanitarian conditions in the country of destination can give rise to a breach of Article 3 of the ECHR 'only in a very exceptional case where the humanitarian grounds against removal are "compelling"'.[1167]

In the cases of *M.S.S., Tarakhel* and *Sufi and Elmi,* the Strasbourg Court innovatively applied the principle of non-refoulement arising from Article 3 of the ECHR in order to preclude removals to states where living or humanitarian conditions were considered 'degrading' or 'dire'. However, it seems that this onward approach has been rethought and assessed as too progressive by the ECtHR's judges, who evidently decided to step back in the following cases regarding both Dublin transfers and expulsions.[1168]

1162 ECtHR, *Sufi and Elmi v. the United Kingdom,* nos. 8319/07 and 11449/07 (2011), §§280-283.

1163 ECtHR, *S.H.H. v. the United Kingdom,* no. 60367/10 (2013), §91. See also Bianku (2016), 59, noticing that the *Sufi and Elmi* case was considered a 'dangerous precedent'.

1164 As well as in regard to Somalia, due to the change of situation in Mogadishu, see e.g. ECtHR, *K.A.B. v. Sweden,* no. 886/11 (2013), and ECtHR, *R.H. v. Sweden,* no. 4601/14 (2015).

1165 See e.g. ECtHR, *S.H.H. v. the United Kingdom,* no. 60367/10 (2013), §§88-92. Costello (2015) *The Human Rights...,* 189, claimed that the *S.H.H.* case proved that the workability of the distinction between *N.* and *M.S.S.* cases established in the *Sufi and Elmi* judgment was 'doubtful'. See also Motz (2015), 189; de Weck (2017), 183-184.

1166 Cf. Motz (2015), 191, stating that 'the ECtHR has remained divided on the appropriate test under Article 3 ECHR in cases involving medical issues and living conditions'.

1167 ECtHR, *A.S.N. and Others v. the Netherlands,* nos. 68377/17 and 530/18 (2020), §§126-128. See also ECtHR, *S.S. v. the United Kingdom,* no. 12096/10, dec. (2012), §74; ECtHR, *Mohammed Hassan and Others v. the Netherlands and Italy,* nos. 40524/10 etc., dec. (2013), §180; ECtHR, *A.S. v. Switzerland,* no. 39350/13 (2015), §§35-38. See also Brandl and Czech (2015), 260-261, explaining that the threshold in regard to living conditions in the non-EU states must be high in order to 'not overstretch member states' patience and willingness to cooperate' under the ECHR.

1168 Dembour (2015) 445, 455, pointing out that the *M.S.S.* judgment is a 'great exception' within the 'Article 3 destitution case law' that has been subsequently 'clawed back'. See also de Weck (2017), 189-190.

The CJ's jurisprudence shows clearly that this court, too, struggles with the idea that socio-economic circumstances are capable of barring removals.[1169] At first, the Luxembourg Court approached the matter restrictively. In the *N.S. and M.E.* case, concerning Dublin transfers to Greece, the court held, relying on the principle of mutual trust,[1170] that not every infringement of fundamental rights is capable of affecting the Member State's obligations under the Dublin II Regulation. There must be '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' to preclude the transfer thereto.[1171] Thus,

> 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.[1172]

In reaching those conclusions, the CJ relied heavily on its interpretation of the *M.S.S. v. Belgium and Greece* judgment.[1173] It stressed the similarity of the circumstances of the two cases and concluded that the situation in Greece examined in the *M.S.S.* case should be categorized as 'a systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers'. The Luxembourg Court also used the *M.S.S.* case to reject the submissions of some Member States that they lack the instruments necessary to assess the compliance with fundamental rights of states responsible under the Dublin II Regulation. It invoked the sources that the Strasbourg Court relied on to examine

1169 Cf. its firm approach to the required reception conditions for asylum seekers and refugees in the Member States: CJ, case C-179/11 *Cimade* (2012); CJ, case C-79/13 *Saciri and Others* (2014); CJ (GC), joined cases C-443/14 and C-444/14 *Alo and Osso* (2016); CJ, case C-713/17 *Ayubi* (2018); CJ (GC), case C-233/18 *Haqbin* (2019).

1170 For more see this Chapter, Title III, point 2.1.

1171 CJ (GC), joined cases C-411/10 and C-493/10 *N.S. and M.E.* (2011), paras 78–86. See also CJ (GC), case C-163/17 *Jawo* (2019), paras 81–85.

1172 CJ (GC), joined cases C-411/10 and C-493/10 *N.S. and M.E.* (2011), para 94. See also Vedsted-Hansen (2016) 'Reception Conditions…', 343, noticing that 'systemic deficiencies in the asylum procedure and in the reception conditions' are not to be treated as cumulative criteria.

1173 See also Lenaerts (2017), 829, 832.

the situation in Greece and concluded that they are available and enable a proper evaluation of the risk of ill-treatment in a state responsible.[1174]

The CJ has been praised for following the ECtHR's judgment.[1175] However, its emphasis on 'systemic deficiencies' in national asylum systems has raised doubts and has been understood by many as a legal requirement that needed to be satisfied to preclude a Dublin transfer.[1176] Meanwhile, in the *M.S.S.* case, the Strasbourg Court did not explicitly qualify the identified shortcomings in reception conditions in Greece as 'systemic'. It also did not establish the 'systemic flaws' criterion under Article 3 of the ECHR.[1177] Therefore, the compatibility of the *N.S. and M.E.* and *M.S.S.* rulings has been questioned.[1178] Nevertheless, in the following jurisprudence (albeit only for a short time), the ECtHR did align with the CJ in the restrictive interpretation of the *M.S.S.* ruling and referred in its decisions concerning Dublin transfers to 'systemic failure where it concerns providing support or facilities catering for asylum seekers'.[1179] The Luxembourg Court continued the questionable *N.S. and M.E.* line of reasoning in the cases of *Puid* and *Abdullahi*.[1180] Its approach is also mirrored in the second and third subparagraphs of Article 3(2) of the Dublin III Regulation.[1181]

1174 CJ (GC), joined cases C-411/10 and C-493/10 *N.S. and M.E.* (2011), paras 88-91.

1175 See e.g. Lenart (2012), 17; de Baere (2013), 114; Velluti (2014), 94.

1176 See e.g. Costello and Mouzourakis (2014), 407; Costello (2015) *The Human Rights…*, 270; Vedsted-Hansen (2016) 'Reception Conditions…', 345-346; Moreno-Lax (2017) *Accessing Asylum…*, 283-284; Baumgärtel (2019), 60; Pergantis (2019), 418-419.

1177 See also Vedsted-Hansen (2016) 'Reception Conditions…', 329-330. Cf. Sicilianos (2015), 5.

1178 See e.g. Morgades-Gil (2015), 442; Lübbe (2015), 136; Vicini (2015), 57, 64-65. See also Zalar (2013), 380-381. Cf. Costello (2012) 'Courting Access…', 331; Lübbe (2015), 136-139; Morano-Foadi (2015), 130-131; Vedsted-Hansen (2016) 'Reception Conditions…', 344, persuading that the contradiction was avoidable or inexistent. See also Lenaerts (2017), 832, stating that the *N.S. and M.E.* case did not require 'to address the question whether Article 4 of the Charter may preclude the transfer of an asylum seeker in a situation that does not involve systemic deficiencies' and this matter was to be resolved in future.

1179 See e.g. ECtHR, *Hussein Diirshi and Others v. the Netherlands and Italy,* nos. 2314/10 etc., dec. (2013), §138. See also Vedsted-Hansen (2016) 'Reception Conditions…', 331-338, 344-345, where he claimed that this post-M.S.S. approach of the ECtHR might have been inspired by the CJ's ruling in the case of *N.S. and M.E.* and it was a 'striking example of less thoughtful, not to say mechanical transfer of legal concepts and criteria from one judicial context to another one'. See also Dembour (2015), 423-424; Vicini (2015), 61; de Weck (2017), 178; Pergantis (2019), 419.

1180 CJ (GC), case C-4/11 *Puid* (2013), paras 30-31; CJ (GC), case C-394/12 *Abdullahi* (2013), para 60. For more on the latter case, see Chapter 6, Title III, point 2. See also Ippolito (2015), 26, stating that the ECtHR's judgment in the *Tarakhel v. Switzerland* case reversed the *Abdullahi* ruling. Cf. Zalar (2013), 381; Morano-Foadi (2015), 131, arguing that the CJ changed its view on systemic flaws in the case C-179/11 *Cimade and GISTI* (2012).

1181 See also CJ (GC), case C-163/17 *Jawo* (2019), para 86.

The adoption of the Dublin III Regulation prompted the CJ to change its restrictive viewpoint. The court's willingness to depart from the 'systemic deficiencies' requirement could already be noticed in the *Ghezelbash* case.[1182] The matter was finally resolved in the case of *C.K. and Others*, concerning the Dublin transfer of an ill asylum seeker to Croatia, where no systemic failure in provision of the health care had been reported. However, her transfer could in itself result in treatment prohibited under Article 4 of the EU Charter. The EU Commission argued that it followed from Article 3(2) of the Dublin III Regulation that only systemic flaws in a national asylum system are capable of affecting the obligation to transfer asylum seekers to a responsible state. The Luxembourg Court explicitly rejected this argument. It particularly highlighted that

> such a reading of Article 3(2) of the Dublin III Regulation would be, first, irreconcilable with the general character of Article 4 of the Charter, which prohibits inhuman or degrading treatment in all its forms. Secondly, it would be manifestly incompatible with the absolute character of that prohibition if the Member States could disregard a real and proven risk of inhuman or degrading treatment affecting an asylum seeker under the pretext that it does not result from a systemic flaw in the Member State responsible.[1183]

Accordingly, the court concluded that Dublin transfers cannot be enforced if they may entail, for a person concerned, a real risk of inhuman or degrading treatment within the meaning of Article 4 of the EU Charter, 'irrespective of the quality of the reception and the care available in the Member State responsible for examining his application'.[1184]

The *C.K. and Others* ruling has been perceived by many commentators as finally aligning the CJ's jurisprudence with the ECtHR's standards, in particular with the case of *Tarakhel v. Switzerland*.[1185] Surely, by rejecting the 'systemic deficiencies' criterion the Luxembourg Court made an important step towards the convergence of the asylum case-law of the two courts.[1186] It

1182 CJ (GC), case C-63/15 *Ghezelbash* (2016). See also Rizcallah (2017). Cf. opinion of AG Tanchev in case C-578/16 PPU *C.K. and Others,* delivered on 9 February 2017, EU:C:2017:108, para 55. For more on the *Ghezelbash* case, see Chapter 6, Title III, point 2.

1183 CJ, case C-578/16 PPU *C.K. and Others* (2017), paras 91-95.

1184 Ibid., paras 73, 85-89. See also CJ (GC), case C-646/16 *Jafari* (2017), para 101; CJ (GC), case C-490/16 *A.S.* (2017), para 41; CJ (GC), case C-163/17 *Jawo* (2019), para 87.

1185 See e.g. Rizcallah (2017); Marin (2017), 146; Lenaerts (2017), 833-834; Callewaert (2018), 1703-1704; Favilli (2018), 90; Sadowski (2019), 49. See also opinion of AG Wathelet in case C-163/17 *Jawo,* delivered on 25 July 2018, EU:C:2018:613, paras 87-88. Cf. Imamović and Muir (2017), 727; Pergantis (2019), 422.

1186 See also Lenaerts (2018), 34.

is clear now that systemic deficiencies in a national reception system are not the only situation that may bar a transfer under Article 4 of the EU Charter and Article 3 of the ECHR. In other exceptional circumstances such a transfer may also be prohibited. However, the *C.K. and Others* case does not elucidate in what specific circumstances living conditions in a responsible state entail the prohibition of refoulement.[1187]

In the case of *Alheto*, the CJ did not clarify the scope of the exceptionality criterium. It merely stated that 'dignified living conditions' must be expected in a destination state.[1188] Only in the case of *Jawo* has the court provided a more elaborate answer to the above-mentioned question. The case concerned a Dublin transfer of a Gambian national from Germany to Italy. The referring court was uncertain whether such a transfer could be enforced if the applicant would be exposed to a serious risk of suffering treatment prohibited under Article 4 of the EU Charter due to the living conditions that beneficiaries of international protection were expected to encounter upon being granted protection in the state responsible. With reference to the *M.S.S. v. Belgium and Greece* case, the Luxembourg Court held that the deficiencies in a receiving state must attain a particularly high level of severity to bar a transfer. Such a level would be attained

> where the indifference of the authorities of a Member State would result in a person wholly dependent on State support finding himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity.[1189]

Thus, even 'a high degree of insecurity or a significant degradation of the living conditions of the person concerned' that do not entail 'extreme material poverty placing that person in a situation of such gravity that it may be equated with inhuman or degrading treatment' is insufficient from the perspective of Article 4 of the EU Charter.[1190] While in the circumstances of the case at hand

1187 See also Pergantis (2019), 423.

1188 CJ (GC), case C-585/16 *Alheto* (2018), para 134. For more see this Chapter, Title III, point 2.2.

1189 CJ (GC), case C-163/17 *Jawo* (2019), paras 91-92. See also CJ (GC), joined cases C-297/17, C-318/17, C-319/17 and C-438/17 *Ibrahim and Others* (2019), paras 89-90; CJ, joined cases C-540/17 and C-541/17 *Hamed and Omar,* order (2019), para 39.

1190 CJ (GC), case C-163/17 *Jawo* (2019), para 93. See also CJ (GC), joined cases C-297/17, C-318/17, C-319/17 and C-438/17 *Ibrahim and Others* (2019), para 91.

the required high threshold had not been reached,[1191] in general 'it cannot be entirely ruled out that an applicant for international protection may be able to demonstrate the existence of exceptional circumstances that are unique to him and mean that, in the event of transfer (...)' he would suffer extreme material poverty after being granted protection.[1192] However, the fact that 'social protection and/or living conditions' are more favourable in the state requesting a transfer than in the state responsible under the Dublin III Regulation is not sufficient to bar a Dublin transfer under Article 4 of the EU Charter.[1193]

The corresponding conclusions were reached in the *Ibrahim and Others* case, decided on the same day. The case considered the application of Article 33(2)(a) of the 2013 Procedures Directive, which entitles the Member States to reject an application for international protection as inadmissible when another Member State has already granted protection to the concerned person. The Luxembourg Court held that the lack of subsistence allowance for beneficiaries of subsidiary protection in that Member State or the fact that this allowance is 'markedly inferior to that in other Member States', when the beneficiaries are not discriminated in this regard (compared to nationals of the Member State), can entail protection under Article 4 of the EU Charter only when the applicant 'would, because of his or her particular vulnerability, irrespective of his or her wishes and personal choices, be in a situation of extreme material poverty' upon removal.[1194] Thus, as clarified later in the *Hamed and Omar* case, the Member State cannot reject the asylum application under Article 33(2)(a) of the 2013 Procedures Directive when the foreseeable living conditions for a beneficiary of international protection in the Member State that granted this protection would expose the applicant to a serious risk of inhuman or degrading treatment, within the meaning of Article 4 of the EU Charter, understood as the exposure to 'extreme material poverty' there.[1195]

1191 CJ (GC), case C-163/17 *Jawo* (2019), paras 94, 96. The applicant invoked the lack of social support for beneficiaries of international protection in Italy resulting in the risk of homelessness and destitution as well as the lack of integration programs there.

1192 CJ (GC), case C-163/17 *Jawo* (2019), para 95. See also CJ, case C-517/17 *Addis* (2020), para 52.

1193 CJ (GC), case C-163/17 *Jawo* (2019), para 97. See also CJ (GC), joined cases C-297/17, C-318/17, C-319/17 and C-438/17 *Ibrahim and Others* (2019), para 94.

1194 CJ (GC), joined cases C-297/17, C-318/17, C-319/17 and C-438/17 *Ibrahim and Others* (2019), para 101. For more on this case, see this Chapter, Title III, point 2.1.

1195 CJ, joined cases C-540/17 and C-541/17 *Hamed and Omar,* order (2019), paras 34-43. See also CJ, case C-517/17 *Addis* (2020), paras 50-51.

The cases of *Jawo*, *Ibrahim* and *Hamed and Omar* clearly show that the CJ replaced the 'systemic deficiencies' criterion with the requirement of 'extreme material poverty'.[1196] The Luxembourg Court refers in this regard to the *M.S.S. v. Belgium and Greece* case, where the Strasbourg Court found that the applicant endured such grave conditions in Greece.[1197] However, the facts that in the specific circumstances of the *M.S.S.* case the applicant's situation was qualified as 'extreme poverty' and that this factual finding led to a conclusion that Greece (and in consequence Belgium) violated Article 3 of the ECHR do not necessarily mean that only such a situation precludes transfers under the principle of non-refoulement arising from the ECHR.[1198] In fact, in the *Tarakhel v. Switzerland* case, the ECtHR allowed for the possibility that other conditions of stay in the responsible state may also bar a Dublin transfer.[1199] Thus, again, the CJ's jurisprudence may be found to be in tension with the *Tarakhel* judgment. Unsurprisingly, the Luxembourg Court has chosen to avoid any

1196 Cf. CJ (GC), case C-163/17 *Jawo* (2019), para 90, where the court referred to joined cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* (2016), invoking again deficiencies that are 'systemic or generalised, or which may affect certain groups of people'. Meanwhile, Xanthopoulou (2018), 493, 496–498, claimed that the CJ did not abandon in full the systemic deficiencies criterion in the *Aranyosi and Căldăraru* case. However, the *Jawo* judgment, overall, must be considered as confirming that systemic flaws are not the only situation that may bar Dublin transfers (see in particular para 87). Den Heijer (2020), 550; Morgades-Gil (2020), 99, 106–107; and Maiani and Migliorini (2020), 39–40, concluded that the *Jawo* or *Aranyosi and Căldăraru* rulings required the examination of both general and individual circumstances.

1197 ECtHR (GC), *M.S.S. v. Belgium and Greece,* no. 30696/09 (2011), §254.

1198 However, the *M.S.S.* judgment has not been unequivocally understood within the ECtHR itself. In some—rare—decisions the court explicitly tied the protection offered by Article 3 of the ECHR exclusively to the 'situations of the most extreme poverty' [see e.g. ECtHR, *Hunde v. the Netherlands*, no. 17931/16, dec. (2016), §59; ECtHR, *J.W. v. the Netherlands*, no. 16177/14, dec. (2017), §33]. In other cases, the *M.S.S.* ruling has been interpreted as introducing the test of ability to cater for most basic needs: food, hygiene and a place to live [see e.g. ECtHR, *S.H.H. v. the United Kingdom,* no. 60367/10 (2013), §§76–77; ECtHR, *N.T.P. and Others v. France,* no. 68862/13 (2018), §47; ECtHR, *N.H. and Others v. France,* nos. 28820/13, 75547/13 and 13114/15 (2020), §184]. The CJ equated those two criteria [see e.g. CJ (GC), case C-163/17 *Jawo* (2019), para 92; see also Slingenberg (2014), 309; Cornelisse (2019), 113; den Heijer (2020), 549]. However, in many other rulings the ECtHR did not refer to any of those criteria, at most the 'extreme material poverty' was mentioned as the factual finding that was made in the *M.S.S.* case [see e.g. ECtHR, *Rahimi v. Greece,* no. 8687/08 (2011), §§91–93; ECtHR, *Hussein Diirshi and Others v. the Netherlands and Italy,* nos. 2314/10 etc., dec. (2013), §138–139; ECtHR, *Safaii v. Austria,* no. 44689/09 (2014), §50; ECtHR, *Ali and Others v. Switzerland and Italy,* no. 30474/14, dec. (2016), §35; ECtHR, *N.A. and Others v. Denmark,* no. 15636/16, dec. (2016), §32].

1199 ECtHR (GC), *Tarakhel v. Switzerland,* no. 29217/12 (2014), §120, where the court relied on 'the possibility that a significant number of asylum seekers removed to that country may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions.'

direct references to this ruling in the *Jawo* and following cases.[1200] Instead, it relied on the most restrictive interpretation of the *M.S.S.* judgment. While it is true that a 'particularly high level of severity' is required by the Strasbourg Court under Article 3 of the ECHR in regard to living conditions,[1201] it seems that–by introducing the explicit requirement of 'extreme material poverty'–the CJ has tightened the criteria in this regard even more than the ECtHR itself.[1202] The insistence on the 'extreme material poverty' criterion may indicate that the Grand Chamber decided to recede from the previous, more generous approach reflected in the Chamber's ruling given in the *C.K. and Others* case. President Lenaerts said that the latter case confirmed that the ECtHR and the CJ 'strive to achieve convergence'.[1203] In *Jawo* and following cases the CJ either changed its course or misinterpreted the *M.S.S.* judgment.

It is argued that the higher threshold in the cases of *Jawo, Ibrahim and Others* and *Hamed and Omar* resulted from the fact that they concerned reception conditions for beneficiaries of international protection,[1204] while in the *M.S.S.* case the ECtHR's conclusions were closely connected with the particular vulnerability of asylum seekers. In fact, the Strasbourg Court explicitly stated that 'the situation of asylum seekers cannot be equated with the lawful stay of a recognised refugee'. Accordingly, in the case of *Mohammed Hassan and Others v. the Netherlands and Italy,* which concerned refugees, the court applied the more demanding test established in the *N. v. the United Kingdom* case (requiring 'exceptionally compelling humanitarian grounds against removal') instead of relying on the *M.S.S.* case.[1205] Nevertheless, the Luxembourg Court did not introduce such a differentiation in the *Jawo* and following cases. In fact, it applied similar reasoning–focussing on the 'extreme material poverty' criterion–in the cases of the asylum seeker *(Jawo),* beneficiaries of

1200 This avoidance may result from the opinion that the obligation to obtain individual guarantees before a Dublin transfer is incompatible with the principle of mutual trust [for more see Vicini (2015), 70-71]. Notwithstanding, the court's insistence–in the *Jawo* and following cases–on the individual assessment of the asylum seeker's situation and on the consideration of his particular vulnerability, mirrors the approach of the ECtHR expressed in the *Tarakhel* ruling.

1201 As rightly noticed by the CJ, see e.g. CJ (GC), case C-163/17 *Jawo* (2019), para 91. See also den Heijer (2020), 550.

1202 Cf. den Heijer (2020), 549, claiming that the ECtHR and CJ understand 'extreme material poverty' coherently.

1203 Lenaerts (2018), 34.

1204 Den Heijer (2020), 548-549.

1205 ECtHR, *Mohammed Hassan and Others v. the Netherlands and Italy,* nos. 40524/10 etc., dec. (2013), §§179-180. Cf. ECtHR, *Mohammed Hussein v. the Netherlands and Italy,* no. 27725/10, dec. (2013), §§70-71; ECtHR, *E.T. and N.T. v. Switzerland and Italy,* no. 79480/13, dec. (2017), §§24-27.

subsidiary protection *(Ibrahim and Others)* and refugees *(Hamed and Omar)*. Moreover, the court stressed that it finds it insignificant 'whether it is at the very moment of the transfer, *during the asylum procedure or following it* that the person concerned would be exposed, because of his transfer to the Member State that is responsible within the meaning of the Dublin III Regulation, to a substantial risk of suffering inhuman or degrading treatment'.[1206]

Both European asylum courts struggle with applying the principle of non-refoulement when a removal is to be enforced to a country with poor living conditions. They agree that in such situations only very exceptional circumstances bar a transfer or expulsion. What constitutes such exceptions is still not clear. The courts take one step forward (the Strasbourg Court in the *M.S.S.* and *Tarakhel* cases, the Luxembourg Court in the *C.K. and Others* case) and then one step back (multiple inadmissibility decisions of the ECtHR, the CJ's *Jawo*, *Ibrahim and Others* and *Hamed and Omar* judgments) in this regard. Such 'wobbly' jurisprudence surely must hamper the goal of conforming standards between the courts. However, it should not justify overlooking important cases (e.g. the Luxembourg Court's omitting the *Tarakhel* judgment) or misinterpreting the respective judgments (e.g. the *M.S.S.* case understood by the CJ as introducing the 'systemic deficiencies' or 'extreme material poverty' requirements).

The cases of *M.S.S.* and *N.S. and M.E.* have been seen as the 'most remarkable illustration' of the dialogue between the Strasbourg and Luxembourg Courts.[1207] This outstanding jurisprudential exchange of views has continued ever since, but in the context of living conditions in a receiving state it is–overall–rather 'testy'[1208] than conciliatory, and ultimately has not resulted in a full convergence of the respective jurisprudence.

III. Denying Protection

While the previous subchapter focusses on the ECtHR's and CJ's approach to granting protection, the present one offers insight into their views on reasons that justify denying protection. States often argue that they are not obliged to issue humanitarian visas to presumptive asylum seekers[1209] (point 1) or

1206 CJ (GC), case C-163/17 *Jawo* (2019), para 88 (emphasis added). See also den Heijer (2020), 547, pointing to the harmony of this conclusion with the ECtHR's jurisprudence.

1207 De Baere (2013), 114.

1208 Pergantis (2019), 412.

1209 See e.g. Moreno-Lax (2018), 50.

that they do not need to give them protection as it is already available elsewhere (point 2). The Dublin system as well as the 'first country of asylum' and 'safe third country' concepts enable the removal of asylum seekers to another state that is presumed to be safe (point 2.1). The exclusion clause provided for in Article 1D of the 1951 Refugee Convention, applicable in practice to Palestine refugees, offers a variation on the 'safe third country' concept. It is based on the presumption that Palestinians do not need to be granted refugee status, because they are already benefiting from the protection of the UNRWA (point 2.2.). Lastly, states are particularly keen to exclude from protection and remove criminal offenders or persons who are deemed to constitute a threat to a national security or public order. Those persons are considered not only undesirable but also undeserving of any kind of protection (point 3).

1. Humanitarian Visas

Humanitarian visas are issued in order to allow a foreigner to legally enter the territory of the state issuing the visa for the sole purpose of seeking protection there. States rarely allow such access to their territory,[1210] even though it has been argued that issuance of humanitarian visas is in fact an obligation arising from the principle of non-refoulement.[1211] The matter has recently been considered by the Strasbourg and Luxembourg Courts.

In the ECtHR's *M.N. and Others v. Belgium* case, the Syrian family unsuccessfully applied to the Belgian embassy in Beirut for a visa in order to, subsequently, ask for international protection in Belgium. They invoked the general situation of violence in Aleppo, in particular its intensive bombardment. They stated that their house had been destroyed by bombing, that access to water, food and electricity was very difficult and that the children were not attending school due to the war. The applicants claimed before the Strasbourg Court that the refusal to issue them 'humanitarian visas' exposed them to a situation prohibited under Article 3 of the ECHR. The Grand Chamber found the application inadmissible.

The ECtHR pointed out that pursuant to Article 1 of the ECHR the scope of Convention is limited to 'persons' within the 'jurisdiction' of the States Parties. While this jurisdiction is primarily territorial, in exceptional circumstances extraterritorial protection of the ECHR is possible. Such special circumstances were not found in the *M.N. and Others v. Belgium* case. The court stressed that the concerned applicants were not Belgian nationals seeking the

1210 See e.g. EPRS (2018), 16-17; Moreno-Lax (2018), 35, 58-62; Pollet (2016), 90.

1211 See e.g. Pollet (2016), 91; Moreno-Lax (2018), 73-74.

protection of their embassy and had had no previous links to Belgium (e.g. family ties). Moreover, at no time did the diplomatic agents exercise de facto control over the applicants, who themselves chose to submit their visa applications at the Belgian Embassy in Beirut–rather than approaching any other embassy–and who had been free to leave its premises without any hindrance.[1212] The court also highlighted that bringing administrative or judicial proceedings to a Contracting Party is in itself insufficient to establish jurisdiction over the applicant (both territorial and extraterritorial)[1213] and that

> to find otherwise would amount to enshrining a near-universal application of the Convention on the basis of the unilateral choices of any individual, irrespective of where in the world they find themselves, and therefore to create an unlimited obligation on the Contracting States to allow entry to an individual who might be at risk of ill-treatment contrary to the Convention outside their jurisdiction.[1214]

It would also be against the states' right to control the entry, residence and expulsion of aliens.[1215] Moreover, the Grand Chamber opposed the comparison with the *Soering v. the United Kingdom* case–which gave prominence to the principle of non-refoulement[1216]–made by the applicants. In its opinion, the *M.N. and Others* case is 'fundamentally different from the numerous expulsion cases' where the applicants 'are, in theory, on the territory of the State concerned–or at its border (...)–and thus clearly fall within its jurisdiction'.[1217] The Strasbourg Court concluded that the applicants were not within Belgium's jurisdiction as regards the circumstances in respect of which they complained under Article 3 of the ECHR. However, it also noted that 'this conclusion does not prejudice the endeavours made by the States Parties to facilitate access to asylum procedures through their embassies and/or consular representations'.[1218]

It is noteworthy that the Grand Chamber briefly mentioned the CJ's case of *X and X*, adjudicated three years earlier. The ECtHR considered it to be 'similar' to the case at hand.[1219] Indeed, the circumstances of the *X and X* and

1212 ECtHR (GC), *M.N. and Others v. Belgium*, no. 3599/18, dec. (2020), §113-118.

1213 Ibid., §112, 121-123.

1214 Ibid., §123.

1215 Ibid., §124.

1216 ECtHR (Plenary), *Soering v. the United Kingdom*, no. 14038/88 (1989). See also Chapter 2, Title II, point 2.1.

1217 ECtHR (GC), *M.N. and Others v. Belgium*, no. 3599/18, dec. (2020), §120.

1218 Ibid., §§125-126.

1219 Ibid., §§71, 124.

M.N. and Others v. Belgium cases are parallel. In the former case, a Syrian family applied to the Belgian Embassy in Beirut for short-term visas on the basis of Article 25(1)(a) of the Visa Code.[1220] They wanted to apply for asylum after arriving in Belgium. They invoked the besiegement of Aleppo and the precarious security situation in Syria in general, but also relied on the individual circumstances resulting from their religion. Their applications were refused with the reasoning that their stay would exceed 90 days and they could not apply for international protection through the embassy. The national authorities stressed also that under Article 3 of the ECHR Contracting States are not required to admit 'victims of a catastrophic situation' to their territories.[1221] The referring court was uncertain of the scope of obligations arising from Article 25(1)(a) of the Visa Code, in particular whether the Member State is required to issue a visa where a risk of an infringement of Article 4 and/or Article 18 of the EU Charter or international obligations, including the ECHR and the 1951 Refugee Convention, has been established.

The CJ decided that the applications for visas submitted by the concerned Syrian family were wrongly qualified by the Belgian authorities as applications for short-term visas regulated by the Visa Code. They fell outside the scope of that code because the purpose of the applicants' stay clearly indicated that it would exceed 90 days in any 180-day period, while the objective of the regulation is to determine procedures and conditions for issuing visas for only short periods of time. Moreover, the European Parliament and the Council did not adopt any measures 'with regard to the conditions governing the issue by Member States of long-term visas and residence permits to third-country nationals on humanitarian grounds'. Thus, 'the applications at issue in the main proceedings fall solely within the scope of national law'. In consequence, the EU Charter did not apply to the main proceedings.[1222] The Luxembourg Court stressed that

> to conclude otherwise would mean that Member States are required, on the basis of the Visa Code, de facto to allow third-country nationals to submit applications for international protection to the representations

1220 Regulation (EC) No 810/2009 of the European Parliament and of the Council establishing a Community Code on Visas (Visa Code), 13 July 2009, OJ L 243/1, entered into force 5 October 2009. Article 25(1)(a) provides for the exceptional issuance of visas with limited territorial validity 'when the Member State concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations (…)'.

1221 CJ (GC), case C-638/16 PPU *X and X* (2017), paras 20–21.

1222 CJ (GC), case C-638/16 PPU *X and X* (2017), paras 41–45, 50. Cf. opinion of AG Mengozzi in this case delivered on 7 February 2017, EU:C:2017:93, who reached quite opposite conclusions. See also Moreno-Lax (2018), 66–67.

> of Member States that are within the territory of a third country. Indeed, whereas the Visa Code is not intended to harmonise the laws of Member States on international protection, it should be noted that the measures adopted by the European Union on the basis of Article 78 TFEU that govern the procedures for applications for international protection do not impose such an obligation and, on the contrary, exclude from their scope applications made to the representations of Member States.[1223]

Relying on the text of the 2013 Procedures Directive and the Dublin III Regulation, the court pointed out that the application for international protection can be made only on the territory of the Member State, including at the border, in the territorial waters or in the transit zones. Moreover, in the court's view, allowing third-country nationals to apply for visas in order to lodge applications for international protection after their arrival in the Member State 'of their choice' would 'undermine the general structure of the system' established under the Dublin III Regulation.[1224]

The judgment in the case of *X and X* has been severely criticized.[1225] The commentators deemed it disappointing, unconvincing and even politically motivated.[1226] Apart from the arguments arising from the EU law and the previous jurisprudence of the Luxembourg Court, the critics relied on the ECtHR's case-law regarding extraterritorial jurisdiction. They considered it likely or even certain that the acts of diplomatic and consular agents concerning visas entail the jurisdiction required under Article 1 of the ECHR, and thus, that Article 3 of the ECHR should be taken into account when deciding on the visa application.[1227] Those arguments have been invalidated by the abovementioned *M.N. and Others v. Belgium* judgment.

With different reasoning, the two European asylum courts reached corresponding conclusions in the *M.N. and Others v. Belgium* and *X and X* judgments: neither the ECHR nor the EU Charter is applicable when prospective asylum seekers try to use the legal pathway of entry to a state of protection, i.e. a visa procedure.[1228] In this context, the protective reach of Article 3 of

1223 CJ (GC), case C-638/16 PPU *X and X* (2017), para 49.

1224 Ibid., para 48. See also, critically, Moreno-Lax (2018), 65-66.

1225 Cf. Folz and Radlgruber (2018), 53.

1226 See e.g. Heschl and Stankovic (2018), 121.

1227 See e.g. Moreno-Lax (2017) 'Asylum Visas…'; Morgades-Gil (2017) 'Humanitarian Visas…', 1011-1012; Spijkerboer, Brouwer and Al Tamimi (2017), 4-5; Sheridan and Taylor (2017); Zoeteweij-Turhan and Progin-Theuerkauf (2017). See also Noll (2005), 564-570; Moreno-Lax (2017) *Accessing Asylum…*, 309-311; Costello and Mouzourakis (2017), 280-281; Heschl and Stankovic (2018), 121.

1228 See also Gammeltoft-Hansen (2020); Stoyanova (2020); Baumgärtel (2020).

the ECHR and Article 4 of the EU Charter does not go as far as to visa claimants at the embassies of the Contracting Parties or Member States.

2. Protection Elsewhere

States have developed various mechanisms to shift the responsibility for asylum seekers to other countries. Within the EU, the Dublin III Regulation serves this purpose. As a rule, only one EU state is responsible for the examination of any application for international protection. Other states—challenged with the secondary movements of asylum seekers—are not obliged to conduct a determination procedure and may transfer an applicant to another EU state where his claims should be examined in accordance with the 2011 Qualification Directive and the 2013 Procedures Directive. The latter directive also entitles the EU Member States to consider the application for international protection inadmissible on the basis of the 'first country of asylum' and 'safe third country' concepts. Then, the asylum seeker's claims are not examined on the merits in the EU, but he is removed to a third—non-EU—country. The application may be also rendered inadmissible when the person concerned has already been granted international protection in another Member State.[1229] The Dublin system and the above-mentioned admissibility grounds are based on the same premise: the protection is available elsewhere, thus the responsibility for the asylum seeker concerned can be shifted. Hence, the ECtHR's and CJ's approach to those measures is considered below jointly (point 2.1).

Under international refugee law and the 2011 Qualification Directive, one more avenue for shifting the responsibility for asylum seekers is given to states. Pursuant to Article 1D the 1951 Refugee Convention, 'persons who are at present receiving from organs or agencies of the UN other than the UNHCR protection or assistance' cannot be considered refugees. It was adopted with one group in mind: Palestinian refugees who have been receiving protection or assistance from the UNRWA. Thus, the Strasbourg and Luxembourg Courts' views on removals of Palestinians that could be or have been provided with the protection of that specialized agency, must also be scrutinized (point 2.2).

2.1 Safe 'Other' Country

Removals to 'third countries', i.e. states that are not the country of origin for the concerned asylum seeker, have been examined by the Strasbourg Court in diverse legal contexts (*inter alia* in connection with the bilateral agreements between the Contracting States and third countries, under the Dublin

1229 See Articles 33(2)(a-c), 35 and 38 of the 2013 Procedures Directive.

Regulations or the Procedures Directives). The ECtHR's response has been unequivocal. Asylum seekers can be removed to a third country only when no 'substantial grounds have been shown for believing that such action would expose them, directly (i.e., in that third country) or indirectly (for example, in the country of origin or another country), to treatment contrary to, in particular, Article 3' of the ECHR.[1230] Thus, the 'safety' of a third country must be established on two levels: first, the applicant cannot be at risk of being subjected to ill-treatment in that country, and, secondly, he cannot be at risk of being refouled from the third country to his country of origin (or another country). The jurisprudence of the Strasbourg Court concerning direct refoulement was examined in the previous subchapter; thus, it is not analysed here in more detail. Instead, the risk of indirect refoulement is given full attention in this section.

Indirect (or chain) refoulement is prohibited under Article 3 of the ECHR. Therefore, when the asylum seeker is to be removed to a third country without his asylum application being assessed on the merits beforehand, domestic authorities must most of all

> examine thoroughly the question whether or not there is a real risk of the asylum seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against refoulement. If it is established that the existing guarantees in this regard are insufficient, Article 3 implies a duty that the asylum seekers should not be removed to the third country concerned.[1231]

The accessibility and reliability of the asylum system in a third state must be carefully examined by national authorities out of their own motion. The assessment has to be up-to-date and concern both the law and practice in a receiving state. Deficiencies of asylum proceedings that are 'well documented in authoritative reports, notably of the UNHCR, Council of Europe and EU bodies' are considered by the Strasbourg Court to be known by the authorities deciding on removals. Moreover, asylum seekers must be given the opportunity to prove that a third country is not safe in their particular case.[1232]

Domestic authorities are swiftly condemned by the ECtHR when the above-mentioned analysis is lacking. In the case of *Abdulkhakov v. Russia*, the Russian authorities were reproached for secretly removing the Uzbek national to Tajikistan without any examination of the accessibility and reliability of

1230 ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §129.

1231 Ibid., §134.

1232 Ibid., §§141, 148.

the asylum proceedings there. In particular, the Russian authorities did not scrutinize whether the applicant would be informed about the asylum procedure and allowed to voice his fears of ill-treatment in Uzbekistan before the competent Tajik authority, or whether those proceedings would entail an automatic suspensive effect and be conducted with an independent and rigorous scrutiny. The removal was found to be in violation of Article 3 of the ECHR.[1233]

Asylum seekers cannot be removed to a third state where no asylum procedure exists and where the principle of non-refoulement is not respected. In the case of *Hirsi Jamaa and Others v. Italy,* the applicants from Somalia and Eritrea were intercepted by Italian ships and—under a bilateral agreement—handed over to the Libyan authorities. Libya did not ratify the 1951 Refugee Convention and did not establish any domestic asylum procedure. Moreover, Libyan authorities did not recognize the refugee status given by the UNHCR's office in Tripoli and effected removals of asylum seekers and refugees to high-risk countries. The ECtHR concluded that the Italian authorities had known or should have known that there had been insufficient guarantees protecting the asylum seekers in Libya from the risk of being arbitrarily returned to their countries of origin. Thus, sending the applicants back to Libya breached Article 3 of the ECHR.[1234]

The removal to a third country is also prohibited when the asylum procedure has been established in the national legislation but is not accessible or effective in practice. In the case of *M.S.S. v. Belgium and Greece,* asylum proceedings in Greece were considered by the Strasbourg Court insufficiently available and reliable to allow for a Dublin transfer there. At the material time, it was widely known that persons seeking asylum in Greece did not receive adequate information about the procedures to be followed and had difficulty accessing proper authorities, that there was no reliable system of communication between the Greek authorities and persons seeking asylum and a shortage of interpreters, that staff responsible for asylum proceedings was not trained adequately, that legal aid was lacking and that asylum decisions were issued after an excessively long time. Moreover, first-instance decisions were mostly negative and 'drafted in a stereotyped manner without any details of the reasons for the decisions being given'. The appeal procedure was also of no use, in particular due to its duration (on average five and a half years). Furthermore, Greece was effecting forced removals to high-risk countries,

1233 ECtHR, *Abdulkhakov v. Russia,* no. 14743/11 (2012), §§152-157. See also Battjes (2006), 401-402, pointing out that asylum proceedings in a third state must satisfy the requirements arising from Article 13 of the ECHR. For more on this provision, see Chapter 6.

1234 ECtHR (GC), *Hirsi Jamaa and Others v. Italy,* no. 27765/09 (2012), §§153-158. See also ECtHR, *Abdolkhani and Karimnia v. Turkey,* no. 30471/08 (2009), §§84-90.

including applicant's country of origin, before the returnee's asylum claims were considered on merits by the proper authorities.[1235] The ECtHR noticed that those major structural deficiencies in the Greek asylum system, amounting to a violation of Article 13 in conjunction with Article 3 of the ECHR, must have been known to the Belgian authorities deciding on the applicant's transfer under the Dublin II Regulation. Accordingly, the Grand Chamber concluded that Article 3 of the ECHR had been violated by Belgium, 'because, by sending him back to Greece, the Belgian authorities exposed the applicant to risks linked to the deficiencies in the asylum procedure in that State'.[1236]

Shortcomings in national asylum proceedings need not be as abysmal and ubiquitous as in the *M.S.S.* case to prevent a removal to a third country.[1237] For instance, the asylum procedure in a third country may be ineffective in practice for one particular group of applicants. In the case of *M.K. and Others v. Poland*, it was claimed that Belarus could not have been considered a 'safe third country' for the applicants, because asylum applications made by Russian citizens in Belarus have usually been refused and there were instances of Russians being deported from Belarus to their country of origin where their rights were subsequently violated. The Strasbourg Court felt satisfied that the applicants 'could arguably claim that there was no guarantee that their asylum applications would be seriously examined by the Belarusian authorities and that their return to Chechnya could violate Article 3 of the Convention'. The Polish authorities should have assessed those claims and allowed the foreigners to remain on their territory for the duration of asylum proceedings. Instead, they repeatedly issued decisions on refusal of entry, forcing the applicants' returns to Belarus, in violation of Article 3 of the ECHR.[1238]

In the above-mentioned cases the responding states tried to argue that they had merely performed their duties arising from the bilateral agreements *(Hirsi Jamaa and Others)* or EU law: the Dublin II Regulation *(M.S.S.)* or Schengen Borders Code[1239] *(M.K. and Others)*. In the latter case, the ECtHR

1235 ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §§298-322.

1236 Ibid., §§346-352. See also ECtHR, *Sharifi and Others v. Italy and Greece*, no. 16643/09 (2014), §§233-235. Cf. ECtHR, *Mohammadi v. Austria*, no. 71932/12 (2014), §§71-75; ECtHR, *Safaii v. Austria*, no. 44689/09 (2014), §§45-51.

1237 See also ECtHR (GC), *Tarakhel v. Switzerland*, no. 29217/12 (2014), §§114-122, in regard to living conditions for asylum seekers in a third state. For more see this Chapter, Title II, point 5.

1238 ECtHR, *M.K. and Others v. Poland*, nos. 40503/17, 42902/17 and 43643/17 (2020), §§174-179. See also ECtHR, *M.A. and Others v. Lithuania*, no. 59793/17 (2018), §§105-115.

1239 Regulation (EU) 2016/399 of the European Parliament and of the Council on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), 9 March 2016, OJ L 077/1, entered into force 12 April 2016.

pointed out that the principle of non-refoulement is embraced under the EU law and asylum seekers are permitted to remain in the Member State examining their application for international protection. Thus, in accordance with the EU law, Polish authorities could allow the applicants' entry after accepting their asylum application. Accordingly, their actions 'fell outside the scope of Poland's strict international legal obligations'.[1240] The same conclusion was reached in the case of *M.S.S.*, as under Article 3(2) of the Dublin II Regulation Belgium could refrain from transferring the applicant to Greece and examine his application for international protection itself.[1241] In the *Hirsi Jamaa and Others* case, the Strasbourg Court pointed out that 'Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya. (...) the Contracting States' responsibility continues even after their having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols in respect of these States'.[1242]

The responding states argued as well that the third countries concerned were EU Member States[1243] or Contracting Parties of the ECHR, 1951 Refugee Convention or other international human rights treaties[1244], thus it was justifiable to assume that they were safe for the applicants. The ECtHR stressed in this regard that

> the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.[1245]

Accordingly, it is not enough to determine that a third country is a Member State of the EU or a Contracting State of the ECHR or the 1951 Refugee Conven-

1240 ECtHR, *M.K. and Others v. Poland*, nos. 40503/17, 42902/17 and 43643/17 (2020), §§180-182.

1241 ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §§339-340. Under Article 3(2) of the Dublin II Regulation, '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'.

1242 ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), §129.

1243 See e.g. ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §326.

1244 See e.g. ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), §141.

1245 ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §353. See also ECtHR, *T.I. v. the United Kingdom*, no. 43844/98, dec. (2000), §1; ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), §128. Cf. ECtHR, *K.R.S. v. the United Kingdom*, no. 32733/08, dec. (2008).

tion.[1246] In particular, 'the expelling State cannot merely assume that the asylum seeker will be treated in the receiving third country in conformity with the Convention standards but, on the contrary, must first verify how the authorities of that country apply their legislation on asylum in practice'.[1247] Thus, relying on the presumption of safety in a third country is not prohibited under the ECHR, but it must be based on a rigorous assessment. The Strasbourg Court firmly holds that any presumption of safety in a third country is refutable and the Contracting States cannot just blindly trust one another that they act in accordance with the ECHR or EU law.[1248]

The responding states also cannot evade their own responsibility under the ECHR by merely relying on the fact that a list of safe third countries is provided for in a domestic law. In the case of *Ilias and Ahmed v. Hungary*, the Bangladeshi nationals arrived in Hungary through Serbia and applied for international protection. Their applications were not considered on the merits but rejected as inadmissible because Serbia was on the list of safe third countries. The Grand Chamber clearly stated

> (t)he Convention does not prevent Contracting States from establishing lists of countries which are presumed safe for asylum seekers. (...) The Court considers, however, that any presumption that a particular country is "safe", if it has been relied upon in decisions concerning an individual asylum seeker, must be sufficiently supported at the outset by an analysis of the relevant conditions in that country and, in particular, of its asylum system.[1249]

The addition of Serbia to the Hungarian list of safe third countries was not preceded with a thorough analysis of whether the access to asylum proceedings in Serbia was effective and the principle of non-refoulement was respected there. Meanwhile, 'a real risk of denial of access to an effective asylum procedure in Serbia and summary removal to North Macedonia and then to Greece'

1246 However, the fact that a third country is not a Contracting Party to the ECHR or the 1951 Refugee Convention may act against removal there, see e.g. ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), §§147, 153; ECtHR, *Abdulkhakov v. Russia*, no. 14743/11 (2012), §154; ECtHR, *M.A. and Others v. Lithuania*, no. 59793/17 (2018), §113. See also De Weck (2017), 441, who noticed that the court's approach in this regard 'demonstrates that a certain presumption towards receiving states being part of the Council of Europe is still valid'. See also Hurwitz (2009), 195; den Heijer (2013), 278-279; Hamdan (2016), 110-112.

1247 ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §141.

1248 See e.g., with regard to the *M.S.S.* case, Mallia (2011), 108, 126; Clayton (2011), 761; Moreno-Lax (2012), 6, 20, 28; Lenart (2012), 16.

1249 ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §152.

has been established by the court. Hence, Hungary 'failed to discharge its procedural obligation under Article 3 of the Convention to assess the risks of treatment contrary to that provision before removing the applicants' to a third country–Serbia.[1250]

In the *Ilias and Ahmed* case, the Hungarian authorities were also reproached for not obtaining any guarantees confirming that the applicants would have access to the asylum procedure in Serbia. The Grand Chamber stressed that

> the risk of summary removal from Serbia to other countries could have been alleviated in this particular case if the Hungarian authorities had organised the applicants' return to Serbia in an orderly manner or through negotiations with the Serbian authorities. However, the applicants were not returned on the strength of an arrangement with the Serbian authorities but were made to cross the border into Serbia without any effort to obtain guarantees (...).[1251]

Similarly, in the case of *Hirsi Jamaa and Others*, the ECtHR pointed out that under Article 46 of the ECHR 'the Italian Government must take all possible steps to obtain assurances from the Libyan authorities that the applicants will not be subjected to treatment incompatible with Article 3 of the Convention or arbitrarily repatriated'.[1252] In the *M.S.S.* case the diplomatic assurances were given by the Greek authorities to their Belgian counterparts, but they were considered insufficient by the court as they were issued after the decision on a transfer had been adopted, were worded in stereotyped terms and contained no individual guarantees.[1253] The significance of individual assurances in the context of removals to a third state was confirmed in the case of *Tarakhel v. Switzerland*.[1254]

In the *Ilias and Ahmed* case, the Hungarian Government claimed also that the applicants were not in fact real asylum seekers but economic migrants

1250 Ibid., §§153-160, 163. See also ECtHR, *Auad v. Bulgaria*, no. 46390/10 (2011), §105. For more on the latter case, see these Chapter and Title, point 2.2.

1251 ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §161. See also ECtHR, *M.S. v. Slovakia and Ukraine*, no. 17189/11 (2020), §88.

1252 ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), §211. For the critique, see concurring opinion of judge Pinto de Albuquerque; Costello (2015) *The Human Rights...*, 263; Dembour (2015), 339-340.

1253 ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §354. See also ECtHR, *T.I. v. the United Kingdom*, no. 43844/98, dec. (2000), §1. For rules concerning diplomatic assurances, see ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09 (2012), §§186-189.

1254 ECtHR (GC), *Tarakhel v. Switzerland*, no. 29217/12 (2014), §§120, 122. For more on this case, see this Chapter, Title II, point 5.

abusing asylum proceedings. Meanwhile, the obligation to examine the accessibility and reliability of the asylum procedure in a third country applies only when persons to be removed there are seeking asylum. The Strasbourg Court swiftly rejected this argument. It responded that 'with regard to asylum seekers whose claims are unfounded or, even more so, who have no arguable claim about any relevant risk necessitating protection, Contracting States are free, subject to their international obligations, to dismiss their claims on the merits and return them to their country of origin or a third country which accepts them'. However, when a state chooses not to examine the asylum application on the merits and considers it inadmissible, it cannot be known whether the person concerned is or is not an asylum seeker.[1255] Similarly, in the case of *Hirsi Jamaa and Others*, the ECtHR noticed that Italy could not have been exempted from its obligations under Article 3 of the ECHR only because the applicants did not manage to apply for asylum on the ships transferring them back to Libya. In those circumstances, it was still for the Italian authorities to determine 'how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees'.[1256]

However, in the case of *M.S. v. Slovakia and Ukraine*, the Strasbourg Court noticed that the Afghan national did not ask for international protection in Slovakia before being removed to Ukraine, even though he had that possibility. At the material time, there was no risk of generalized violence in Afghanistan, thus it was for the applicant to present before the competent authorities his reasons to seek protection. The ECtHR stressed that 'there is nothing to indicate that, had he done so, his application would not have been accepted and examined, for example because the Slovakian authorities applied in an overly rigid manner a presumption that Ukraine was a safe third country'. Moreover, 'there was no reason for the Slovakian authorities to be on alert concerning any situation of systematic violation of migrants' rights to which the applicant could fall victim in Ukraine'. Since the applicant did not apply for asylum, the Slovakian authorities 'were under no obligation to verify whether he would have effective access to the Ukrainian asylum system'.[1257] Thus, the applicant's claims that Slovakia violated Article 3 of the ECHR by returning him to Ukraine were considered manifestly ill-founded. Interestingly, this

1255 ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §§135-138.

1256 ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), §157. See also ECtHR, *M.A. v. Belgium*, no. 19656/18 (2020), §86, where the court stated that the voluntary withdrawal of the asylum application did not exonerate states from their obligations under Article 3 of the ECHR, in particular the obligation to rigorously examine the risks upon removal.

1257 ECtHR, *M.S. v. Slovakia and Ukraine*, no. 17189/11 (2020), §§80–89.

conclusion was reached even though the applicant did ask for asylum in Ukraine and the Strasbourg Court found that Ukraine violated Article 3 of the ECHR by not adequately examining the applicant's fears of persecution in Afghanistan.[1258]

Lastly, the question arises whether the claims of the concerned asylum seekers must be arguable to entail an obligation of the thorough analysis of the asylum procedure in a third country. Most of the above-mentioned judgments may lead to such a conclusion.[1259] However, in the case of *Ahmed and Ilias v. Hungary*, the Grand Chamber decided that it is not its task to examine whether the applicants risked ill-treatment in Bangladesh. Seeing that the Hungarian authorities decided to remove the applicants to Serbia without conducting a risk assessment in regard to Bangladesh, the ECtHR pointed out that it should not act as a court of first instance dealing with aspects of the case that had not been considered by the national authorities.[1260]

To sum up, both direct and indirect refoulement are prohibited under Article 3 of the ECHR. However, 'where a Contracting State seeks to remove the asylum seeker to a third country without examining the asylum request on the merits, the State's duty not to expose the individual to a real risk of treatment contrary to Article 3 is discharged in a manner different from that in cases of return to the country of origin'.[1261] In the case of a removal of an asylum seeker to a third country, the accessibility and reliability of the asylum procedure there, both in law and practice, must be rigorously examined. The fact that the third country concerned is bound by its obligations arising from e.g. the ECHR or EU law is insufficient to conclude that it is safe for asylum seekers. The Contracting States cannot just assume that the rights of asylum seekers are respected in a third country; blind trust in this regard is unacceptable.[1262]

The ECtHR's approach to removals of asylum seekers to third countries, in particular expressed in the *M.S.S. v. Belgium and Greece* and *Hirsi*

1258 Ibid., §§121-130.

1259 See e.g. ECtHR, *T.I. v. the United Kingdom*, no. 43844/98, dec. (2000), §1; ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §344; ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), §§148-152; ECtHR, *Abdulkhakov v. Russia*, no. 14743/11 (2012), §§141-151; ECtHR, *Mohammed v. Austria*, no. 2283/12 (2013), §§107-110; ECtHR, *M.K. and Others v. Poland*, nos. 40503/17, 42902/17 and 43643/17 (2020), §178. See also den Heijer (2013), 278-279; Hamdan (2016), 110; de Weck (2017), 435. Cf. Moreno-Lax (2012), 24; Velluti (2014), 84; Dembour (2015), 408; Battjes and Brouwer (2015), 187-188; Baumgärtel (2019), 53-54, who noticed the lightened burden of proof for asylum seekers in this regard.

1260 ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §§145-147, where it referred *inter alia* to ECtHR, *Mohammadi v. Austria*, no. 71932/12 (2014), §§71-75. See also ECtHR, *M.A. and Others v. Lithuania*, no. 59793/17 (2018), §105.

1261 ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §130.

1262 See also Costello (2015) *The Human Rights…*, 258.

Jamaa and Others v. Italy judgments, was rightly anticipated to have a profound impact on the EU law and practice.[1263] This impact is particularly tangible in the Dublin context,[1264] where the *M.S.S.* judgment significantly affected the Member States' practice[1265] and prompted a change in the EU law[1266]. It also shaped the CJ's stand as regards Dublin transfers taken in the *N.S and M.E.* case.[1267] The principle of mutual trust, which is a founding rationale of the Dublin system, has been seriously weakened by the ECtHR. Thus, the Luxembourg Court was challenged with the uneasy task of providing the interpretation of the Dublin II Regulation, one that was in accordance with fundamental rights and preserved the *effet utile* of the Dublin system.

The *N.S. and M.E.* ruling concerned–as did the *M.S.S.* case–asylum seekers who were about to be transferred to Greece under the Dublin II Regulation. They opposed the transfers by arguing that Greece did not comply with its obligations arising from the EU law and ECHR. The referring courts asked the CJ whether and how the situation in a state responsible affects the hosting state's obligations stemming from the Dublin Regulation. First, the CJ confirmed that the CEAS was based on the premise that the Member States do observe fundamental rights, including the ones arising from the ECHR and 1951 Refugee Convention, and that they can trust each other in this regard. It pointed out that it was 'precisely because of that principle of mutual confidence that the European Union legislature adopted' the Dublin II Regulation. It concluded that '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'.[1268]

1263 See e.g. Mallia (2011), 126; Clayton (2011), 759; Bossuyt (2012), 218; den Heijer (2013), 285-289; Dembour (2015), 339, 440; de Weck (2017), 440-441.

1264 See also de Weck (2017), 444, who stated that the ECtHR 'was–and continues to be–an important human rights monitoring body with regard to the EU Dublin system'.

1265 In particular, all Dublin transfers to Greece have been suspended for many years, see Baumgärtel (2019), 55; Morgades-Gil (2020), 100; ECRE (2020), 26. For the practice of the selected Member States after the *M.S.S.* and *N.S. and M.E.* judgments, see Battjes and Brouwer (2015), 193-212.

1266 The second and third subparagraphs of Article 3(2) of the Dublin III Regulation. For the impact of the *M.S.S.* case, see Sicilianos (2015), 5; de Weck (2017), 437. The CJ stresses that Article 3(2) of the Dublin III Regulation codified the *N.S. and M.E.* ruling [see CJ, case C-578/16 PPU *C.K. and Others* (2017), para 63; CJ (GC), case C-163/17 *Jawo* (2019), para 86].

1267 Cf. Matera (2013), 283-284.

1268 CJ (GC), joined cases C-411/10 and C-493/10 *N.S. and M.E.* (2011), paras 78-80. See also CJ (GC), case C-163/17 *Jawo* (2019), paras 80-82; CJ (GC), joined cases C-297/17, C-318/17, C-319/17 and C-438/17 *Ibrahim and Others* (2019), paras 83-85. See also Recital 2 of the Preamble to the Dublin II Regulation and Recital 3 of the Preamble to the Dublin III Regulation, stating that 'Member States, all respecting the principle of non-refoulement, are considered as safe countries for third- country nationals'.

Secondly, the Luxembourg Court allowed for the possibility that the Member States 'may, in practice, experience major operational problems (…), 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'.[1269] Accordingly, applying a conclusive presumption that the state responsible under the Dublin II Regulation observes fundamental rights is prohibited under the EU law. The court relied in this regard on the wording of Article 36(2)(a) and (c) of the 2005 Procedures Directive. Under this provision, a third country can be considered a safe third country only when it has ratified and observes the 1951 Refugee Convention and ECHR. Thus, '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 assumption that asylum seekers are treated in compliance with fundamental rights in a Member State responsible is then rebuttable.[1270]

Thirdly, the court emphasized that minor infringements of fundamental rights by a Member State responsible cannot affect the obligations under the Dublin Regulation, because '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'.[1271] However,

> 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.[1272]

1269 CJ (GC), joined cases C-411/10 and C-493/10 *N.S. and M.E.* (2011), para 81. See also CJ (GC), case C-163/17 *Jawo* (2019), para 83.

1270 CJ (GC), joined cases C-411/10 and C-493/10 *N.S. and M.E.* (2011), paras 99-105. See also ECtHR (GC), *Tarakhel v. Switzerland,* no. 29217/12 (2014), §103; CJ (GC), case C-163/17 *Jawo* (2019), para 84.

1271 CJ (GC), joined cases C-411/10 and C-493/10 *N.S. and M.E.* (2011), paras 82-85. See also, critically, Costello (2012) 'Courting Access…', 326-327, 334-335. Lenaerts (2017), 813, claimed that paragraph 83 in the *N.S. and M.E.* ruling confirmed that 'the principle of mutual trust is a constitutional principle that pervades the entire AFSJ' (Area of Freedom, Security and Justice).

1272 CJ (GC), joined cases C-411/10 and C-493/10 *N.S. and M.E.* (2011), para 86 (emphasis added). See also Maiani and Migliorini (2020), 38, claiming that 'the judgment is paradigmatic of the Court's preoccupation to shield trust-based instruments from "too much" human rights review. Its "systemic deficiency" concept is, in fact, a thinly veiled attempt at restricting a pre-existing human rights exception to mutual trust ("real risk"), all the while trying to avoid an open confrontation with the ECtHR'. See also Pollet (2016), 77.

The Luxembourg Court relied in this regard on the *M.S.S. v. Belgium and Greece* judgment. It stated in particular that 'the extent of the infringement of fundamental rights described in that judgment shows that there existed in Greece, at the time of the transfer of the applicant M.S.S., a systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers'. It mentioned the sources of information used by the ECtHR in the *M.S.S.* case and concluded that states can reach for similar instruments to assess the functioning of the asylum system in a Member State responsible. In particular, they ought to know the documents of the EU Commission. Accordingly, the transfer of an asylum seeker to a Member State responsible under the Dublin II Regulation is precluded when the state deciding on a transfer 'cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers' in the state responsible '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'.[1273]

Lastly, the court indicated that after finding that the transfer of the asylum seeker to the state primarily designated as responsible under the Dublin Regulation is precluded, the hosting state can either continue to seek another responsible state (provided that it does not take an unreasonable length of time) or exercise its right (not a duty) to examine the application by itself.[1274] The right (rather than the obligation) to make use of the 'discretionary clause' laid down in Article 17(1) of the Dublin III Regulation in those circumstances was later confirmed in the case of *C.K. and Others*.[1275]

Hence, the CJ–in accordance with the *M.S.S.* judgment–confirmed in the *N.S. and M.E.* case that the Dublin Regulation cannot be applied blindly and the Member States must determine that the asylum seekers' rights are observed in practice in the state responsible, to allow for a transfer there.[1276] However, its insistence on the 'systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers' in the state responsible, maintained in the subsequent rulings,[1277] could be found to be in tension with the ECtHR's

1273 CJ (GC), joined cases C-411/10 and C-493/10 *N.S. and M.E.* (2011), paras 88-94. See also CJ, case C-578/16 PPU *C.K. and Others* (2017), para 60; CJ (GC), case C-163/17 *Jawo* (2019), para 85.

1274 CJ (GC), joined cases C-411/10 and C-493/10 *N.S. and M.E.* (2011), paras 95-98. CJ (GC), case C-4/11 *Puid* (2013), paras 36-37; CJ, case C-528/11 *Halaf* (2013), paras 33-39. See also, critically, Maiani (2016) 'The Dublin III Regulation…', 135.

1275 CJ, case C-578/16 PPU *C.K. and Others* (2017), para 88. In practice, the Member States make use of this right rarely, see ECRE (2020), 18-19.

1276 See also Lenart (2012), 17; Xanthopoulou (2018), 492.

1277 See CJ (GC), case C-4/11 *Puid* (2013), paras 30-31; CJ (GC), case C-394/12 *Abdullahi* (2013), para 60. For more on the latter case, see Chapter 6, Title III, point 2.

jurisprudence.[1278] The discrepancy of the two courts' views in this regard has already been scrutinized in the section on living conditions.[1279] The judicial saga (consisting of *inter alia* the *M.S.S.* and *Tarakhel v. Switzerland* judgments of the Strasbourg Court and the *N.S. and M.E.*, *Abdullahi*, *C.K. and Others* and *Jawo* rulings of the Luxembourg Court) shows that both courts allow a Dublin transfer under Article 3 of the ECHR and Article 4 of the EU Charter to be ruled out for reasons other than systemic deficiencies in the national reception system.[1280] Thus, it remains here to determine whether similar conclusions can be reached in regard to faulty asylum proceedings in a state responsible.

Establishing the 'systemic deficiencies' criterion in the *N.S. and M.E.* ruling, the CJ expressly relied on the *M.S.S. v. Belgium and Greece* case. In fact, the ECtHR has incidentally noticed in the latter judgment that it was widely known at the material time that the asylum procedure in Greece was 'marked by such *major structural deficiencies*' that asylum seekers had 'very little chance of having their applications and their complaints under the Convention seriously examined by the Greek authorities'.[1281] It is indisputable that the Greek asylum procedure was in fact systemically flawed.[1282] Nevertheless, the finding of systemic deficiencies in the asylum procedure in the *M.S.S.* case should not be read as a legal requirement under the ECHR.[1283] In the case of *Tarakhel v. Switzerland,* the Strasbourg Court referred to the CJ's criterion of 'systemic flaws in the asylum procedure and reception conditions' and generally stated that

> (i)n the case of "Dublin" returns, the presumption that a Contracting State which is also the "receiving" country will comply with Article 3 of the Convention can therefore validly be rebutted where "substantial grounds have been shown for believing" that the person whose return is

1278 Cf. Lenaerts (2017), 832, claiming that 'one should read *N.S.* as a sign of deference towards the ruling of the ECtHR in *M.S.S.*' and that the *N.S. and M.E.* case 'simply did not require the ECJ to determine the precise contours of the notion of "systemic deficiencies", nor to address the question whether Article 4 of the Charter may preclude the transfer of an asylum seeker in a situation that does not involve systemic deficiencies'.

1279 See this Chapter, Title II, point 5. See also Chapter 6, Title III, point 2.

1280 See ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011); ECtHR (GC), *Tarakhel v. Switzerland*, no. 29217/12 (2014); CJ (GC), joined cases C-411/10 and C-493/10 *N.S. and M.E.* (2011); CJ (GC), case C-394/12 *Abdullahi* (2013); CJ, case C-578/16 PPU *C.K. and Others* (2017); CJ (GC), case C-163/17 *Jawo* (2019).

1281 ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §300 (emphasis added).

1282 Even though some other Contracting Parties struggled to provide effective access to asylum proceedings, only the asylum proceedings in Greece have been found by the ECtHR so defunct as to preclude all transfers there. See e.g. ECtHR, *Sharifi and Others v. Italy and Greece*, no. 16643/09 (2014), §§233-235.

1283 See also Costello (2012) 'Courting Access…', 331.

> being ordered faces a "real risk" of being subjected to treatment contrary to that provision in the receiving country. *The source of the risk does nothing to alter the level of protection* guaranteed by the Convention or the Convention obligations of the State ordering the person's removal.[1284]

Hence, it is insignificant whether the risk of ill-treatment stems from the defunct reception system or faulty asylum proceedings, from systemic deficiencies or shortcomings that are not yet systemic. In all those cases, a state must carry out 'a thorough and individualised examination of the situation of the person concerned' and suspend enforcement of the removal order when any risk of inhuman or degrading treatment has been established.[1285] Moreover, the ECtHR's case-law on removals to third states also clearly shows that defects in national asylum proceedings do not have to be as abysmal and ubiquitous as in the *M.S.S.* case to prevent a removal.[1286]

Taking that into account, the CJ rightly eventually distanced itself from the 'systemic deficiencies' criterion in regard to both reception conditions and asylum proceedings in a state responsible. In the *Jawo* case, the Grand Chamber admitted that the approach taken in the *N.S. and M.E.* ruling is codified in the second and third subparagraphs of Article 3(2) of the Dublin III Regulation, which refer only to 'systemic flaws in the asylum procedure and in the reception conditions' in a state responsible. Despite this, the transfer of an applicant to a Member State is precluded '*in any situation* in which there are substantial grounds for believing' that he runs a real risk of inhuman or degrading treatment 'during his transfer or thereafter'.[1287] Thus, it is not only a risk stemming from systemic flaws in the asylum procedure or reception conditions that is capable of barring Dublin transfers.

Despite showing a different approach to the 'systemic deficiencies' criterion, both the *N.S. and M.E.* and *Jawo* judgments are rooted in the principle of mutual trust.[1288] In the *Jawo* ruling, the Grand Chamber confirmed that the principle of mutual trust was still 'of fundamental importance' and 'requires, particularly as regards the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member

1284 ECtHR (GC), *Tarakhel v. Switzerland,* no. 29217/12 (2014), §104 (emphasis added).

1285 Ibid.

1286 See e.g. ECtHR, *M.A. and Others v. Lithuania,* no. 59793/17 (2018), §§105-115; ECtHR, *M.K. and Others v. Poland,* nos. 40503/17, 42902/17 and 43643/17 (2020), §§174-179.

1287 CJ (GC), case C-163/17 *Jawo* (2019), para 87.

1288 See e.g. Moreno-Lax (2015), 681-682; Heschl and Stankovic (2018), 125; Morgades-Gil (2020), 96-97; Maiani and Migliorini (2020), 38. Cf. de Baere (2013), 117. See also CJ (GC), case C-394/12 *Abdullahi* (2013), paras 52-53. Xanthopoulou (2018), 494-495, claimed that the *Abdullahi* case 'served the purpose of taming the limits to trust'.

States to be complying with EU law and particularly with the fundamental rights recognised by EU law'.[1289] Thus, it seems that a state carrying a Dublin transfer should presume that the other Member States are safe for asylum seekers, but it must take into account that–in exceptional circumstances–that presumption may not be true.[1290]

Outside of the Dublin context, the case of *Ibrahim and Others* must be mentioned. The referring court sought to know whether the systemic flaws in the Bulgarian asylum proceedings precluded exercising the option given in Article 33(2)(a) of the 2013 Procedures Directive. Under this provision, Member States are entitled to reject an application for international protection as inadmissible when another Member State has already granted protection to the concerned person. Bulgaria granted subsidiary protection to the concerned foreigners, but it was accused of breaching the secondary asylum law on a regular basis. Even though its practices were contrary to Article 18 of the EU Charter, the Luxembourg Court concluded that the hosting Member State was entitled to 'reject a further application submitted to them by the person concerned as being inadmissible, pursuant to Article 33(2)(a) of the Procedures Directive, read with due regard to the principle of mutual trust'.[1291] At first sight, the *Ibrahim and Others* case may be seen as being at odds with the CJ's and ECtHR's jurisprudence. However, it must be kept in mind that the case concerned beneficiaries of subsidiary protection, thus persons who had already benefited from protection against refoulement in Bulgaria.[1292] The identified flaws in the asylum proceedings did not put them at risk of being removed to their country of origin or another country where they would be treated in a manner prohibited under Article 4 of the EU Charter. Thus, they were not at risk of indirect refoulement due to deficiencies in asylum proceedings in Bulgaria.[1293]

1289 CJ (GC), case C-163/17 *Jawo* (2019), para 81. For more on this case, see this Chapter, Title II, point 5. See also, for the CJ's approach to the principle of mutual trust in the context of a transfer of an ill asylum seeker, CJ, case C-578/16 PPU *C.K. and Others* (2017), para 95, which prompted some commentators to conclude that the systemic deficiencies criterion was not fully abolished [see Imamović and Muir (2017), 726; cf. Xanthopoulou (2018), 497-498].

1290 See also CJ, Opinion 2/13 (2014), paras 191-192.

1291 CJ (GC), joined cases C-297/17, C-318/17, C-319/17 and C-438/17 *Ibrahim and Others* (2019), paras 95-100.

1292 See Article 21 in conjunction with Article 20(2) of the 2011 Qualification Directive. See also Battjes (2016) 'Asylum Qualification Directive…', 1256. Cf. CJ, case C-616/19 *M.S. and Others* (2020), paras 27-54, concerning the admissibility criteria under the 2005 Procedures Directive in case of beneficiaries of subsidiary protection.

1293 See also den Heijer (2020), 549, claiming that 'subsidiary protection meets the standards of humane treatment within the meaning of Article 4 of the Charter'.

Article 33(2) of the 2013 Procedures Directive provides for other admissibility criteria as well. Under subparagraph (b), states may consider the application inadmissible when a country which is not a Member State is regarded as the first country of asylum for the applicant. Under Articles 35 of the 2013 Procedures Directive, such a conclusion can be reached if the applicant has been recognized in that country as a refugee and he can still avail himself of that protection (a); or he otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement, provided that he will be readmitted to that country (b). When the national law departs from those requirements, as the domestic legislations did in the cases of *LH* and *FMS and Others,* the CJ swiftly indicates that such law cannot be seen as the implementation of Article 33(2)(b) of the 2013 Procedures Directive.[1294]

In the case of *Alheto,* the referring court asked whether Jordan may be considered a first country of asylum within the meaning of Article 35 of the 2013 Procedures Directive. The applicant—a Palestinian refugee registered with the UNRWA[1295]—travelled from the Gaza Strip through Jordan to Bulgaria where she applied for asylum. It was conceivable that she could benefit from the protection or assistance of the UNRWA in Jordan. The court firstly noticed that persons registered with the UNRWA have the status of 'Palestine refugees in the Near East'. Therefore, 'they do not benefit from refugee status specifically linked to the Hashemite Kingdom of Jordan and cannot therefore, by the mere fact of that registration and protection or assistance granted to them by that agency, fall within the scope of point (a) of the first paragraph of Article 35' of the 2013 Procedures Directive.[1296] However, point (b) of this provision may be found to be applicable, provided that the person concerned enjoys sufficient protection in a third country, i.e. when this country

> agrees to readmit the person concerned after he or she has left its territory in order to apply for international protection in the European Union; and recognises that protection or assistance from UNRWA and *supports the principle of non-refoulement,* thus enabling the person concerned to stay in its territory in safety under dignified living conditions for as long as necessary in view of the risks in the territory of habitual residence.[1297]

1294 CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 161-164. See also CJ, case C-564/18 *LH* (2020), paras 52-55.

1295 Palestinian refugees who are at present receiving protection or assistance from the UNRWA are covered by the exclusion clause provided for in Article 1D of the 1951 Refugee Convention and Article 12(1)(a) of the 2004 and 2011 Qualification Directives. For more, see these Chapter and Title, point 2.2.

1296 CJ (GC), case C-585/16 *Alheto* (2018), para 139.

1297 Ibid., para 143 (emphasis added), see also paras 140-141.

The national authorities must rigorously examine whether each of those conditions has been satisfied as well as ensure that the asylum seeker is heard in person.[1298]

Under subparagraph (c) of Article 33(2) of the 2013 Procedures Directive, states may consider the application inadmissible when a country which is not a Member State is regarded as a third safe country for the applicant. Article 38(1-4) of that directive provides for the cumulative conditions that must be satisfied to consider a third country 'safe'.[1299] National legislation stating grounds for inadmissibility in asylum proceedings that omits any of those conditions (e.g. where the requirement of compliance in a third country with the principle of non-refoulement is absent) cannot be considered to implement Article 33(2)(c) of the 2013 Procedures Directive.[1300]

Pursuant to Article 38(2)(a) of that directive, states must lay down in national law rules concerning the 'safe third country' concept, including rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country. In the cases of *FMS and Others* and *LH*, the Hungarian authorities claimed that a transit via Serbia constituted in itself a sufficient connection within the meaning of this provision. That argument was rejected by the CJ. It stated that

> the obligation imposed on Member States by Article 38(2) of Directive 2013/32 (...) to adopt rules providing for the methodology applicable for assessing, on a case-by-case basis, whether the third country concerned satisfies the conditions for being regarded as safe for the applicant, and the possibility for the applicant to challenge the existence of a connection with that third country, cannot be justified if the mere fact that the applicant for international protection transited through the third country concerned constituted a sufficient or significant connection for those purposes.[1301]

1298 Ibid., paras 121, 124, 142. See also CJ, case C-564/18 *LH* (2020), para 69. See also Article 34(1) of the 2013 Procedures Directive.

1299 See CJ (GC), case C-585/16 *Alheto* (2018), para 121; CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), para 153; CJ, case C-564/18 *LH* (2020), paras 40. With regard to the last condition (e) [the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the 1951 Refugee Convention], see Vedsted-Hansen (2016) 'Asylum Procedures Directive...', 1363, claiming that the ratification or accession to the 1951 Refugee Convention is not formally required, but in practice it is indispensable. See also Hurwitz (2009), 53. Cf. Hathaway (2005), 327-333.

1300 CJ, case C-564/18 *LH* (2020), paras 42, 43, 51; CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 154, 155, 160.

1301 CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 156-159. See also CJ, case C-564/18 *LH* (2020), paras 44-51.

Moreover, national legislation must include rules on the individual examination of the safety of a third country in question. At a minimum, the asylum seeker must have a right to challenge the application of the safe third country concept on the grounds that the third country is not safe in his particular circumstances.[1302]

The 'safe third country' concept may be also applied to a Dublin transferee. In the case of *Mirza*, after transiting through Serbia, the Pakistani national applied for international protection in Hungary and—before the decision on his application was made—travelled to the Czech Republic. Transferred back under the Dublin III Regulation to Hungary, he applied for asylum again, but his application was considered inadmissible because Serbia was regarded as a safe third country. The CJ allowed for such chain refoulement. It stated that 'the concept of a safe third country may be applied by all the Member States, whether it be the Member State which is responsible for examining the application for international protection pursuant to the criteria set out in chapter III of the Dublin III Regulation or any other Member State, on the basis of Article 3(3) of that regulation'.[1303] Neither the interpretation of the 2013 Procedures Directive nor of the Dublin III Regulation can lead to a conclusion that a Member State that accepted its responsibility for examining the application for international protection cannot find it inadmissible on the basis of a 'safe third country' concept. Otherwise, asylum seekers could feel encouraged to travel to another Member State in order to prevent the application of this concept after the Dublin transfer is enforced.[1304] The application of the 'safe third country' concept is not impaired by the fact that 'the Member State carrying out the transfer of that applicant to the Member State responsible has not been informed, during the take-back procedure, either of the rules of the latter Member State relating to the sending of applicants to safe third countries or of the relevant practice of its competent authorities'. There is no obligation under the EU law to provide such information in Dublin proceedings. The lack of this information does not affect the applicant's right to an effective remedy against the transfer decision or against the decision on the application for international protection.[1305]

1302 Vedsted-Hansen (2016) 'Asylum Procedures Directive…', 1364, pointed out that a third country can be considered safe only when it observes the 1951 Refugee Convention and 'basic general human rights standards' under the ECHR and EU Charter.

1303 Article 3(3) of the Dublin III Regulation states: 'Any Member State should retain the right to send an applicant to a safe third country, subject to the rules and safeguards laid down in the 2013 Procedures Directive'.

1304 CJ, case C-695/15 PPU *Mirza* (2016), paras 37–53.

1305 Ibid., para 54–63. See also, critically, Morgades-Gil (2020), 92.

While those conclusions may be seen both as too burdensome for asylum seekers and as ignoring the ECtHR's requirement of the rigorous examination *proprio motu* of asylum proceedings in a third country, it must be remembered that the *Mirza* ruling was about the rights and obligations of the Member State responsible under the Dublin III Regulation, not the one carrying out the transfer. It did not concern making the decision on a Dublin transfer, but the application of the 'third safe country' concept after the execution of the transfer. Accordingly, the court's findings in the *Mirza* case do not affect the obligations of a state deciding on a transfer arising from Article 4 of the EU Charter. Thus, the determination within Dublin proceedings that the state responsible applies a presumption of safety (as in the circumstances of the *Mirza* case) to a third state that is in fact not safe for asylum seekers (e.g. the principle of non-refoulement is not respected there), should prompt the hosting state–in accordance with the *N.S. and M.E.*, *C.K. and Others* and *Jawo* rulings and the ECtHR's jurisprudence–to conclude that a Dublin transfer to that state is ruled out.[1306]

Despite the 'systemic deficiencies' confusion, the CJ's case-law on the Dublin Regulations and the 2013 Procedures Directive examined in this section must be considered, overall, compatible with the ECtHR's jurisprudence. While the Dublin system and the concepts of the 'first country of asylum' and 'safe third country' have been severely criticized for years,[1307] the Strasbourg and Luxembourg Courts do not consider them, in general, contrary to the ECHR or EU law. However, both courts clearly state that removals to third countries are prohibited when there are substantial grounds for believing that the asylum seeker concerned would be exposed there to a real risk of being subjected to treatment contrary to Article 3 of the ECHR and Article 4 of the EU Charter. The ECtHR places emphasis on the accessibility and reliability of the asylum procedure in the third country. Similarly, the CJ stressed that the risk of ill-treatment may emanate from e.g. the deficiencies in asylum proceedings disclosed in a state responsible under the Dublin Regulation. With regard to the admissibility criteria, the Luxembourg Court highlighted the respect for the principle of non-refoulement in a third country (although it did not provide more elaborate guidance in this regard by e.g. referring to the ECtHR's case-law). Both courts also insist that the hosting state must take into account the law and practice concerning asylum seekers when assessing

1306 Cf. Sadowski (2019), 55.

1307 See in particular a comprehensive analysis of Moreno-Lax (2015), 665-721, who contested the legality of the 'safe third country' notions.

the situation in a third country. The principle of mutual trust is still valid under the EU law,[1308] but it is no longer a blind trust.[1309]

It cannot be overlooked that the compatibility achieved between the views of the two courts on removals to third countries was facilitated by two factors. First, the respective EU law directly provides for safeguards for asylum seekers in this regard. For instance, under Article 35 and 38 of the 2013 Procedures Directive, respect for the principle of non-refoulement in a third state is required in order to apply the 'first country of asylum' or 'safe third country' concept. The Dublin III Regulation, as highlighted by the CJ, differs in essential respects from the Dublin II Regulation. It contains Article 3(2), which directly allows for the possibility that a transfer is ruled out due to 'systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4' of the EU Charter. It is also, in general, more human rights oriented than its predecessor. In particular, under Recitals 32 and 39, 'the Member States are bound, in the application of that regulation, by the case-law of the European Court of Human Rights and by Article 4 of the Charter'.[1310] Those legislative changes had a profound impact on the interpretation of the scope of the Dublin transferees' rights provided by the Luxembourg Court.[1311]

Secondly, the circumstances of the cases dealt with by the two courts were very similar. The *M.S.S. v. Belgium and Greece* and *N.S. and M.E.* cases concerned transfers under the Dublin II Regulation to Greece ordered in 2009. The judgments in both cases were given in 2011. The ECtHR's case of *Ilias and Ahmed v. Hungary* as well as the CJ's cases of *Mirza*, *LH* and *FMS and Others* all involved asylum seekers who travelled via Serbia to Hungary and whose applications for international protection were considered inadmissible as Serbia was deemed to be a safe third country. However, while in the *N.S. and M.E.* case the Luxembourg Court relied heavily on the *M.S.S.* judgment, in the *LH* and *FMS and Others* rulings no reference was made to the *Ilias and Ahmed*

1308 See the CJ's strong stand in this regard expressed in the Opinion 2/13 (2014), paras 191-194.

1309 See also Battjes and Brouwer (2015), 186; Lenarts (2017), 840; Marin (2017), 150. Cf. Morgades-Gil (2020), 112, noticing that the fact that six EU Member States (Greece, Bulgaria, Hungary, Italy, Cyprus and Spain) 'have been found unsafe for a quite long period of time (in some cases) may seriously undermine the presumption underlying the Dublin system'. In her view, in those cases, the principle of mutual trust is either broken or rebutted.

1310 CJ, case C-578/16 PPU *C.K. and Others* (2017), paras 62-63. See also Maiani (2016) 'The Dublin III Regulation…', 116-118.

1311 See also Lenaerts (2017), 830.

judgment in the context of the 'safe third country' concept. The reasons may be twofold. Firstly, it was possible to reject the Hungarian legislation in question under the secondary asylum law alone. As it was clearly incompatible with Article 33(2)(b-c) in conjunction with Articles 35 and 38 of the 2013 Procedures Directive, there was no need to consider its coherency with the EU Charter or the ECHR. Secondly, the CJ might have preferred not to mention the *Ilias and Ahmed* case as that judgment also provided for an interpretation of Article 5 of the ECHR that the Luxembourg Court disagreed with, as explained in chapter 5.

2.2 Palestinian Refugees and the UNRWA

Palestinians were intentionally kept out of the protective ambit of the 1951 Refugee Convention. Article 1D, which contains both an exclusion and an inclusion clause, was adopted with one group in mind, i.e. the Palestinian refugees who have been receiving protection or assistance from UN organs and agencies (e.g. the UNCCP and/or UNRWA).[1312] It states:

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

The operations of the UNRWA are of particular relevance in this regard.[1313] Since the 1950s, it has been responsible for, *inter alia,* education, medical care, relief and social services, accommodation and emergency assistance for Palestinian refugees. Nowadays, approximately 5.6 million Palestinians are registered with the UNRWA and more than 1.5 million live in refugee camps in Jordan, Lebanon, Syria, the Gaza Strip and the West Bank.[1314] Those Palestinians

1312 See e.g. Goddard (2009), 482-489; Qafisheh and Azarov (2011), 544, 556; Hathaway and Foster (2014), 509-510; Akram (2014), 234. Diverse views are expressed in regard to the applicability of Article 1D of the 1951 Refugee Convention to other groups [see e.g. Qafisheh and Azarov (2011), 569; Hathaway and Foster (2014), 521-522; UNHCR, 'Handbook…', 28].

1313 The role of the UNCCP is nowadays negligible [see e.g. Qafisheh and Azarov (2011), 556-558; Akram (2014), 228]. Goddard (2009), 507-509, argued that the operation of the UNRWA was a sufficient protection and assistance for the purposes of Article 1D of the 1951 Refugee Convention. See also Ogg (2019), 364-366, and CJ (GC), case C-31/09 *Bolbol* (2010), para 44, and CJ (GC), case C-364/11 *El Kott and Others* (2012), para 48.

1314 See the UNRWA's website. See also Akram (2014), 228-230, and CJ (GC), case C-585/16 *Alheto* (2018), para 84.

who receive 'at present' protection or assistance from the UNRWA are, as a rule, excluded from the protection under international refugee law.

No exclusion clause similar to the one provided for in Article 1D of the 1951 Refugee Convention is to be found in the ECHR. The prohibition of torture or inhuman or degrading treatment or punishment expressed in Article 3 of the ECHR is an absolute and non-derogable right.[1315] The Convention is applicable to all persons within the jurisdiction of the Contracting Parties, irrespective of their nationality or status.[1316] Therefore, under the ECHR, the principle of non-refoulement protects all asylum seekers and refugees equally, including those of Palestinian origin.

Occasionally, Palestinians fleeing from refugee camps in the Middle East and seeking asylum in Europe turn to the Convention organs. In the *G.M. v. the Federal Republic of Germany* case, the applicant stated that upon expulsion to Lebanon she would have to live in the refugee camp where she had been registered. Meanwhile, this camp was subjected to attacks by the Israeli air force and the Amal militia. The ECommHR declared the application inadmissible as the German authorities had already suspended deportations of Palestinians to Lebanon for an indefinite period of time. Therefore, there was no serious reason to believe that the applicant would be subjected to treatment prohibited in Article 3 of the ECHR.[1317] In the more recent case of *Ghali v. Sweden,* the ECtHR also found the application of the Palestinian applicant manifestly ill-founded. She claimed that she would be ill-treated by her husband upon arrival in the refugee camp in Lebanon and that her child would not receive proper medical assistance there. The Strasbourg Court decided that the first claim was unsubstantiated. In regard to the child's health it applied the demanding test established in the *D. v. the United Kingdom* case.[1318] The court stressed that the medical assistance was available in Lebanon, including through the UNRWA's services.[1319] Meanwhile in the *L.M. and Others v. Russia* case, the fact that one of the applicants was a stateless Palestinian having a habitual residence in Syria before arrival in Russia was considered an aggravating factor in the risk assessment. The ECtHR relied on the UNHCR's information that the conflict in Syria affected nearly all the areas hosting large numbers of Palestinian refugees. The UNHCR deemed this group in need of

1315 See e.g. ECtHR (GC), *Chahal v. the United Kingdom,* no. 22414/93 (1996), §§79-80. For more on the absoluteness of Article 3 of the ECHR, see these Chapter and Title, point 3.

1316 Article 1 of the ECHR. See also ECommHR, *Austria v. Italy,* no. 788/60, dec. (1961).

1317 ECommHR, *G.M. v. the Federal Republic of Germany,* no. 12437/86, dec. (1987).

1318 ECtHR, *D. v. the United Kingdom,* no. 30240/96 (1997). For more see this Chapter, Title II, point 4.

1319 ECtHR, *Ghali v. Sweden,* no. 74467/12, dec. (2013), §§24, 32-36.

international protection. Accordingly, the general situation of violence in Syria as well as personal characteristics of the applicants led the court to a conclusion that their expulsion would be in violation of Articles 2 and/or 3 of the ECHR.[1320]

The situation of Palestinian refugees in Lebanon was examined in more detail by the Strasbourg Court in the case of *Auad v. Bulgaria*. The applicant fled from the refugee camp in Lebanon to Bulgaria. Initially given humanitarian protection, he was subsequently ordered to leave Bulgaria as a threat to the national security. The ECtHR emphasized that the asylum seeker had already been considered to be at risk of ill-treatment in Lebanon by the Bulgarian authorities. Next, the court noticed that the applicant–as a stateless Palestinian–might be forced to return to the same camp where he had been in danger. Thus, the grave situation in refugee camps situated in Lebanon (they were controlled by armed factions, outside of the state's authority, with frequent violent clashes), 'coupled with the applicant's personal account, amount to at least prima facie evidence capable of proving that there are substantial grounds for believing that he would be exposed to a real risk of being subjected to treatment contrary to Article 3 if expelled to Lebanon'. It was, though, for the Bulgarian authorities to 'dispel any doubts in that regard'. However, national authorities did not assess the risk of ill-treatment in Lebanon but focussed on the risk that the applicant posed to national security and public order.[1321]

In the *Auad* case, the Bulgarian Government tried to rely before the Strasbourg Court on the list of safe third countries. However, the ECtHR stressed that this argument was irrelevant because 'the Government did not declare that the applicant would not be removed to Lebanon, but merely said that the point would be examined at the time of the execution of the expulsion order'. Moreover, its declaration in this regard was 'not based on, or reflected in, a binding legal act'. The court was not persuaded that the Bulgarian authorities would assess 'with the necessary rigour' whether the applicant's expulsion to Lebanon or another country would constitute direct or indirect refoulement. Accordingly, the court concluded that the foreigner's removal, if carried out, would be in breach of Article 3 of the ECHR.[1322]

In regard to the situation in refugee camps, albeit not camps designed for Palestinians but Somalis, the *Sufi and Elmi v. the United Kingdom* case must again be mentioned. In this case, the Strasbourg Court decided that it was

1320 ECtHR, *L.M. and Others v. Russia*, nos. 40081/14, 40088/14 and 40127/14 (2015), §§124-126. For more on general situation of violence, see this Chapter, Title II, point 3.

1321 ECtHR, *Auad v. Bulgaria*, no. 46390/10 (2011), §§102-104. For more on the refoulement of persons considered a security threat, see these Chapter and Title, point 3.

1322 Ibid., §§105-108. For more on indirect refoulement, see these Chapter and Title, point 2.1.

likely that upon expulsion the applicants would have to seek refuge in the settlements for internally displaced persons or refugee camps in Somalia. The conditions there were 'sufficiently dire to amount to treatment reaching the threshold of Article 3' of the ECHR. Refugees faced major difficulties with accessing water, food, accommodation and sanitary facilities. Although the UNHCR was present in the Dadaab camps and humanitarian assistance was available there, the overcrowding was affecting the refugees' access to services. The inhabitants of the camps were also 'vulnerable to violent crime, exploitation, abuse and forcible recruitment' and had 'very little prospect of their situation improving within a reasonable timeframe'. Hence, the 'dire humanitarian conditions' in those camps attained the level of severity required under Article 3 of the ECHR and the internal flight alternative therein was not considered by the court a viable possibility for the applicants.[1323] The approach taken in the *Sufi and Elmi* case is rather rare in the court's jurisprudence, although the ECtHR may find it instructive in cases where the living conditions in Palestinian (or other) refugee camps are to be considered.

Thus, under the case-law of the Strasburg Court, the principle of non-refoulement is applied to removals of Palestinians to their previous habitual residence (which may also be within the UNRWA's operations area) just as in any other case. National authorities must rigorously assess whether there is a real risk that upon expulsion a Palestinian refugee would be subjected to ill-treatment that is prohibited under Article 3 of the ECHR. The risk of ill-treatment may be considered diminished or non-existent when effective protection and assistance are provided in a country of destination, including through international organizations such as the UNRWA.[1324] Conversely, when the protection and assistance are ineffective or insufficient, and thus the applicant would be at risk of being subjected to ill-treatment upon return, his removal is prohibited.[1325]

The EU law is less clear in this regard. Article 12(1)(a) of the 2004 and 2011 Qualification Directives refers to Article 1D of the 1951 Refugee Convention, so it inherited all its flaws, including its ambiguity.[1326] A harmonized interpretation of those provisions within the EU was urgently needed from the very

1323 ECtHR, *Sufi and Elmi v. the United Kingdom,* nos. 8319/07 and 11449/07 (2011), §§284-292, 303, 310. For more on this case, see this Chapter, Title II, points 3 and 5.

1324 See e.g. ECtHR, *Ghali v. Sweden,* no. 74467/12, dec. (2013), §§24, 32-36.

1325 See e.g. ECtHR, *Sufi and Elmi v. the United Kingdom,* nos. 8319/07 and 11449/07 (2011), §§284-292; ECtHR, *Auad v. Bulgaria,* no. 46390/10 (2011), §§102-108; ECtHR, *L.M. and Others v. Russia,* nos. 40081/14, 40088/14 and 40127/14 (2015), §§124-126.

1326 See Hathaway and Foster (2014), 509, invoking the opinion that Article 1D of the 1951 Refugee Convention is 'pregnant with ambiguity'. See also Goodwin-Gil and McAdam (2007), 152 and 190 fn 276, where they stated that the Directive missed the opportunity of clarifying Article 1D that was very needed. Goddard (2009), 490-491, noticed that even the UNHCR's explanations in this regard were ambiguous and misleading.

beginning.[1327] Unsurprisingly, one of the first asylum cases before the Luxembourg Court concerned Palestinians. In the case of *Bolbol*, the Palestinian refugee lived in the Gaza Strip before seeking protection in Hungary, but was never registered by the UNRWA. It was, however, arguable that she was still eligible for the protection or assistance of this agency. Therefore, the referring court asked the CJ whether Article 12(1)(a) of the Qualification Directive must be interpreted as encompassing all Palestinian refugees eligible for the UNRWA's protection or assistance or only those who have actually availed themselves of that protection or assistance. Relying on the formulation used in the 1951 Refugee Convention (persons 'at present receiving protection or assistance'), the CJ held that

> (i)t follows from the clear wording of Article 1D of the Geneva Convention that only those persons who have actually availed themselves of the assistance provided by UNRWA come within the clause excluding refugee status set out therein, which must, as such, be construed narrowly and cannot therefore also cover persons who are or have been eligible to receive protection or assistance from that agency.[1328]

Accordingly, when the Palestinian asylum seeker has never availed himself of the UNRWA's protection or assistance, the exclusion clause provided for in the first sentence of Article 12(1)(a) of the 2004 Qualification Directive cannot be applied and his application for international protection must be examined pursuant to Article 2(c) of that directive.[1329]

While those findings obviously limit the scope of application of the exclusion clause in question, the CJ was not ready to go any further. It firmly rejected the interpretation of the phrase 'at present receiving (…) protection or assistance' suggested by one of the Member States that only those Palestinians who had become refugees as a result of the conflict of 1948 and who were receiving protection or assistance from the UNRWA at the time of the adoption of the 1951 Refugee Convention are covered by Article 1D. The court pointed out that the 1967 Protocol had lifted the temporal limitations arising from the 1951 Refugee Convention.[1330]

1327 For divergent state practice in regard to Article 1D of the 1951 Refugee Convention, see Goddard (2009), 496-499.

1328 CJ (GC), case C-31/09 *Bolbol* (2010), para 51. See also CJ (GC), case C-364/11 *El Kott and Others* (2012), para 47. Cardwell (2011), 145, and de Baere (2013), 112, favoured the court's approach in the *Bolbol* case. Cf. Hathaway (2011), 5 fn 29; UNHCR (2013), 3-4.

1329 CJ (GC), case C-31/09 *Bolbol* (2010), para 54.

1330 Ibid., paras 47-48. Cardwell (2011), 141-142, found the court's conclusions 'unsurprising'. See also Goodwin-Gil and McAdam (2007), 158; UNHCR (2017), 8. However, it is not

In the case of *El Kott and Others* the Luxembourg Court again opposed the overly restrictive interpretation of the phrase 'at present receiving (…) protection or assistance'. The case concerned Palestinian refugees who fled—for different reasons—from camps recognized by the UNRWA and sought protection in Hungary. The court pointed out that the 'mere absence or voluntary departure from UNRWA's area of operations' cannot be understood as implying that the protection or assistance is not provided 'at present'. Such circumstances are not 'sufficient to end the exclusion from refugee status' under the first sentence of Article 1D of the 1951 Refugee Convention.[1331] Accordingly, Article 12(1)(a) of the Qualification Directive covers those Palestinian refugees 'who are currently availing themselves of assistance provided by UNRWA' as well as those 'who in fact availed themselves of such assistance shortly before submitting an application for asylum in a Member State, provided, however, that that assistance has not ceased within the meaning of the second sentence of Article 12(1)(a) of the directive.[1332]

In the above-mentioned provision, the Qualification Directive provides for the inclusion clause for Palestinian refugees. It states that: 'When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, those persons shall *ipso facto* be entitled to the benefits of this Directive'. In the *El Kott and Others* case, the CJ had to decide in what circumstances the protection or assistance of the UN organ or agency must be considered 'ceased'. It held that the protection or assistance is terminated when the organ or agency itself is abolished or when it is 'impossible for that organ or agency to carry out its mission'.[1333] Referring to the circumstances of the cases at hand, where the asylum seekers left the UNRWA's operations area, the court stressed that

> (m)ere absence from such an area or a voluntary decision to leave it cannot be regarded as cessation of assistance. On the other hand, if the person concerned has been *forced to leave for reasons unconnected with that person's will,* such a situation may lead to a finding that the assistance from which that person benefited has ceased within the meaning of the second sentence of Article 12(1)(a) of Directive 2004/83.[1334]

a commonly accepted interpretation, see e.g. Hathaway and Foster (2014), 513-515; Akram (2014), 232-233; Foster and Lambert (2019), 203 fn 66; Ogg (2019), 360-363.

1331 CJ (GC), case C-364/11 *El Kott and Others* (2012), paras 49-51. See also Battjes (2016) 'Piecemeal Engineering…', 227, in favour of the court's approach.

1332 CJ (GC), case C-364/11 *El Kott and Others* (2012), para 52.

1333 Ibid., para 56.

1334 Ibid., para 59 (emphasis added).

The objective of Article 12(1)(a) of the Qualification Directive is 'to ensure that Palestinian refugees continue to receive protection by affording them effective protection or assistance and not simply by guaranteeing the existence of a body or agency whose task is to provide such assistance or protection'. Therefore, domestic asylum authorities must consider 'whether the departure of the person concerned may be justified by reasons beyond his control and independent of his volition which force him to leave the area in question and thus prevent him from receiving UNRWA assistance'. In particular, 'a Palestinian refugee must be regarded as having been forced to leave UNRWA's area of operations if his personal safety is at serious risk and if it is impossible for that agency to guarantee that his living conditions in that area will be commensurate with the mission entrusted to that agency'.[1335] When it is established that the UNRWA's protection or assistance has ceased, the person concerned must be automatically granted refugee status, unless other exclusion clauses are applicable.[1336]

In the *Alheto* case, the Luxembourg Court considered whether it may be expected from Palestinian refugees to avail themselves of the UNRWA's assistance or protection outside the territory of their habitual residence. An asylum seeker had left the Gaza Strip, where she was registered by the UNRWA, through Jordan, to Bulgaria. Jordan is a part of the UNRWA's area of operations; thus it was arguable that the asylum seeker concerned could be provided with the protection and assistance in that country. In those circumstances, the court concluded that

> in the event that a person who has left the UNRWA area of operations and lodged an application for international protection in the European Union benefits from *effective* protection or assistance from UNRWA, thereby enabling him or her to stay there *in safety, under dignified living conditions* and *without being at risk of being refouled to the territory of habitual residence* for as long as he or she is unable to return there in safety, that person cannot be regarded by the authority empowered to decide on that

1335 Ibid., paras 60–65. See also CJ (GC), case C-585/16 *Alheto* (2018), para 86. See also Costello (2015) *The Human Rights…*, 214, considering the *Bolbol* and *El Kott and Others* cases (read together) as 'an important protective interpretation'; and Foster and Lambert (2019), 203, stating that the CJ is a 'driving force' for a 'liberal jurisprudence' on the narrow understanding of the exclusion clause provided for in Article 1D of the 1951 Refugee Convention, as confirmed in the *Bolbol* and *El Kott and Others* cases. Cf. Ogg (2019), 364–369, who criticized the *El Kott* ruling for adopting a narrow interpretation of the notions of 'protection' and 'assistance' and for relying on the concept of 'forced migration'.

1336 CJ (GC), case C-364/11 *El Kott and Others* (2012), para 81, where the court provided for the interpretation of the phrase 'persons shall *ipso facto* be entitled to the benefits of this Directive'. See also UNHCR (2013), 6; UNHCR (2017), 14–15. For other exclusion clauses, see these Chapter and Title, point 3.

> application as having been forced, by reason of circumstances beyond his or her control, to leave UNRWA's area of operations. That person must, in that case, be excluded from refugee status in the European Union, in accordance with Article 12(1)(a) of Directive 2011/95(...).[1337]

Hence, if it were to be established that the applicant who was registered in the Gaza Strip could receive the effective protection or assistance from the UNRWA in Jordan, she would be excluded from being granted refugee status in the EU.

The *Alheto* case gave rise to questions concerning the interplay between the exclusion clause provided for in Article 12(1)(a) of the Qualification Directive and the admissibility grounds expressed in Article 33(2)(b) in conjunction with Article 35 of the 2013 Procedures Directive. Under the latter provisions, the Member States may consider an application for international protection inadmissible if a country that is not a Member State is considered to be the first country of asylum for the applicant. The CJ highlighted that admissibility clauses can be applied in the Palestinian cases. If they are not applicable, the exclusion clause of Article 12(1)(a) of the directive should be looked into by national authorities.[1338] In the Palestinian cases, for a third country to be considered 'a first country of asylum' under Article 35 of the 2013 Procedures Directive, the following conditions must be fulfilled. Firstly, a Palestinian refugee registered with the UNRWA must enjoy effective protection outside of the country of his habitual residency, but still within the UNRWA's area of operations. Secondly, a third country has to agree to the readmission of the person concerned. Thirdly, it must recognize or regulate the protection or assistance from UNRWA within its borders. Lastly, that third country should support the principle of non-refoulement, thus enable the Palestinian refugee 'to stay in its territory in safety under dignified living conditions for as long as necessary in view of the risks in the territory of habitual residence'.[1339]

While the impact of the UNHCR is palpable in the above-mentioned cases, the ECtHR's jurisprudence concerning the prohibition of torture or inhuman or degrading treatment or punishment is absent from the reasoning of the Luxembourg Court. While in the *Alheto* ruling the court mentions the principle of non-refoulement, it does so only in the context of Article 35 of the 2013 Procedures Directive.[1340] In none of the relevant judgments–*Bolbol*, *El Kott and Others* and *Alheto*–does it refer to Articles 4 or 19(2) of the EU Charter or

1337 Ibid., para 134 (emphasis added). Cf. Ogg (2019), 369-370.

1338 CJ (GC), case C-585/16 *Alheto* (2018), paras 87-90.

1339 Ibid., paras 140-143.

1340 See point (b) of this provision directly referring to the principle of non-refoulement.

Article 3 of the ECHR[1341] (even though it stated in the preliminary observations given in the first two cases that the Qualification Directive must be interpreted in a manner consistent with the rights recognized by the EU Charter[1342]).

On the one hand, the CJ may be seen as having missed the opportunity to plainly confirm that all Palestinian refugees staying in the EU are protected against–both indirect and direct–refoulement under the ECHR and EU Charter; thus, to expressly accord its standards with the Strasbourg Court. On the other hand, not mentioning the ECHR and ECtHR's jurisprudence in the Palestinian cases may have been intentional and justified. The Luxembourg Court might not have felt inclined to rely on the ECHR in the preliminary rulings concerning Palestinian refugees for two reasons. First, it had already confirmed in the case of *B and D*, that the exclusion of a person from refugee status under international refugee law and EU law 'does not imply the adoption of a position on the separate question of whether that person can be deported to his country of origin'.[1343] Thus, the CJ might not have seen the need to confirm in those cases that those Palestinian refugees who are covered by the first sentence of Article 12(1)(a) of the Qualification Directive are still protected against refoulement under the EU Charter and the ECHR.[1344] It was simply not what it was asked to do in the preliminary request. Secondly, according to the UNHCR's guidelines, the risk of being subjected to torture or inhuman or degrading treatment or punishment in the UNRWA's area of operations is only one of many objective reasons for a Palestinian refugee's case to fall within the second paragraph of Article 1D of the 1951 Refugee Convention.[1345] Using the general terms of 'safety' and 'living conditions', the Luxemburg Court might have wanted to apply a comparably broad understanding of the circumstances that justify the Palestinians' departure from the UNRWA's area of operations. However, the ambiguity of those terms[1346] may in fact act against such intentions and give a state leeway for applying a narrow

1341 In the *Alheto* case, Article 19 of the EU Charter was invoked only in connection with the right to an effective remedy in asylum proceedings, see CJ (GC), case C-585/16 *Alheto* (2018), paras 119, 129. For more on effective remedies, see Chapter 6.

1342 CJ (GC), case C-31/09 *Bolbol* (2010), para 38; CJ (GC), case C-364/11 *El Kott and Others* (2012), para 43.

1343 CJ (GC), joined cases C-57/09 and C-101/09 *B and D* (2010), para 110. For more on this case, see these Chapter and Title, point 3. See also Ippolito (2015), 21, who pointed out that neither the *Bolbol* nor *B and D* cases 'resulted in a significant deviation in terms of standard of protection from that provided by Strasbourg and especially its jurisprudence'.

1344 See, per analogy, CJ (GC), joined cases C-391/16, C-77/17 and C-78/17 *M and Others* (2019), para 94. The case is examined in detail in these Chapter and Title, point 3.

1345 UNHCR (2017), 9-12.

1346 See also Battjes (2016) 'Piecemeal Engineering…', 228.

interpretation of the inclusion clause provided for in Article 1D of the 1951 Refugee Convention.[1347]

3. Undesirable Persons

International refugee law has been built on the premise that not all refugees within the meaning of Article 1A(2) of the 1951 Refugee Convention deserve protection.[1348] Hence, that treaty does not apply to persons with respect to whom there are serious reasons for considering that they have committed specified, grave crimes or have been guilty of acts contrary to the purposes and principles of the UN.[1349] International refugee law also safeguards the interests of the Contracting States by providing for exceptions from the principle of non-refoulement and rules on deporting persons who are considered to constitute a danger to the security or community of the hosting state.[1350]

The ECtHR reiterates that the protection offered by Article 3 of the ECHR is–in this regard–wider than that provided by the 1951 Refugee Convention.[1351] The prohibition of torture or inhuman or degrading treatment or punishment expressed in this provision is absolute. Exceptions are not provided for in Article 3 and the derogation from this right is not permissible under Article 15 of the ECHR. Thus, Article 3 is fully applicable even in times of war or other public emergency threatening the life of the nation. The Strasbourg Court firmly holds that Article 3 of the ECHR is 'equally absolute' in the refoulement context,[1352] even when the persons that are to be expelled or extradited are suspected or convicted terrorists.

1347 See e.g. Ogg (2019), 264-368, 373, who understood the *El Kott and Others* ruling, with its focus on safety and living conditions in the UNRWA's areas of operations, as providing for 'a narrow and skewed understanding of the meaning of the words 'protection' and 'assistance' in article 1D' and showed that some national authorities willingly follow this restrictive approach. In her view, it may result in leaving some of the Palestinian refugees without any protection.

1348 See e.g. UNHCR (2003), 1; Guild and Garlick (2010), 73. Cf. Simeon (2013) 'Ethics…', 262-265, questioning the appropriateness of the labelling anybody as an 'undeserving refugee'.

1349 See Article 1F of the 1951 Refugee Convention.

1350 See Articles 32 and 33(2) of the 1951 Refugee Convention.

1351 See e.g. ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §80; ECtHR (GC), *Saadi v. Italy*, no. 37201/06 (2008), §138. See also Simeon (2019), 205, claiming that the ECtHR's jurisprudence is 'the most progressive in the protection of asylum seekers with respect of the principle of non-refoulement' in comparison with other jurisdictions.

1352 See e.g. ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §§79-80; ECtHR, *Ahmed v. Austria*, no. 25964/94 (1996), §§40-41; ECtHR, *A v. the Netherlands*, no. 4900/06 (2010), §143; ECtHR, *Auad v. Bulgaria*, no. 46390/10 (2011), §96; ECtHR, *X v. Sweden*, no. 36417/16 (2018), §55.

The ECtHR emphasizes that it is 'acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence, which represents, in itself, a grave threat to human rights'.[1353] In its opinion, it is legitimate for states to 'take a firm stand against those who contribute to terrorist acts, which it cannot condone in any circumstances'.[1354] Most importantly, 'as part of the fight against terrorism, States must be allowed to deport non-nationals whom they consider to constitute a threat to their national security'.[1355] Nevertheless, 'even in the most difficult of circumstances, such as the fight against terrorism' the prohibition established in Article 3 of the ECHR is of absolute character.[1356]

As bluntly concluded in the case of *Azimov v. Russia*, 'Article 3 of the Convention protects everyone, even those who have committed serious crimes'.[1357] The nature of the offences that the foreigner is suspected of or convicted for (both those committed in a country of origin and in a hosting state) is irrelevant from the perspective of Article 3 of the ECHR.[1358] In the *Chahal v. the United Kingdom* case, the ECtHR stressed that 'the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration' under Article 3 of the ECHR.[1359] Accordingly, the court has equally applied the principle of non-refoulement to removals of minor offenders, drug dealers and persons suspected of or convicted for involvement in international terrorism.[1360] It maintains that it is no part of its function to assess whether

1353 ECtHR, *X v. Sweden*, no. 36417/16 (2018), §46. See also ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §79; ECtHR, *A v. the Netherlands*, no. 4900/06 (2010), §143; ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09 (2012), §183.

1354 See e.g. ECtHR, *Auad v. Bulgaria*, no. 46390/10 (2011), §95; ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09 (2012), §183; ECtHR, *M.A. v. France*, no. 9373/15 (2018), §53; ECtHR, *X. v. the Netherlands*, no. 14319/17, dec. (2018), §71.

1355 See e.g. ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09 (2012), §184; ECtHR, *X. v. Germany*, no. 54646/17, dec. (2017), §27; ECtHR, *X v. Sweden*, no. 36417/16 (2018), §46.

1356 See e.g. ECtHR, *A v. the Netherlands*, no. 4900/06 (2010), §143; ECtHR, *M.S. v. Belgium*, no. 50012/08 (2012), §126; ECtHR, *X v. Sweden*, no. 36417/16 (2018), §55; ECtHR, *M.K. and Others v. Poland*, nos. 40503/17, 42902/17 and 43643/17 (2020), §166.

1357 ECtHR, *Azimov v. Russia*, no. 67474/11 (2013), §118.

1358 See e.g. ECtHR, *N. v. Finland*, no. 38885/02 (2005), §166; ECtHR (GC) *Saadi v. Italy*, no. 37201/06 (2008), §136; ECtHR, *Auad v. Bulgaria*, no. 46390/10 (2011), §96.

1359 ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §80. See also ECtHR, *Ahmed v. Austria*, no. 25964/94 (1996), §41; ECtHR, *N. v. Finland*, no. 38885/02 (2005), §159; ECtHR (GC), *Saadi v. Italy*, no. 37201/06 (2008), §138; ECtHR, *Al Husin v. Bosnia and Herzegovina*, no. 3727/08 (2012), §49; ECtHR, *M.K. and Others v. Poland*, nos. 40503/17, 42902/17 and 43643/17 (2020), §166. See also ECtHR, *D. v. the United Kingdom*, no. 30240/96 (1997), §47, and ECtHR, *Aswat v. the United Kingdom*, no. 17299/12(2013), §49.

1360 See e.g. ECtHR, *D. v. the United Kingdom*, no. 30240/96 (1997), §46-47; ECtHR, *N. v. Finland*, no. 38885/02 (2005), §166; ECtHR, *M.A. v. France*, no. 9373/15 (2018), §58. See

the applicant is in fact a threat to national security, 'its only task is to consider whether that individual's deportation would be compatible with his or her rights under the Convention'.[1361]

In case of offenders and foreigners presenting a threat to national security or public order, the risk of ill-treatment in a country of origin must be assessed as rigorously as in any other refoulement case.[1362] Domestic authorities cannot refrain from determining whether substantial grounds have been shown for believing that there is a real risk that the foreigner will face ill-treatment upon removal, or place a higher burden of proof on the returnee, because he is considered dangerous or has committed some crimes.[1363] The risk of ill-treatment and the 'dangerousness' of a person concerned should be examined independently. When the risk in a country of destination is established, it cannot be reduced by the fact that a foreigner may pose a serious threat to the community in a hosting state.[1364] However, the degree of that risk may be found to be increased because a foreigner has been considered a threat to national security in a Contracting State.[1365]

The absoluteness of the prohibition provided for in Article 3 of the ECHR in the context of refoulement was challenged, but the Strasbourg Court remained adamant.[1366] In the case of *Saadi v. Italy,* the United Kingdom attempted to convince the ECtHR that some balancing between the risk of

also ECtHR, *Ahorugeze v. Sweden*, no. 37075/09 (2011), §§90–95, concerning the extradition of the Rwandan citizen suspected of committing crimes against humanity and genocide against Tutsis.

1361 See e.g. ECtHR, *Othman (Abu Qatada) v. the United Kingdom,* no. 8139/09 (2012), §184; ECtHR, *X. v. Germany,* no. 54646/17, dec. (2017), §27; ECtHR, *X v. Sweden*, no. 36417/16 (2018), §46. See also ECtHR, *Auad v. Bulgaria*, no. 46390/10 (2011), §101.

1362 See e.g. ECtHR (GC) *Saadi v. Italy,* no. 37201/06 (2008), §§142; ECtHR, *X. v. Germany,* no. 54646/17, dec. (2017), §29; ECtHR, *X v. Sweden*, no. 36417/16 (2018), §§59–60. For more on rigorous scrutiny, see Chapter 6, Title III.

1363 See e.g. ECtHR (GC) *Saadi v. Italy,* no. 37201/06 (2008), §§139–141; ECtHR, *Charahili v. Turkey*, no. 46605/07 (2010), §§57–58; ECtHR, *Auad v. Bulgaria*, no. 46390/10 (2011), §101.

1364 ECtHR (GC) *Saadi v. Italy,* no. 37201/06 (2008), §139.

1365 The fact that the foreigner was (in particular publicly) considered to present a threat to national security in a hosting state may make him a person of interest in his country of origin, see e.g. ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §106; ECtHR, *A v. the Netherlands*, no. 4900/06 (2010), §§148–149; ECtHR, *Al Husin v. Bosnia and Herzegovina*, no. 3727/08 (2012), §53; ECtHR, *X v. Sweden*, no. 36417/16 (2018), §57; ECtHR, *M.A. v. France*, no. 9373/15 (2018), §§55, 58. See also Sitaropoulos (2007), 92. Cf. ECtHR, *X. v. the Netherlands,* no. 14319/17, dec. (2018), §§78–80.

1366 See also McAdam (2007), 138, stating that is unlikely that the ECtHR will change its approach. For the firm stand of the ECtHR in this regard, see also Sitaropoulos (2007), 87; Moeckli (2008), 548; Dembour (2015), 241. Cf. Hailbronner (2002), 11–12, critically on the absoluteness of the prohibition expressed in Article 3 of the ECHR in regard to terrorists.

ill-treatment for the concerned foreigner upon removal and the interests of the community as a whole should be permissible under Article 3 of the ECHR. It argued that the treatment inflicted directly by a Contracting State must be distinguished from the treatment that might be inflicted by the authorities of another State. The ECtHR maintained its previous firm stance on the absolute nature of the prohibition provided for in Article 3 of the ECHR and clearly stated that 'it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State'.[1367]

While the protection offered by Article 3 of the ECHR to 'undesirable' foreigners is clearly wider than that under Article 33 of the 1951 Refugee Convention, the secondary asylum law seems to follow more closely international refugee law than the ECHR.[1368] The exclusion clauses provided for in Article 1F of the 1951 Refugee Convention are mirrored in the text of the 2011 Qualification Directive and its predecessor[1369] and inspired the respective clauses applicable to beneficiaries of subsidiary protection[1370]. Article 21(2) of the Qualification Directives reflects the exceptions from the principle of non-refoulement provided for in international refugee law.[1371] Thus, a 'dangerous' refugee, recognized or not, may be refouled and his residence permit may be revoked.[1372] Moreover, the Member States shall or may revoke, end or refuse

1367 ECtHR (GC) *Saadi v. Italy,* no. 37201/06 (2008), §138. For the comprehensive analysis, see Moeckli (2008), 541-544. See also ECtHR, *Abdolkhani and Karimnia v. Turkey,* no. 30471/08 (2009), §91.

1368 See also CJ (GC), joined cases C-57/09 and C-101/09 *B and D* (2010), para 104, where the CJ elucidated the aims of introducing the exclusion clauses to the EU law that correspond to the premises on which the 1951 Refugee Convention had been based. See also CJ, case C-369/17 *Ahmed* (2018), para 51.

1369 Article 12(2) of the 2004 and 2011 Qualification Directives. See also CJ (GC), joined cases C-57/09 and C-101/09 *B and D* (2010), paras 86, 102; CJ (GC), case C-573/14 *Lounani* (2017), para 43. However, Article 12(2)(b) adds to Article 1F(b) of the 1951 Refugee Convention and Article 14(5) provides for the further grounds for refusing refugee status [see Guild and Garlick (2010), 72-73; Tsourdi (2013), 217].

1370 See Article 17(1) of the 2004 and 2011 Qualification Directives and CJ, case C-369/17 *Ahmed* (2018), paras 43-45. Cf. Guild and Garlick (2010), 73-74; Tsourdi (2013), 218. See also Costello (2015) *The Human Rights…,* 225-226, where she pointed to the tensions between Article 17 of the Qualification Directive and Article 3 of the ECHR.

1371 See also CJ (GC), joined cases C-57/09 and C-101/09 *B and D* (2010), para 101; CJ, case C-373/13 *T.* (2015), para 42. Cf. Boeles (2017), claiming that Article 21(2-3) is a 'dead letter' because of the addition in paragraph (1) of the words: 'in accordance with their international obligations'. See Mink (2012), 146-147, stating that Article 21(2) constitutes 'a wonderful confusion' as it does not explicitly acknowledge the absolute character of the principle of non-refoulement. She also admitted that this provision may be applied sporadically if ever. See also Moreno-Lax and Garlick (2015), 162-163; Peers (2015) 'What if…'.

1372 Articles 21(2-3) and 24(1) of the 2004 and 2011 Qualification Directives.

to renew the status of a person who committed specified crimes or constitutes a danger to the community or to the security of the Member State.[1373]

The significance of the 1951 Refugee Convention within the CEAS has been acknowledged by the Luxembourg Court.[1374] The 2011 Qualification Directive, like its predecessor, must be understood consistently with international refugee law. However, 'other relevant treaties' as referred to in Article 78(1) of the TFEU and 'the fundamental rights and the principles recognised, in particular, by the Charter of Fundamental Rights of the European Union' cannot be disregarded when the Qualification Directive is being interpreted.[1375] Invoking those general rules, the CJ does not directly mention the ECHR, but it surely alludes to it.[1376]

Accordingly, it is broadly accepted that persons who—in accordance with international refugee law or the EU law—have been excluded from international protection, or whose status or residence permit have been revoked, or to whom the exceptions from the principle of non-refoulement apply, are still protected against refoulement under Article 3 of the ECHR.[1377] Despite that, the Member States encounter difficulties in marrying the exclusion and revocation clauses and exceptions to the principle of non-refoulement expressed in the international refugee law and EU law with the absolute character of Article 3 of the ECHR.

Already in one of its first asylum cases, *B and D*, the CJ was asked whether the application of the exclusion clauses provided for in Article 12(2)(b) and (c) of the Qualification Directive (due to committing a serious non-political crime and being guilty of acts contrary to the purposes and principles of the UN) should be affected by the fact that the foreigner concerned enjoyed protection against refoulement under Article 3 of the ECHR. The question remained

1373 Articles 14(3-6) and 19(2-3) of the 2004 and 2011 Qualification Directives. However, Article 14(5) has been particularly criticized as the 'exclusion in disguise' contrary to international refugee law [see e.g. Moreno-Lax and Garlick (2015), 131].

1374 See e.g. CJ (GC), joined cases C-57/09 and C-101/09 *B and D* (2010), para 77, with the case-law cited; CJ (GC), joined cases C-411/10 and C-493/10 *N.S. and M.E.* (2011), paras 4, 75; CJ (GC), case C-573/14 *Lounani* (2017), para 41; CJ, case C-369/17 *Ahmed* (2018), para 40; CJ (GC), joined cases C-391/16, C-77/17 and C-78/17 *M and Others* (2019), para 81.

1375 See e.g. CJ (GC), joined cases C-57/09 and C-101/09 *B and D* (2010), para 78, with the case-law cited. Cf. CJ (GC), case C-573/14 *Lounani* (2017), para 42; CJ, case C-369/17 *Ahmed* (2018), para 41, where the CJ curiously departed from previous formulation and did not mention fundamental rights and the EU Charter.

1376 See Article 52(3) of the EU Charter. 'Other relevant treaties' referred to in Article 78(1) of the TFEU include the ECHR, see e.g. Guild and Garlick (2010), 77; Battjes (2016) 'Piecemeal Engineering…', 198.

1377 See e.g. Lauterpacht and Bethlehem (2003),133; Simeon (2013) 'Ethics…', 281-282; Peers (2015) 'What if…'; Simeon (2019), 185; Foster and Lambert (2019), 213-214.

unanswered.[1378] Nevertheless, the Luxembourg Court shyly mentioned in this case that 'the exclusion of a person from refugee status pursuant to Article 12(2) of Directive 2004/83 does not imply the adoption of a position on the separate question of whether that person can be deported to his country of origin'.[1379] Moreover, the court allowed for the possibility of Member States granting a national form of protection to persons excluded from refugee status under the EU law 'for reasons other than the need for international protection within the meaning of Article 2(a) of Directive 2004/83–that is to say, on a discretionary and goodwill basis or for humanitarian reasons'.[1380]

In the case of *T.,* the Luxembourg Court stressed that returning a refugee to a country where he is at risk may have 'potentially very drastic' consequences. Therefore, Article 21(2) of the Qualification Directive, specifying the circumstances under which the Member States may refoule a refugee, 'subjects the practice of refoulement to rigorous conditions'. Moreover, such refoulement is only one of the options within the discretion of the Member States: they can also 'expel the refugee to a third country where he does not risk being persecuted or being the victim of serious harm within the meaning of Article 15 of that directive' or permit him to remain in their territory. The refoulement of a refugee is 'only the last resort' that may be used to deal with the threat that the person concerned poses.[1381]

The CJ also explained that a residence permit issued for a refugee may be revoked (or terminated in another way specified in Article 21(3) of the Qualification Directive) when his refoulement is possible under paragraph (2).[1382] Thus, 'refoulable' refugees can have their residence permits revoked. Moreover,

1378 CJ (GC), joined cases C-57/09 and C-101/09 *B and D* (2010), paras 106-112. Cf. UNHCR (2003), 27-29.

1379 CJ (GC), joined cases C-57/09 and C-101/09 *B and D* (2010), para 110. See also Tsourdi (2013), 219, noticing that the CJ reflects here the ECtHR's case-law on the principle of non-refoulement.

1380 CJ (GC), joined cases C-57/09 and C-101/09 *B and D* (2010), paras 113-121. See also CJ, case C-720/17 *Bilali* (2019), para 61.

1381 CJ, case C-373/13 *T.* (2015), paras 42-43, 71-72. See also, critically, Boeles (2017), noticing that the CJ's reasoning lacks the 'explicit referral to the absolute character of the principle of non-refoulement'. Moreno-Lax (2017) *Accessing Asylum…*, 289 fn 319, points out that para. 42 of the T. case 'should be taken as a misconstruction of Art. 21 QD, as it disregards the effect of Art. 3 ECHR and Arts 4 and 19(2) CFR in 'neutralizing' Art. 33(2) CSR51 exceptions'. Cf. Singer (2019), 384-385, and Peers (2015) 'What if…'. The latter author pointed out that the CJ did not have to rule on the absoluteness of the principle of non-refoulement in the T. case, because Germany did not seek to remove the concerned foreigner.

1382 Thus, only when the refoulement is permissible under international obligations of the Member States, although the court did not highlight this limitation here, see CJ, case C-373/13 *T.* (2015), para 44.

Article 24(1) of the same directive 'supplements Article 21(3), in that it implicitly but necessarily authorises the relevant Member State to revoke a residence permit, or to end one, even in the event that the conditions of Article 21(3) of the directive are not met, where that is justified by compelling reasons of national security or public order'. However, Article 24(1) concerns only the revocation of a refugee's residence permit or the refusal to issue one. It 'cannot lead to the revocation of his refugee status and, even less, to his refoulement within the meaning of Article 21(2) of that directive'. The revocation of a residence permit is not tantamount to the revocation of a refugee status. A refugee whose residence permit has been revoked pursuant to Article 24(1) of the Qualification Directive 'retains his refugee status, at least until that status is actually ended'.[1383]

Refugee status 'ends' with the application of the revocation clauses provided for in Article 14 of the Qualification Directive. In the case of *M and Others*, the referring court expressed doubts as to the validity of Article 14(4-6) of that directive. It argued that the scenarios mentioned there (being a danger to the security of the Member State or having been convicted by a final judgment of a particularly serious crime and being a danger to the community) do not correspond to the exclusion and cessation clauses provided for in Article 1C-F of the 1951 Refugee Convention, which are exhaustive.[1384] The Luxembourg Court first noted that the circumstances in which Article 14(4-5) of the Qualification Directive is applicable are in essence equivalent to those in which the Member States may refoule a refugee under Article 21(2) of the same directive and Article 33(2) of the 1951 Refugee Convention.[1385] Next, it explained how international refugee law, secondary asylum law and fundamental rights must interplay in this regard, by stating

> while Article 33(2) of the Geneva Convention denies the refugee the benefit, in such circumstances, of the principle of non-refoulement to a country where his life or freedom would be threatened, Article 21(2) of Directive 2011/95 must, as is confirmed by recital 16 thereof, be interpreted and applied in a way that observes the rights guaranteed by the Charter, in particular Article 4 and Article 19(2) thereof, which prohibit *in absolute terms* torture and inhuman or degrading punishment or treatment *irrespective of the conduct of the person concerned,* as well as removal to

1383 CJ, case C-373/13 *T.* (2015), paras 50, 73-74, 95.

1384 UNHCR (2003), 4, emphasized the exhaustiveness of those clauses. Article 14(5) of the directive has been particularly criticized in the literature, as it concerns a refusal (not revocation) of refugee status, see e.g. Moreno-Lax and Garlick (2015), 131. See also Goodwin-Gil and McAdam (2007), 190-191; Hathaway (2011), 4.

1385 CJ (GC), joined cases C-391/16, C-77/17 and C-78/17 *M and Others* (2019), para 93.

> a State where there is a serious risk of a person being subjected to such treatment. Therefore, Member States may not remove, expel or extradite a foreign national where there are substantial grounds for believing that he will face a genuine risk, in the country of destination, of being subjected to treatment prohibited by Article 4 and Article 19(2) of the Charter.[1386]

Thus, a refugee who is considered a danger to the security or community of the Member State, but whose removal would expose him to the risk of infringement of his fundamental rights, provided for in Articles 4 and 19(2) of the EU Charter, may be refused international protection or lose his refugee status, but he cannot be refouled. In those circumstances, 'the Member State concerned may not derogate from the principle of non-refoulement under Article 33(2) of the Geneva Convention'. Therefore, the EU law provides 'more extensive international protection' for 'dangerous' refugees than that guaranteed by international refugee law.[1387]

The CJ's approach to the protection of 'undesirable' refugees against refoulement may be summarized as follows. Under the EU law, such persons may be excluded from being a refugee or deprived of their refugee status or of the residence permit intertwined with their international protection. However, those actions do not automatically entail refoulement. The possibility of refoulement to a state where the 'undesirable' person would be at risk must be considered separately and rigorously by the Member States. It should be 'only the last resort'. Even when it is established that a refugee is covered by one of the scenarios referred to in Article 21(2) of the Qualification Directive, providing for the exceptions from the prohibition of refoulement, it is not necessarily permissible to refoule him. Then, it must be examined whether there is a serious risk that he would be subjected to treatment contrary to Articles 4 and 19(2) of the EU Charter upon removal. If he would, the refoulement is prohibited.

In the case of *M and Others,* the Luxembourg Court finally clearly aimed at marrying the principle of non-refoulement as provided for in international refugee law with the absolute protection arising from Article 3 of the ECHR. The court has distinctly drawn from the ECtHR's jurisprudence in particular when it stated that Articles 4 and 19(2) of the EU Charter 'prohibit in absolute terms torture or inhuman or degrading punishment or treatment irrespective of the conduct of the person concerned'. However, neither in the *M and Others* case nor in the earlier jurisprudence concerning 'undesirable' refugees, did

1386 Ibid., para 94 (emphasis added).

1387 Ibid., paras 95–96.

the CJ directly refer to the ECHR.[1388] Moreover, it did not rely on the limitation to the derogation from the principle of non-refoulement directly provided for in Article 21(2) of the Qualification Directive, i.e. that the refoulement is possible only when it is not prohibited by the international obligations of the Member States. The ECHR must surely be included in these 'international obligations';[1389] thus the standards established by the Strasbourg Court under Article 3 of the ECHR could easily have been invoked by the Luxembourg Court.[1390] Despite this, the CJ remained silent on the absolute nature of Article 3 of the ECHR in the *B and D, T.* and *M and Others* rulings.[1391]

Only in the last case was the absoluteness of the prohibition expressed in Article 4 of the EU Charter, which has the same wording, scope and meaning as Article 3 of the ECHR, invoked. Hence, one may presume that—by choosing to focuss solely on the EU Charter—the Luxembourg Court simply aimed at establishing the autonomous interpretation of the EU law in this regard. Nevertheless, in other cases, ones that did not concern 'undesirable' third-country nationals, the court has not been so timid in referring to both Article 4 of the EU Charter and Article 3 of the ECHR.[1392] Thus, it seems that the Luxembourg Court—by abstaining from referring to the ECHR—tried to avoid relying on the jurisprudence that is questioned by the Member States. The respective case-law of the Strasbourg Court—which adamantly maintains the absoluteness of the prohibition provided for in Article 3 of the ECHR even in regard to the refoulement of suspected or convicted terrorists—raises considerable objections in the Member States.[1393] Notwithstanding, the arguments against the absolute character of the prohibition of torture or inhuman or degrading treatment or punishment in the refoulement context, apparently did not convince the CJ. The approach taken by the ECtHR is now reinforced—albeit indirectly—by the case-law of the Luxembourg Court.

1388 Only in the *B and D* case does the court mention Article 3 of the ECHR in the section 'Legal context'. However, in the CJ (GC), joined cases C-391/16, C-77/17 and C-78/17 *M and Others* (2019), para 94, the court referred to paras 86-88 of its previous judgment given in the joined cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* (2016), where it had mentioned directly the absolute character of Article 3 of the ECHR.

1389 See e.g. Kälin, Caroni and Heim (2011), 1349; Moreno-Lax and Garlick (2015), 162; Peers (2015) 'What if…'; Battjes (2016) 'Asylum Qualification Directive…', 1256; Boeles (2017).

1390 As AG Sharpston did in her opinion in case C-573/14 *Lounani* delivered on 31 May 2016, EU:C:2016:380, para 34.

1391 Meanwhile, the ECtHR referred to the *M and Others* case (as well as the *Affum* case) in ECtHR (GC), *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15 (2020), §§182-183.

1392 See e.g. CJ (GC), joined cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* (2016), paras 85-87, concerning the enforcement of the European arrest warrant in the case of the Hungarian offenders.

1393 See e.g. Moeckli (2008), 536-538; Wojnowska-Radzińska (2013), 109-110; Nowak and Charbord (2014), 93-95; Costello (2015) *The Human Rights…*, 192-193; Hamdan (2016), 31-33.

IV. Conclusions

In this chapter, the Strasbourg Court's approach to the principle of non-refoulement arising from Article 3 of the ECHR was examined and juxtaposed with the respective jurisprudence of the Luxembourg Court. Firstly, the chapter answers the question of who is protected against refoulement in the particular circumstances of seeking asylum: due to religion, sexual orientation, general situation of violence, health and living conditions. Then, it outlines the courts' responses to some measures used by the states to deny this protection: by hampering access to their territory; by shifting responsibility for asylum seekers to other states or entities; or by excluding some persons from the possibility of being granted protection. The analysis was meant to enable a determination of whether the principle of non-refoulement is interpreted in a convergent manner by the two courts, providing a clear and undoubtful standard that asylum seekers can rely on in domestic proceedings.

The principle of non-refoulement has been derived by the ECtHR from Article 3 of the ECHR, which provides for the absolute prohibition of torture or inhuman or degrading treatment or punishment. Article 4 of the EU Charter has the identical wording, meaning and scope. Additionally, pursuant to Article 19(2) of the EU Charter, no one may be removed, expelled or extradited to a state where there is a serious risk that he would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. The latter provision was adopted in order to incorporate 'the relevant case-law from the European Court of Human Rights regarding Article 3 of the ECHR'.[1394] Taking into account those close relations between the ECHR and EU Charter, it seems reasonable to expect that Article 3 of the ECHR and Articles 4 and 19(2) of the EU Charter will be–in the context of removals–interpreted coherently by the Strasbourg and Luxembourg Courts.

The analysis conducted in this chapter shows that the European asylum courts meet this expectation. Their respective jurisprudence is predominantly congruent. For instance, the ECtHR and CJ agree that a general situation of violence in a country of return may bar removals, but only when the violence is intense enough, thus in exceptional situations.[1395] Moreover, they concur that in some, extraordinary, circumstances the removal of a seriously ill foreigner may constitute inhuman or degrading treatment prohibited under Article 3 of the ECHR and Article 4 of the EU Charter.[1396] They both maintain

1394 'Explanations Relating to the Charter of Fundamental Rights' (2007), 18 and 24.

1395 See this Chapter, Title II, point 3.

1396 See this Chapter, Title II, point 4.

that the protection under those provisions is absolute and applies even to those persons who are excluded from protection under international refugee law. In regard to undesirable asylum seekers and refugees, thus criminal offenders or persons who are deemed to constitute a threat for the national security or public order, Article 3 of the ECHR and Article 4 of the EU Charter act as a 'safety net'—the refoulement may be possible under the 1951 Refugee Convention, but it is still prohibited under human rights law.[1397]

The case-law of the two courts is in fact consonant even in those areas that were indicated by some commentators as discrepant. The courts' approach to the 'discretion' requirement provides a good example in this regard. National asylum authorities tend to expect that asylum seekers will conceal their religion or sexual orientation upon removal in order to avoid ill-treatment. The Luxembourg Court's case-law has been interpreted as speaking out against those expectations, while the jurisprudence of the Strasbourg Court has been understood as allowing for them. However, such understanding of the courts' case-law is either overly simplistic or outdated. In regard to religion-based persecution,[1398] the CJ rejected the possibility of expecting by domestic authorities that the asylum seeker would abstain from certain religious practices to avoid persecution upon return only when the applicant 'will engage in religious practices which will expose him to a real risk of persecution'.[1399] Thus, the Luxembourg Court finds the manner in which a person concerned manifests his faith relevant in the assessment of the risks upon return. It does not exclude the possibility of expecting that asylum seekers continue to be discreet about their religion upon removal. However, they cannot be forced to manifest their faith differently than hitherto (e.g. privately instead of publicly) after a removal in order to avoid ill-treatment. Those conclusions are in line with the ECtHR's case-law. In fact, its most recent jurisprudence has aligned the views of the two courts on the 'discretion' requirement even more closely.[1400] With regard to asylum claims based on the sexual orientation of the applicant,[1401] the jurisprudence of the Strasbourg Court could have been understood at some point as bolstering the states' expectation that homosexuals can conceal their orientation upon return, but nowadays such interpretation of Article 3 of the ECHR is most probably no longer permissible, as mirrored in the ECtHR's recent case-law.[1402]

1397 See this Chapter, Title III, point 3.

1398 See this Chapter, Title II, point 1.

1399 CJ (GC), joined cases C-71/11 and C-99/11 *Y and Z* (2012), para 80.

1400 See e.g. ECtHR, *A.A. v. Switzerland,* no. 32218/17 (2019), §§52–58.

1401 See this Chapter, Title II, point 2.

1402 See ECtHR, *I.K. v. Switzerland*, no. 21417/17, dec. (2017), §24; ECtHR, *B and C v. Switzerland*, nos. 889/19 and 43987/16 (2020), §57.

The courts' jurisprudence has proved to be compatible also in those areas where it was anticipated to be conflicting. When the CJ decided in 2017 that applications for visas lodged by presumptive asylum seekers fall solely within the scope of national law and the EU Charter is not applicable to these proceedings,[1403] many commentators criticized the judgment, *inter alia* relying on the ECtHR's case-law. They considered it likely or even certain that the acts of diplomatic and consular agents concerning visas entail the jurisdiction required under Article 1 of the ECHR, thus, that Article 3 of the ECHR and the principle of non-refoulement should be taken into account when deciding on a visa application submitted for humanitarian reasons. Those arguments have been invalidated by the Grand Chamber's decision of 2020. In the case of *M.N. and Others v. Belgium*, the applicants argued that the refusal to issue them 'humanitarian visas' exposed them to a situation prohibited under Article 3 of the ECHR. The Strasbourg Court found the application inadmissible due to the state's lack of jurisdiction.[1404]

The two European asylum courts visibly 'strive to achieve convergence'[1405] in their case-law on the principle of non-refoulement. As has been mentioned above, while the CJ's jurisprudence on religion- or sexual orientation-based persecution seemed for some time to be more favourable for asylum seekers, the ECtHR reacted with rulings that brought its case-law closer to the approach of the Luxembourg Court.[1406] The landmark judgments of the Strasbourg Court, notably NA. v. the United Kingdom,[1407] *N. v. the United Kingdom*, Paposhvili v. Belgium[1408] and M.S.S. v. Belgium and Greece,[1409] had a prominent impact on the CJ's jurisprudence. In particular, its case-law concerning removals of seriously ill foreigners closely follows the jurisprudence of the ECtHR.[1410] While in some cases, the Luxembourg Court directly referred to and depended on the case-law of the Strasbourg Court,[1411]

1403 CJ (GC), case C-638/16 PPU *X and X* (2017). See this Chapter, Title III, point 1.

1404 ECtHR (GC), *M.N. and Others v. Belgium*, no. 3599/18, dec. (2020). See this Chapter, Title III, point 1.

1405 Lenaerts (2018), 34.

1406 See this Chapter, Title II, points 1 and 2.

1407 ECtHR, *NA. v. the United Kingdom*, no. 25904/07 (2008). See this Chapter, Title II, point 3.

1408 ECtHR (GC), *N. v. the United Kingdom*, no. 26565/05 (2008); ECtHR (GC), *Paposhvili v. Belgium*, no. 41738/10 (2016). See this Chapter, Title II, point 4.

1409 ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011). See this Chapter, Title II, point 5, and Title III, point 2.1.

1410 See this Chapter, Title II, point 4.

1411 See CJ (GC), case C-465/07 *Elgafaji* (2009), paras 27 and 44; CJ (GC), joined cases C-411/10 and C-493/10 *N.S. and M.E.* (2011), paras 88-90; CJ (GC), case C-542/13 *M'Bodj* (2014),

in others, it implicitly drew from it, ensuring the consistency of the two courts' views[1412].

The judicial saga initiated with the *M.S.S. v. Belgium and Greece* and *N.S. and M.E.* judgments of 2011 shows clearly that seeking convergence with the other court's jurisprudence is not always successful. In the *N.S. and M.E.* ruling the CJ relied heavily on the ECtHR's judgment rendered in the *M.S.S.* case. It concluded that a Dublin transfer is precluded when the state hosting an asylum seeker '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'.[1413] The introduction of the 'systemic deficiencies' criterion, understood by many as a legal requirement brought in to protect the principle of mutual trust, jeopardized the consistency of the two courts' views on Dublin transfers. In the *M.S.S.* case, the Strasbourg Court did identify the 'major structural deficiencies' in the asylum procedure in Greece,[1414] but it did not (at least explicitly) qualify the shortcomings in reception conditions there as 'systemic'. Nevertheless, those factual findings concerning the situation in the specific country of destination could not be equated with the establishment of the legal requirement of systemic deficiencies under Article 3 of the ECHR. In the case of *Tarakhel v. Switzerland,* the ECtHR confirmed that it is not only such flaws that are capable of barring a Dublin transfer, but individual circumstances pertaining to the applicant must be also taken into account. The Luxembourg Court aligned its views with the Strasbourg Court only in the *Ghezelbash, C.K. and Others* and *Jawo* rulings. It is now clear that, according to both courts, systemic deficiencies in domestic reception system or asylum proceedings are not the only reason to rule out a Dublin transfer under Article 3 of the ECHR and Article 4 of the EU Charter.[1415]

paras 39-40; CJ (GC), case C-562/13 *Abdida* (2014), para 47; CJ, case C-578/16 PPU *C.K. and Others* (2017), paras 68, 78-79; CJ (GC), case C-353/16 *MP* (2018), paras 38-40; CJ (GC), case C-163/17 *Jawo* (2019), paras 91-92.

1412 See this Chapter, Title II, point 1, in regard to the impact of ECtHR, *Z. and T. v. the United Kingdom,* no. 27034/05, dec. (2006) on CJ (GC), joined cases C-71/11 and C-99/11 *Y and Z* (2012); and Title III, point 3, in regard to the ECtHR's influence on the conclusions in CJ (GC), joined cases C-57/09 and C-101/09 *B and D* (2010); CJ (GC), joined cases C-391/16, C-77/17 and C-78/17 *M and Others* (2019).

1413 CJ (GC), joined cases C-411/10 and C-493/10 *N.S. and M.E.* (2011), para 94.

1414 ECtHR (GC), *M.S.S. v. Belgium and Greece,* no. 30696/09 (2011), §300.

1415 See, in regard to reception conditions, this Chapter, Title II, point 5, and, in regard to asylum proceedings in a destination country, Title III, point 2.1.

However, the *Jawo* case has brought in a new inconsistency within the two courts' jurisprudence. The Luxembourg Court held there–again relying on the *M.S.S.* judgment–that the particularly high level of severity required to bar a Dublin transfer is attained 'where the indifference of the authorities of a Member State would result in a person wholly dependent on State support finding himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity'.[1416] Those findings were later confirmed in the *Ibrahim and Others* and *Hamed and Omar* cases in the context of the admissibility grounds provided for in Article 33(2) of the 2013 Procedures Directive. Nevertheless, the 'extreme material poverty' requirement must be considered flawed similarly to that of the 'systemic deficiencies' criterion mentioned above. In the specific circumstances of the *M.S.S.* case the applicant's situation in Greece was qualified by the Strasbourg Court as 'extreme poverty' and this factual finding led to the conclusion that Greece (and in consequence Belgium) violated Article 3 of the ECHR. However, that does not necessarily mean that only such a situation precludes transfers under the principle of non-refoulement arising from the ECHR. In fact, in the *Tarakhel v. Switzerland* case, the ECtHR allowed for the possibility that other conditions of stay in a state responsible may also bar a Dublin transfer. While it is true that a particularly high level of severity is required by the Strasbourg Court under Article 3 of the ECHR in regard to living conditions, it seems that–by introducing the explicit requirement of 'extreme material poverty'–the CJ has tightened the criteria in this regard even more than the ECtHR itself.[1417]

The introduction of the 'extreme material poverty' criterion is one of two significant divergencies between the courts' case-law identified in this chapter that still persist.[1418] The second one concerns the relation between Article 15(c) of the 2004 and 2011 Qualification Directives and Article 3 of the ECHR. Pursuant to the former provision, 'a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict' is one of the reasons to consider a person eligible for subsidiary protection. The CJ stressed in the *Elgafaji* ruling that only point

1416 CJ (GC), case C-163/17 *Jawo* (2019), paras 91-92.

1417 See this Chapter, Title II, point 5.

1418 For other divergences, see e.g. this Chapter, Title II, point 1, for the approach of the two courts to the religious-based imprisonment that has been expressed in ECtHR, *M.E. v. France*, no. 50094/10 (2013) and CJ, case C-56/17 *Fathi* (2018).

(b) of Article 15 corresponds, in essence, to Article 3 of the ECHR and the content of point (c) differs from 'that of Article 3 of the ECHR, and the interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR'.[1419] In the case of *Sufi and Elmi v. the United Kingdom,* the Strasbourg Court accurately contested the CJ's conclusion on the distinctiveness of the two provisions.[1420]

The two courts' views on the relation between Article 15(c) of the 2004 and 2011 Qualification Directives and Article 3 of the ECHR can be somehow reconciled on a national level by taking the Strasbourg Court's jurisprudence on a general situation of violence into account under point (b) of Article 15, which–as the CJ claimed–corresponds to Article 3 of the ECHR. However, the discrepancy between the *Jawo, Ibrahim and Others* and *Hamed and Omar* cases and the ECtHR's jurisprudence is untenable. Under Article 52(3) of the EU Charter, the EU law must provide for the same or more extensive protection than the ECHR. Meanwhile, the Luxembourg Court has tightened the scope of protection under Article 4 of the EU Charter (thus, Article 3 of the ECHR) with the introduction of the 'extreme material poverty' requirement. To achieve coherency with the case-law of the Strasbourg Court, the 'extreme material poverty' criterion cannot be treated by domestic authorities as a required threshold that must be attained to activate the protection against refoulement (counter *Jawo*), but as a guidance that a removal causing an asylum seeker to suffer 'extreme material poverty' is, in particular, prohibited.

Simeon recently concluded that 'the future of the principle of non-refoulement does not appear to be bright'.[1421] Indeed, the principle seems to be increasingly challenged in practice. Asylum seekers are more and more seen as a problem rather than human beings in need of protection. Their rights are pushed aside and presented as less important than the rights of nationals who must be protected against the risks that migratory flows are supposed to entail. In those circumstances, it is particularly important that the Strasbourg and Luxembourg Courts continue to remind the states–coherently and strongly–that the rights arising from Article 3 of the ECHR and Articles 4 and 19(2) of the EU Charter are absolute and the principle of non-refoulement must be respected.

1419 CJ (GC), case C-465/07 *Elgafaji* (2009), para 28.

1420 ECtHR, *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07 (2011), §226. See this Chapter, Title II, point 3.

1421 Simeon (2019), 206.

Chapter 5
Detention

I. Introduction

Immigration detention is widespread nowadays.[1422] Asylum seekers are particularly vulnerable to deprivation of liberty.[1423] They are detained in diverse migration contexts, *inter alia* pending border, asylum, Dublin or return proceedings. For many years and repeatedly, the UNHCR has been sounding the alarm about national practices in this regard. It has been denouncing the use of arbitrary, unjustified and unduly prolonged detention of asylum seekers, including children. Moreover, the unacceptable and inhumane conditions that applicants for international protection are being held in have been criticized, as has the lack of adequate access to 'fair procedures for timely review of their detention status'.[1424]

The lawfulness of asylum seekers' detention, its duration and conditions as well as the respective procedural safeguards are also frequently considered by the ECtHR and the CJ. Despite the fact that neither international nor EU law prohibits depriving asylum seekers of their liberty, they do restrain the states' discretion in this regard. The ECHR and EU Charter play important roles here, as does the jurisprudence of the Strasbourg and Luxembourg Courts. In this chapter, the case-law of the two European asylum courts concerning immigration detention is scrutinized and juxtaposed (Titles II-VII). This examination is preceded by introductory remarks concerning the applicable legal framework (1) and by a detailed determination of the scope of the analysis conducted in this chapter (2).

1422 The real scope of detention of asylum seekers in Europe is unknown due to the significant gap in the data collection in this regard. However, the partial information that is available already shows that depriving asylum seekers of liberty is common in Europe. See Global Detention Project and Access Info Europe (2015); ECRE (2017) 'The Detention…', 2-4, 13; FRA (2017), 13.

1423 Costello and Mouzourakis (2016), 73.

1424 See UNHCR, Executive Committee: (1977) 'General…', point (a); (1985), point (f); (1992), point (e); (1993), points (e-f); (1998), points (dd) and (ee); (2000). See also UNHCR, Executive Committee: (1986), point (a); (1989), point (g); (2008); and UNHCR (2014), 5-6.

1. Legal Framework

In exceptional situations, detention of refugees is allowed under international refugee law. Firstly, pursuant to Article 9 of the 1951 Refugee Convention, states can resort to detention as a provisional measure that is essential to the national security in a time of war or in other grave and exceptional circumstances.[1425] Secondly, detention is acceptable under Article 32 para 3 of the 1951 Refugee Convention, which applies to refugees who were lawfully staying in a respective state but are facing an expulsion due to national security or public order considerations.[1426] They have the right to seek–for a reasonable period–a legal admission into another country. States are entitled to 'apply during that period such internal measures as they may deem necessary'. Deprivation of liberty is one of them.[1427] Lastly, under Article 31 para 2 of the 1951 Refugee Convention states should not restrict movements of refugees that are unlawfully in a hosting country (including asylum seekers[1428]) unless that restriction is necessary and temporary.[1429] The drafters of the Convention agreed that detention may be necessary in particular in order to carry out a basic, preliminary investigation of asylum seekers' identity and circumstances.[1430] It may be ordered as well for reasons relating to national security, public order or public health or in the face of a mass influx of foreigners, but asylum seekers should not be detained only for the convenience of national authorities.[1431] Automatic detention of all asylum seekers is excluded; each case should be individually examined.[1432] A deprivation of liberty that lasts for the whole period of

1425 The expression 'other grave and exceptional circumstances' refers to 'conditions bordering on war' [Grahl-Madsen (1997), 27].

1426 The provision applies to addressees of final and enforceable expulsion orders [Davy (2011), 1321]. See also Hathaway (2005), 694.

1427 See e.g. Hathaway (2005), 693-694; Davy (2011), 1322. See also UNHCR, Executive Committee (1977) 'Expulsion', point (e), stating: 'an expulsion order should only be combined with custody or detention if absolutely necessary for reasons of national security or public order and that such custody or detention should not be unduly prolonged'.

1428 For the applicability of Article 31 para 2 sentence 1 to both asylum seekers and recognized refugees, see Noll (2011), 1266.

1429 Restrictions of movement are permissible only as long as refugees' status in the country is not regularized or until they obtain admission into another country.

1430 See e.g. Grahl-Madsen (1997), 106; Goodwin-Gill (2003), 195; Hathaway (2005), 420-422; Wilsher (2011), 129-130; Boeles et al. (2014), 271.

1431 See e.g. Grahl-Madsen (1997), 106. See also UNHCR (1990), 219; Goodwin-Gill (2003), 195; Boeles et al. (2014), 272.

1432 Noll (2011), 1268, 1270, 1272. See also Hathaway (2005), 423; Goodwin-Gill and McAdam (2007), 463, 465; Costello (2017), 45.

a refugee status determination procedure also seems to be unjustified under this provision.[1433]

The 1951 Refugee Convention does not deal with conditions of detention suitable for asylum seekers; nor does it provide for specific time-limits in this regard nor explicitly require a review of a legality or necessity of deprivation of liberty. However, those issues were repeatedly considered by the UNHCR. As early as 1986, the UNHCR emphasized that detention of asylum seekers and refugees 'should normally be avoided' and is permissible

> only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.[1434]

Deprivation of liberty cannot be arbitrary and discriminatory.[1435] Importantly, detention should not be used to 'deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them'.[1436] Moreover, refugees and asylum seekers should be protected from an unduly prolonged deprivation of liberty.[1437] It was later specified that their detention cannot be indefinite and that maximum periods in this regard have to be set in national law.[1438] Minimum procedural safeguards are required, including a review of detention.[1439] The conditions in which deprivation of liberty is effected must be humane and dignified: in particular asylum seekers should not be accommodated with persons detained as common criminals.[1440] Furthermore, in 1987 the UNHCR expressly condemned the arbitrary detention of asylum-seeking children.[1441] Twenty years later it stated that 'States should

1433 See Hathaway (2005), 419-422, claiming that when a state decides to provisionally allow an asylum seeker to enter or remain in its territory, e.g. in order to examine his asylum application, the detention under Article 31 para 2 is no longer justified. See also Moreno-Lax (2011), 193; Costello (2017), 44. Goodwin-Gill (2003), 195, mentioned 'a few days' of detention as justified. Cf. Grahl-Madsen (1997), 64, 107.

1434 UNHCR, Executive Committee (1986), point (b). See also UNHCR (2012), 13-19.

1435 UNHCR (2012), 15, 25. For more on the UNHCR's views on the arbitrariness of asylum seekers' detention, see O'Nions (2008), 158-161.

1436 UNHCR (2012), 19.

1437 UNHCR, Executive Committee (1986), point (c).

1438 UNHCR (2012), 26.

1439 UNHCR, Executive Committee (1986), points (e) and (g). See also UNHCR (2012), 27-28.

1440 UNHCR, Executive Committee (1986), point (f); UNHCR (2012), 29-32.

1441 UNHCR, Executive Committee (1987), point (e).

refrain from detaining children, and do so only as a measure of last resort and for the shortest appropriate period of time, while considering the best interests of the child'.[1442] Special circumstances and needs of other vulnerable asylum seekers must also be taken into account.[1443]

The UNHCR's guidelines and conclusions regarding detention are rooted in both international refugee law and human rights law.[1444] As shown above, the provisions of the 1951 Refugee Convention that concern deprivation of liberty of refugees are rather vague and leave a lot of discretion to the states.[1445] However, their powers in this regard are significantly curtailed pursuant to international human rights law,[1446] including the ECHR.[1447]

Under Article 5 of the ECHR a person's non-absolute right to liberty and security is guaranteed.[1448] As the ECtHR reiterates: 'Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty'.[1449] This protection applies to everyone,[1450] so also to asylum seekers and refugees. Detention is permissible only in six specified situations, one of which pertains to immigration detention. Subparagraph (f) allows for 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'. Pursuant to Article 5(2) of the ECHR, detainees have a right to prompt information in understandable language about the reasons for their detention. Paragraph 4 provides for the right to a review of the lawfulness of deprivation of liberty and it is considered a *lex specialis* to Article 13 of the ECHR.[1451]

1442 UNHCR, Executive Committee (2007), point (b)(xi). See also UNHCR (2012), 34-36.

1443 Including victims of trauma and torture, women, victims or potential victims of trafficking, persons with disabilities, elderly and LGBTI asylum seekers [see UNHCR (2012), 33, 37-39].

1444 See multiple referrals to international human rights law or standards in UNHCR (2012).

1445 See also Wilsher (2011), 138, stating that the 1951 Refugee Convention 'has failed to provide practical protection for asylum seekers against arbitrary detention'.

1446 See e.g. Goodwin-Gill (2003), 232; Noll (2011), 1269-1270; Davy (2011), 1322.

1447 See also Giakoumopoulos (1998), 165, claiming that Article 5 of the ECHR supplements or even strengthens the protection granted to asylum seekers by the 1951 Refugee Convention.

1448 Under Article 15 of the ECHR derogations from the right to liberty and security are possible.

1449 See e.g. ECtHR (GC), *Khlaifia and Others v. Italy*, no. 16483/12 (2016), §88.

1450 See e.g. ECtHR (GC), *A. and Others v. the United Kingdom*, no. 3455/05 (2009), §162; ECtHR, *Louled Massoud v. Malta*, no. 24340/08 (2010), §58.

1451 See e.g. ECtHR (GC), *A. and Others v. the United Kingdom*, no. 3455/05 (2009), §202. For more on Article 13 of the ECHR, see Chapter 6.

Article 5(5) of the Convention secures the right to compensation for an arrest or detention that is not in accordance with the above-mentioned rules.[1452] Under Article 5 of the ECHR conditions of detention are not specified, but the deprivation of liberty may be considered arbitrary due to the inappropriate place or conditions in which it was effected. Moreover, those conditions may be found to be in violation of Article 3 of the ECHR, which prohibits torture or inhuman or degrading treatment or punishment.

The right to liberty and security is also expressed in the EU Charter. The text of Article 6 is very moderate. It simply states that everyone has the right to liberty and security of person. It does not specify exceptions to this right, nor does it expressly provide for a right to information, review and compensation. However, in accordance with Article 52(3) of the EU Charter, the rights provided for in Article 6 have the same meaning and scope as the ones guaranteed by Article 5 of the ECHR. Restrictions to the right to liberty and security are then permissible, but they cannot exceed the ones allowed under the ECHR.[1453] Moreover, pursuant to Article 52(1) of the EU Charter limitations on the exercise of the right to liberty and security are subjected to the principle of proportionality. Furthermore, Article 4 of the EU Charter has the same wording, meaning and scope as Article 3 of the ECHR.[1454]

The secondary EU law provides for more detailed guidance in regard to immigration detention. Asylum seekers may be deprived of liberty pending asylum proceedings according to the 2013 Reception Directive (Articles 8–11).[1455] Dublin transferees may be detained pursuant to Article 28 of the Dublin III Regulation.[1456] A person cannot be held in detention for the sole reason that he is seeking asylum or is subject to Dublin proceedings.[1457] Rejected asylum seekers are deprived of liberty pursuant to Articles 15–18 of the Return Directive. All those acts establish specific grounds for detention, regulate its duration and conditions and provide foreigners with the procedural safeguards.

1452 Thus, it does not secure the right to compensation when detention was in breach of Article 3 of the ECHR.

1453 'Explanations Relating to the Charter of Fundamental Rights' (2007), 19. See also CJ (GC), case C-601/15 PPU *J.N.* (2016), para 47.

1454 'Explanations Relating to the Charter of Fundamental Rights' (2007), 18. See also CJ (GC), case C-128/18 *Dorobantu* (2019), para 58.

1455 See also Articles 8 and 26 of the 2013 Procedures Directive. Cf. Article 7(3) of the 2003 Reception Directive and Article 18 of the 2005 Procedures Directive.

1456 The Dublin II Regulation did not contain any provisions regarding detention. See also CJ, case C-528/15 *Al Chodor and Others* (2017), para 35.

1457 See Article 8(1) of the 2013 Reception Directive and Article 28(1) of the Dublin III Regulation. See also Article 26(1) of the 2013 Procedures Directive.

Detention of asylum seekers and returnees proved to be a particularly contentious issue during the negotiations between the Member States.[1458] The secondary law that the states managed to agree on is therefore a compromise that leaves considerable discretion to the Member States and often lacks the needed clarity and precision, raising a lot of doubts amongst national authorities that are ordering, prolonging and effecting detention in practice. In the process of the negotiations important guarantees were also watered down.[1459] The guidance from the ECtHR and CJ thus seems indispensable and in practice is often asked for.

2. Scope of Analysis

The analysis in this chapter concentrates on immigration detention, thus the deprivation of liberty that is intertwined with asylum, Dublin and return proceedings. In consequence, the issues concerning the criminalization of migration and detention as a punitive measure are not examined here.[1460]

As the rights provided for in Article 6 of the EU Charter are considered to have the same meaning and scope as the ones guaranteed by Article 5 of the ECHR, the abundant case-law of the Strasbourg Court regarding immigration detention serves as a starting point for the analysis conducted in this chapter. The ECtHR reiterates that deprivation of liberty permissible under Article 5(1)(f) of the ECHR must be lawful and non-arbitrary, but it does not have to be necessary. Immigration detention has to be carried out in good faith, it must be closely connected to its grounds, the place and conditions of detention should be appropriate and its length must not exceed that reasonably required for the purpose pursued.[1461] Inhuman or degrading conditions of detention are prohibited under Article 3 of the ECHR. Moreover, pursuant to Article 5(2) and (4) of the ECHR, foreigners detained pending asylum-related proceedings must be afforded sufficient procedural safeguards.

In this chapter, the above-mentioned requirements arising from the right to liberty and security as they are determined by the Strasbourg Court in its case-law on immigration detention are examined and juxtaposed with the respective jurisprudence of the CJ. In this context, the chapter answers

1458 For the drafting history, see e.g. Hruschka and Maiani (2016), 1574-1575; Peek and Tsourdi (2016), 1412-1413, 1419, 1423; Mananashvili (2016), 734-739.

1459 See e.g. Wilsher (2011), 191-192; Velluti (2014), 63.

1460 The AGs clearly state that 'detention for removal purposes is neither punitive nor penal and does not constitute a prison sentence' (see view of AG Szpunar delivered on 14 May 2014 in the case C-146/14 PPU *Mahdi,* EU:C:2014:1936, para 47, referring to the previous opinions of other AGs).

1461 See e.g. ECtHR, *Haghilo v. Cyprus*, no. 47920/12 (2019), §§200-203.

the following questions: when immigration detention is considered lawful (Title II), whether it must be proportional and necessary (Title III), when it is permissible (Title IV), for how long it is allowed (Title V), where it should be effected (Title VI) and what procedural safeguards shall be granted to detained foreigners (Title VII). The aim of this chapter is to determine whether the right to liberty and security applied in the context of immigration detention is interpreted in a convergent manner by the two courts, providing a clear and indubitable standard that asylum seekers can rely on (Title VIII).

II. Lawfulness

Under Article 5(1)(f) of the ECtHR, immigration detention has to be both 'in accordance with a procedure prescribed by law' and 'lawful'. In the ECtHR's abundant case-law regarding deprivation of liberty, those requirements often overlap.[1462] Accordingly, in this subchapter they are analysed jointly.

The detention must have a basis in law.[1463] When international or EU law is a part of a domestic legal order, it may constitute a legal basis for deprivation of liberty.[1464] However, when the applicant claimed before the Strasbourg Court in the *Thimothawes v. Belgium* case that the national law on detention was in conflict with the EU law, the court was not willing to find that the deprivation of liberty had been unlawful on this basis. The ECtHR maintains that, as a rule, it is for domestic authorities to interpret and apply domestic law, where appropriate in accordance with EU law.[1465]

Detaining asylum seekers and returnees without any legal basis constitutes a clear violation of Article 5(1) of the ECHR.[1466] Moreover, even when an appropriate legal basis for deprivation of liberty exists in the domestic legal

1462 See e.g. ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §118; ECtHR (GC), *Saadi v. the United Kingdom*, no. 13229/03 (2008), §67.

1463 See e.g. ECtHR, *Amuur v. France*, no. 19776/92 (1996), §50; ECtHR (GC), *Khlaifia and Others v. Italy*, no. 16483/12 (2016), §91.

1464 See e.g. ECtHR, *Gordyeyev v. Poland*, nos. 43369/98 and 51777/99, dec. (2005); ECtHR, *Soldatenko v. Ukraine*, no. 2440/07 (2008), §112; ECtHR, *Thimothawes v. Belgium*, no. 39061/11 (2017), §70. See also Ruiz Ramos (2020), 18-20.

1465 ECtHR, *Thimothawes v. Belgium*, no. 39061/11 (2017), §71. Cf. ECommHR (Plenary), *Caprino v. the United Kingdom*, no. 6871/75, dec. (1978); ECtHR, *Raza v. Bulgaria*, no. 31465/08 (2010), §74.

1466 See e.g. ECtHR, *Shamsa v. Poland*, nos. 45355/99 and 45357/99 (2003), §§53-57; ECtHR, *Riad and Idiab v. Belgium*, nos. 29787/03 and 29810/03 (2008), §78; ECtHR, *M.A. v. Cyprus*, no. 41872/10 (2013), §202; ECtHR (GC), *Khlaifia and Others v. Italy*, no. 16483/12 (2016), §§97-104; ECtHR, *Amerkhanov v. Turkey*, no. 16026/12 (2018), §66; ECtHR (GC), *Z.A. and Others v. Russia*, nos. 61411/15 etc. (2019), §164; ECtHR, *Moustahi v. France*, no. 9347/14 (2020), §93.

order, but a procedure in this regard has not been established, detention may be considered unlawful as well.[1467] A basis in the law has to exist for each period of the effected deprivation of liberty. In the case of *S.D. v. Greece*, the right to liberty was considered to be breached because the Turkish citizen, who had been arrested for an illegal entry to Greece, continued to be deprived of freedom after applying for asylum even though none of the provisions of the Greek law authorized detention pending asylum proceedings.[1468]

A massive influx of asylum seekers and other foreigners does not justify effecting detention without any legal basis. As explained in the case of *Z.A. and Others v. Russia*, concerning the deprivation of liberty of the asylum seekers at the airport, the conditions that a domestic law must satisfy under Article 5 of the ECHR are not excessive. The court stressed that

> the lawfulness requirement of that provision may be considered generally satisfied by a domestic legal regime that provides, for example, for no more than the name of the authority competent to order deprivation of liberty in a transit zone, the form of the order, its possible grounds and limits, the maximum duration of the confinement and, as required by Article 5§4, the applicable avenue of judicial appeal.[1469]

The ECtHR maintains that states can adopt a law regarding detention that is both in accordance with the ECHR and adapted to the practical realities of a massive influx of asylum seekers.[1470]

The Strasbourg Court reiterates that for a deprivation of liberty to satisfy the lawfulness requirement it must be ordered in compliance with the substantive and procedural rules of a national law.[1471] Thus, immigration detention may be considered unlawful under the ECHR when the decision in this regard was made in a breach of a domestic law.[1472] In the case of *Lokpo and*

1467 ECtHR, *Soldatenko v. Ukraine*, no. 2440/07 (2008), §§112-113. See also ECtHR, *Muminov v. Russia*, no. 42502/06 (2008), §122; ECtHR, *Tehrani and Others v. Turkey*, nos. 32940/08, 41626/08 and 43616/08 (2010), §§70-73.

1468 ECtHR, *S.D. v. Greece*, no. 53541/07 (2009), §65. See also ECtHR, *Longa Yonkeu v. Latvia*, no. 57229/09 (2011), §§122-132; ECtHR, *M.A. v. Cyprus*, no. 41872/10 (2013), §184; ECtHR, *Muhammad Saqawat v. Belgium*, no. 54962/18 (2020), §§44, 53-54.

1469 ECtHR (GC), *Z.A. and Others v. Russia*, nos. 61411/15 etc. (2019), §162.

1470 Ibid., §163. See also Wilsher (2005), 163. Cf. ECtHR (GC), *Saadi v. the United Kingdom*, no. 13229/03 (2008), §80, where the court referred to the authorities' difficulties resulting from large numbers of asylum seekers as contributing to the finding that the detention was not arbitrary.

1471 See e.g. ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §118; ECtHR, *Nabil and Others v. Hungary*, no. 62116/12 (2015), §30; ECtHR, *S.K. v. Russia*, no. 52722/15 (2017), §111.

1472 See e.g. ECtHR, *Sadaykov v. Bulgaria*, no. 75157/01 (2008), §§24-25, ECtHR, *Jusic v. Switzerland*, no. 4691/06 (2010), §§80-82; ECtHR, *Abdi v. the United Kingdom*, no. 27770/08

Toure v. Hungary, the asylum seekers' detention continued only because the refugee authority had not initiated their release, as provided for in the national law, and this non-action was not susceptible to a remedy. The court stressed that 'the applicants were deprived of their liberty by virtue of the mere silence of an authority–a procedure which in the Court's view verges on arbitrariness'. This conclusion was reached even though, as the court explained referring to the Government's arguments, their detention may have been in compliance with the EU law.[1473] Immigration detention may be also considered unlawful when it continues against a release order.[1474]

Not all flaws in a detention order violate Article 5(1) of the ECHR, as not all of them are 'of such a nature so as to deprive the applicant's detention of its legal basis under domestic law'.[1475] Moreover, when 'the putative error is immediately detected and redressed by the release of the persons concerned', the person's right to liberty is not breached.[1476]

Compliance with the national rules on detention is not sufficient from the perspective of Article 5 of the ECHR. The ECtHR emphasizes that the applicable domestic law must be of sufficient quality. It has to be in conformity with the ECHR, including the general principles expressed or implied therein.[1477] The court reiterates that the wording of Article 5(1) of the Convention relates 'to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention'.[1478] In particular,

> (w)here deprivation of liberty is concerned, legal certainty must be strictly complied with in respect of each and every element relevant to the justification of the detention under domestic and Convention law.[1479]

(2013), §69; ECtHR, *M.A. v. Cyprus,* no. 41872/10 (2013), §209, 211-216; ECtHR, *Mahamed Jama v. Malta,* no. 10290/13 (2015), §§154-159; ECtHR, *Haghilo v. Cyprus,* no. 47920/12 (2019), §206; ECtHR, *G.B. and Others v. Turkey,* no. 4633/15 (2019), §§149-150.

1473 ECtHR, *Lokpo and Toure v. Hungary,* no. 10816/10 (2011), §§23-24.

1474 See e.g. ECtHR, *John v. Greece,* no. 199/05 (2007), §33; ECtHR, *Riad and Idiab v. Belgium,* nos. 29787/03 and 29810/03 (2008), §§73-74; ECtHR, *V.M. v. the United Kingdom (No. 2),* no. 62824/16 (2019), §38; ECtHR, *G.B. and Others v. Turkey,* no. 4633/15 (2019), §§152-155. Cf. ECtHR, *Nassr Allah v. Latvia,* no. 66166/13 (2015), §58.

1475 ECtHR, *Nikolov v. Bulgaria,* no. 38884/97 (2003), §63. See also ECtHR (GC), *Douiyeb v. the Netherlands,* no. 31464/96 (1999), §§51-54; ECtHR, *Alim v. Russia,* no. 39417/07 (2011), §57.

1476 ECtHR (GC), *Slivenko v. Latvia,* no. 48321/99 (2003), §149.

1477 See e.g. ECtHR, *Nasrulloyev v. Russia,* no. 656/06 (2007), §71; ECtHR, *Soldatenko v. Ukraine,* no. 2440/07 (2008), §111; ECtHR, *M.A. v. Cyprus,* no. 41872/10 (2013), §198; ECtHR, *Haghilo v. Cyprus,* no. 47920/12 (2019), §201.

1478 See e.g. ECtHR, *Amuur v. France,* no. 19776/92 (1996), §50; ECtHR, *Dougoz v. Greece,* no. 40907/98 (2001), §55; ECtHR, *R. v. Russia,* no. 11916/15 (2016), §102.

1479 ECtHR, *Auad v. Bulgaria,* no. 46390/10 (2011), §133. See also ECtHR (GC), *Khlaifia and Others v. Italy,* no. 16483/12 (2016), §§91-92; ECtHR, *Haghilo v. Cyprus,* no. 47920/12 (2019), §201; ECtHR (GC), *Z.A. and Others v. Russia,* nos. 61411/15 etc. (2019), §161.

A national law authorizing detention has to be sufficiently accessible, precise and foreseeable in its application to avoid a risk of arbitrariness.[1480] The ECtHR explained that the standard of lawfulness requires that the applicable law has to 'be sufficiently precise to allow the person–if need be, with appropriate advice–to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.[1481] The Strasbourg Court stressed that the accessibility and precision of the law on detention is of particular importance when asylum seekers are being deprived of liberty.[1482]

The ECtHR assesses whether the law is of sufficient quality on a case-by-case basis. The requirement may not be satisfied when inconsistent or mutually exclusive interpretations of law on immigration detention are followed by various national authorities.[1483] The absence or existence of time-limits to the duration of detention can also affect the quality of law.[1484] Internal guidelines or other documents that had never been published nor accessible to the public fell short of the 'quality of law' standard as well.[1485] Moreover, in the case of *Dougoz v. Greece*, the Strasbourg Court concluded that the opinion expressed by the public prosecutor could not constitute a law that was in accordance with the requirements arising from Article 5 of the ECHR.[1486] In the case of *Soldatenko v. Ukraine*, the court stressed that the resolutions of the Plenary Supreme Court had not had the force of law and were not legally binding.[1487] By contrast, in the case of *Firoz Muneer v. Belgium*, the ECtHR accepted the well-established and consistent case-law of the Court of Cassation as being a sufficiently precise legal basis for the purposes of Article 5(1) of the ECHR.[1488]

1480 See e.g. ECtHR, *Shamsa v. Poland*, nos. 45355/99 and 45357/99 (2003), §49, ECtHR, *Nasrulloyev v. Russia*, no. 656/06 (2007), §71; ECtHR, *Soldatenko v. Ukraine*, no. 2440/07 (2008), §111; ECtHR, *M.A. v. Cyprus*, no. 41872/10 (2013), §198.

1481 ECtHR (GC), *Khlaifia and Others v. Italy*, no. 16483/12 (2016), §92. See also ECtHR, *R. v. Russia*, no. 11916/15 (2016), §102.

1482 ECtHR, *Amuur v. France*, no. 19776/92 (1996), §50; ECtHR, *Dougoz v. Greece*, no. 40907/98 (2001), §55; ECtHR, *Rashed v. the Czech Republic*, no. 298/07 (2008), §73.

1483 See e.g. ECtHR, *Nasrulloyev v. Russia*, no. 656/06 (2007), §§76-77; ECtHR, *Rashed v. the Czech Republic*, no. 298/07 (2008), §§75-76; ECtHR, *Suso Musa v. Malta*, no. 42337/12 (2013), §§98-99; ECtHR, *L.M. and Others v. Russia*, nos. 40081/14, 40088/14 and 40127/14 (2015), §150; ECtHR (GC), *Khlaifia and Others v. Italy*, no. 16483/12 (2016), §106.

1484 For more see this Chapter, Title V.

1485 See e.g. ECtHR, *Nolan and K. v. Russia*, no. 2512/04 (2009), §99; ECtHR (GC), *Khlaifia and Others v. Italy*, no. 16483/12 (2016), §102.

1486 ECtHR, *Dougoz v. Greece*, no. 40907/98 (2001), §57. See also ECtHR, *Mathloom v. Greece*, no. 48883/07 (2012), §69.

1487 ECtHR, *Soldatenko v. Ukraine*, no. 2440/07 (2008), §113.

1488 ECtHR, *Firoz Muneer v. Belgium*, no. 56005/10 (2013), §§59-62. The court emphasized that the foreigner had been represented by a professional lawyer who should be

Additionally, in regard to the expected quality of the law, the Strasbourg Court emphasized that 'adequate legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by the Convention' is required. Meanwhile, in the case of *Amuur v. France*, the national courts could not review the conditions of detention at the airport where the presumptive asylum seekers were held, nor impose time-limits in this regard. The applicable law did not provide for legal, humanitarian and social assistance for the asylum seekers that were deprived of freedom in the transit zone. Thus, Article 5(1) of the ECHR was violated.[1489]

The deprivation of liberty must not be arbitrary. The ECtHR reiterates that

> any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. No detention which is arbitrary can be compatible with Article 5 §1 and the notion of "arbitrariness" in that context extends beyond lack of conformity with national law: a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.[1490]

Whether the conduct of domestic authorities constitutes 'arbitrariness' within the meaning of Article 5(1) of the ECHR is decided on a case-by-case basis. However, some key principles have been established in the court's jurisprudence. Immigration detention has to be carried out in good faith, it must be closely connected to its grounds, the place and conditions of detention should be appropriate and its length should not exceed that reasonably required for the purpose pursued.[1491]

As grounds, duration and conditions of detention are examined in more detail in the following subchapters (IV-VI), only the 'good faith' requirement needs some comment here. Firstly, when national authorities act in good faith that there is a legal basis for a detention, while in fact there is not, the

aware of this case-law. See also ECtHR, *M.D. v. Belgium*, no. 56028/10 (2013), §§52–53. Cf. in regard to the common law system, ECtHR, *J.N. v. the United Kingdom*, no. 37289/12 (2016), §§97–99.

1489 ECtHR, *Amuur v. France*, no. 19776/92 (1996), §. See also ECtHR, *L.M. and Others v. Russia*, nos. 40081/14, 40088/14 and 40127/14 (2015), §149.

1490 ECtHR, *Nabil and Others v. Hungary*, no. 62116/12 (2015), §32. See also ECtHR (GC), *Saadi v. the United Kingdom*, no. 13229/03 (2008), §67; ECtHR, *S.K. v. Russia*, no. 52722/15 (2017), §111.

1491 See e.g. ECtHR (GC), *Saadi v. the United Kingdom*, no. 13229/03 (2008), §§68, 74; ECtHR, *Nabil and Others v. Hungary*, no. 62116/12 (2015), §§33-34; ECtHR, *L.M. and Others v. Russia*, nos. 40081/14, 40088/14 and 40127/14 (2015), §146; ECtHR, *Haghilo v. Cyprus*, no. 47920/12 (2019), §203.

state is not absolved from responsibility under the ECHR.[1492] However, the Strasbourg Court maintains that

> it may happen that a Contracting State's agents conduct themselves unlawfully in good faith; in such cases, a subsequent finding by the courts that there has been a failure to comply with domestic law may not necessarily retrospectively affect the validity, under domestic law, of any implementing measures taken in the meantime. Matters would be different if the authorities at the outset knowingly contravened the legislation in force and, in particular, if their original decision was an abuse of powers.[1493]

Accordingly, when the domestic courts had ordered the release of the asylum seekers, but the Alien Office had them transported to the closed transit zone at the airport instead of giving them freedom, the ECtHR concluded that the latter authority had knowingly exceeded its powers. Thus, the detention at the airport was not effected in good faith.[1494]

Secondly, when domestic authorities deceive foreigners in order to arrest and remove them, their detention may be considered arbitrary.[1495] In the case of *Čonka v. Belgium,* the asylum seekers received a written notice inviting them to the police station to 'enable the file concerning their application for asylum to be completed'. In fact, they were served there with the deportation and detention orders and subsequently arrested. The ECtHR emphasized that

> (a)lthough the Court by no means excludes its being legitimate for the police to use stratagems in order, for instance, to counter criminal activities more effectively, acts whereby the authorities seek to gain the trust of asylum-seekers with a view to arresting and subsequently deporting them may be found to contravene the general principles stated or implicit in the Convention.[1496]

The court determined that the wording of the notice had been chosen consciously in order to ensure and facilitate the removal. Using such a decoy to enable the detention of asylum seekers was considered by the Strasbourg Court incompatible with Article 5 of the ECHR.[1497]

1492 See e.g. ECtHR, *Fedotov v. Russia,* no. 5140/02 (2005), §75.

1493 ECtHR, *Riad and Idiab v. Belgium,* nos. 29787/03 and 29810/03 (2008), §76.

1494 Ibid. See also ECtHR, *John v. Greece,* no. 199/05 (2007), §§33-37; ECtHR, *Azimov v. Russia,* no. 67474/11 (2013), §§163-165.

1495 Cf. ECtHR, *Al-Moayad v. Germany,* no. 35865/03, dec. (2007), §§83-89; ECtHR, *Adamov v. Switzerland,* no. 3052/06 (2011), §§69-72.

1496 ECtHR, *Čonka v. Belgium,* no. 51564/99 (2002), §41.

1497 Ibid., §§40-42. See also ECtHR, *Bozano v. France,* no. 9990/82 (1986), §§55, 60; ECtHR, *Iskandarov v. Russia,* no. 17185/05 (2010), §146.

Lastly, in the case of *Saadi v. the United Kingdom*, the ECtHR concluded that the detention of the asylum seeker for seven days had been effected in good faith, because it had been meant to ensure a speedy examination of asylum applications to the benefit of the applicant and other foreigners.[1498] By contrast, in the case of *Z.A. and Others v. Russia*, the national authorities were reproached for impeding the foreigners' access to the asylum procedure by detaining them in the transit zone at the airport where no information had been available on asylum proceedings and their access to legal aid had been limited. The asylum seekers had considerable difficulties with submitting asylum applications in those circumstances and some decisions of the national bodies were communicated to them with delays. Those facts contributed to the Strasbourg Court's finding that the detention fell short of the Convention standards.[1499] In other cases, the court questioned the good faith of domestic authorities when they had not taken the best interest of an asylum-seeking unaccompanied minor into account and had not investigated whether alternatives to detention had been available and more suitable,[1500] as well as when the age-assessment or vulnerability procedures were unduly lengthy.[1501]

The ECtHR's jurisprudence concerning Article 5(1) of the ECHR, in particular the case-law regarding detention of asylum seekers, clearly shows that the lawfulness requirement is expected to be strictly observed. As demonstrated below, the CJ follows the Strasbourg Court's approach in this regard.

Article 6 of the EU Charter does not expressly require 'a procedure prescribed by law' or a 'lawful arrest or detention'. However, under Article 52(1) of the EU Charter, limitations on the exercise of the rights and freedoms recognized by the Charter, including the right to liberty and security, must be provided for by law, including the EU law.[1502] In fact, immigration detention

1498 ECtHR (GC), Saadi v. the United Kingdom, no. 13229/03 (2008), §77. See, critically on this conclusion, the partly dissenting opinion of judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä in this case, stating that '(...) to maintain that detention is in the interests of the person concerned appears to us an exceedingly dangerous stance to adopt. Furthermore, to contend in the present case that detention is in the interests not merely of the asylum-seekers themselves "but of those increasingly in the queue" is equally unacceptable. In no circumstances can the end justify the means; no person, no human being may be used as a means towards an end'. See also Markiewicz-Stanny (2020), 152.

1499 ECtHR (GC), *Z.A. and Others v. Russia*, nos. 61411/15 etc. (2019), §§165-167, 170. See also in regard to 'odd practices' concerning asylum seekers that made the 'good faith' of the authorities questionable, ECtHR, *Suso Musa v. Malta*, no. 42337/12 (2013), §100.

1500 See e.g. ECtHR, *Rahimi v. Greece*, no. 8687/08 (2011), §109. Cf. ECtHR, *Aarabi v. Greece*, no. 39766/09 (2015), §44.

1501 See e.g. ECtHR, *Abdullahi Elmi and Aweys Abubakar v. Malta*, nos. 25794/13 and 28151/13 (2016), §§145-146; ECtHR, *Abdi Mahamud v. Malta*, no. 56796/13 (2016), §§134-135.

1502 See CJ (GC), case C-601/15 PPU *J.N.* (2016), para 51.

is strictly regulated in the secondary law, as the CJ emphasized, 'inter alia in order to ensure observance of the fundamental rights of the third-country nationals concerned'.[1503]

Pursuant to the 2013 Reception Directive, asylum seekers may be deprived of freedom 'only under very clearly defined exceptional circumstances laid down in this Directive'.[1504] The grounds for detention are enumerated in the directive. They shall also be provided for in a national law. Moreover, under a domestic law, rules concerning alternatives to detention, procedures for challenging an order on deprivation of liberty and for the access to legal assistance and representation must be regulated.[1505] The lawfulness requirement is also reflected in the text of the Return Directive, which determines the grounds for detention in regard to illegally staying foreigners.[1506] Under both this directive and the 2013 Reception Directive, a detention order must contain reasons in fact and in law.[1507] Moreover, pursuant to both acts, a detained foreigner should have access to a speedy judicial review of the lawfulness of detention and be released immediately if he is deprived of freedom unlawfully.[1508] Those guarantees are also applicable in regard to asylum seekers detained under the Dublin III Regulation.[1509]

The Luxembourg Court emphasizes, relying on the ECtHR's and its own jurisprudence, that immigration detention–'constituting a serious interference with those applicants' right to liberty–is subject to compliance with strict safeguards, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness'.[1510] Thus, like the Strasbourg Court, it considers the deprivation of liberty lawful when it is based on law of a sufficient quality and it is not arbitrary.

Under the CJ's case-law, the legal basis for detention may be present in EU or national law.[1511] In the case of *Al Chodor and Others*, the CJ confirmed

1503 CJ, case C-61/11 PPU *El Dridi* (2011), para 42; CJ (GC), case C-47/15 *Affum* (2016), para 62.

1504 Recital 15 in the preamble to the 2013 Reception Directive.

1505 Articles 8(3-4) and 9(4) and (10) of the 2013 Reception Directive. See also Article 7(3) of the 2003 Reception Directive, stating that 'Member States may confine an applicant to a particular place in accordance with their national law'.

1506 Article 15(1) of the Return Directive.

1507 Article 15(2) of the Return Directive and Article 9(2) of the 2013 Reception Directive. For more see this Chapter, Title VII, point 1.

1508 Article 15(2) of the Return Directive and Article 9(3) and (5) of the 2013 Reception Directive. For more see this Chapter, Title VII, point 2.

1509 Article 28(2) and (4) of the Dublin III Regulation. See also CJ, case C-528/15 *Al Chodor and Others* (2017), para 28.

1510 CJ, case C-528/15 *Al Chodor and Others* (2017), para 40, see also paras 38-39.

1511 See also view of AG Sharpston delivered on 26 January 2016 in case C-601/15 PPU *J.N.*, EU:C:2016:85, para 127.

that the expression 'defined by law' used in the Dublin III Regulation refers to both the EU and domestic law. The court concluded that since none of the EU acts established objective criteria in regard to the 'risk of absconding' that are required to be set in order to detain Dublin transferees, such criteria have to be elaborated under a national law.[1512] In the case of *Arslan*, the Luxembourg Court highlighted that the 2003 Reception Directive and the 2005 Procedures Directive in force at the time did not provide for the grounds for detention of asylum seekers. Thus, it was for the Member States to determine, 'in full compliance with their obligations arising from both international law and European Union law', those grounds.[1513] Since the 2013 Reception Directive exhaustively enumerates the reasons for depriving asylum seekers of liberty,[1514] any detention falling outside this regime should be now considered unlawful.[1515] Accordingly, when asylum seekers were deprived of liberty due to the lack of places in the humanitarian reception centres or of means of subsistence, the Luxembourg Court easily concluded that such grounds did not correspond to any of the reasons enumerated in Article 8(3) of the 2013 Reception Directive and that asylum seekers may not be detained for any other reason than those provided for therein.[1516]

Immigration detention not only must have a legal basis in the EU or national law, but also must not be arbitrary. The CJ highlights that

> the objective of the safeguards relating to liberty, such as those enshrined in both Article 6 of the Charter and Article 5 of the ECHR, consists in particular in the protection of the individual against arbitrariness. Thus,

1512 CJ, case C-528/15 *Al Chodor* (2017), paras 28, 41.

1513 CJ, case C-534/11 *Arslan* (2013), para 56.

1514 Article 8(3) of the 2013 Reception Directive. See also CJ, case C-36/20 PPU *VL* (2020), para 104; CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), para 250.

1515 However, the CJ 'has no jurisdiction to assess the facts of the case or to rule on the lawfulness of Mr Kadzoev's detention and the proceedings relating to it, which are, in any event, also the subject of an application to the European Court of Human Rights'(view of AG Mazák in case C-357/09 PPU *Kadzoev* delivered on 10 November 2009, EU:C:2009:691, para 25).Despite that, the findings of the CJ are often of great importance for a concerned asylum seeker. Mr Kadzoev was released four days after the preliminary ruling was rendered. Meanwhile, the case before the ECtHR was struck out of the list of the cases [see ECtHR, *Said Shamilovich Kadzoev v. Bulgaria*, no. 56437/07, dec. (2013)].

1516 CJ, case C-36/20 PPU *VL* (2020), paras 106-113 (the lack of places in the reception centres); CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 251-256 and–in regard to the Return Directive–paras 268-272 (the lack of means of subsistence). See also CJ (GC), case C-808/18 *Commission v Hungary* (2020), paras 168-186, where the court examined whether detention in Hungarian transit zones 'falls within at least one of the situations listed in the first subparagraph of Article 8(3) of Directive 2013/33'.

> if the execution of a measure depriving a person of liberty is to be in keeping with the objective of protecting the individual from arbitrariness, this means, in particular, that there can be no element of bad faith or deception on the part of the authorities.[1517]

Thus, the Luxembourg Court applies the 'good faith' requirement as does the Strasbourg Court. Moreover, it emphasized in the case of *J.N.*, referring to the ECtHR's judgment in the case of *Saadi v. the United Kingdom*, that the arbitrariness is excluded when the detention 'is consistent with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5(1) ECHR and that the deprivation of liberty concerned is proportionate in relation to the ground relied on'.[1518]

Lastly, under the CJ's asylum jurisprudence a sufficient quality of law is also expected.[1519] This requirement was highlighted in the case of *Al Chodor and Others* regarding the grounds for detention of Dublin transferees. The preliminary reference of the Czech court concerned the interpretation of Article 2(n) of the Dublin III Regulation providing for a definition of a 'risk of absconding'. Pursuant to this provision, the reasons to believe that a Dublin transferee may abscond must be based on objective criteria defined by law. However, it was not clear to the referring court how the objective criteria should be defined, in particular whether they had to be determined in a legislative act or if a consistent practice sufficed.[1520] Answering the preliminary question, the CJ relied on the ECtHR's case-law on the sufficient quality of law concerning detention that requires accessibility, predictability and clarity of the respective provisions. The Luxembourg Court emphasized also that the protection of an individual against arbitrariness is necessary.[1521] Taking into account the high level of protection afforded to asylum seekers under the Dublin III Regulation, the court concluded that only a binding provision of

1517 CJ, case C-528/15 *Al Chodor and Others* (2017), para 39. See also CJ (GC), case C-601/15 PPU *J.N.* (2016), para 81.

1518 CJ (GC), case C-601/15 PPU *J.N.* (2016), para 81.

1519 Cf. Peers and Prechal (2014), 1473, expressing regret that the CJ did not confirm that the 'quality of law' requirement is applicable under Article 52(1) of the EU Charter. However, such a conclusion may be now indirectly inferred from CJ, case C-528/15 *Al Chodor and Others* (2017), paras 37-38, and CJ, case C-806/18 *JZ* (2020), paras 41-43. In the latter case, the CJ emphasized that the referring court must ascertain whether the national law in question met the 'accessibility, precision and foreseeability' requirements stemming from the ECtHR's case-law.

1520 In fact, the provision raised doubts in many Member States. Not all of them introduced the required definition to their legislations. See Hruschka and Maiani (2016), 1576; Costello and Mouzourakis (2016), 67-68; Vavoula (2019), 1054-1055.

1521 CJ, case C-528/15 *Al Chodor and Others* (2017), paras 38-40.

general application can satisfy the above-mentioned requirements arising from Article 6 of the EU Charter and Article 5 of the ECHR.[1522] When there is no such provision in a domestic law, ordering the detention of Dublin returnees must be considered unlawful. Settled case-law confirming a consistent administrative practice cannot suffice.[1523]

In the case of *Al Chodor and Others*, the CJ did not discuss diverse opinions expressed by the Member States, European Commission and referring court on the meaning of the 'law' under the ECHR.[1524] The Czech court relied in the preliminary reference on the ECtHR's case of *Kruslin v. France*, where the settled case-law had been considered a sufficient legal basis for detention.[1525] The Strasbourg Court reached the same conclusion in the case of *Firoz Muneer v. Belgium*.[1526] Moreover, in other cases, the ECtHR allowed for the possibility that the imprecise legal provisions on detention could be clarified by the domestic jurisprudence.[1527] However, the Strasbourg Court's case-law regarding the quality of law on detention is very casuistic. The court have found in some cases that the domestic jurisprudence constituted a sufficient legal basis for detention, but in others it ruled against it.[1528] Due account is taken by the ECtHR of diverse factors, e.g. whether the jurisprudence in question is well-established, long-standing, precise and accessible and, even, whether a detainee is assisted by a professional lawyer who should know the relevant case-law.[1529] Moreover, the administrative practice, even if consistent

1522 The wording used by the court ('a binding provision of general application') was considered by some national courts vague and not necessarily requiring that the criteria must be established in the national legislation. Vavoula did not agree with such interpretation and explained that pursuant to the judgment the criteria must be elaborated either in the national or EU legislation [Vavoula (2019), 1056-1057].

1523 CJ, case C-528/15 *Al Chodor and Others* (2017), paras 42-46.

1524 See ibid., para 21; opinion of AG Saugmandsgaard Øe in case C-528/15 *Al Chodor and Others* delivered on 10 November 2016, EU:C:2016:865, paras 39-40.

1525 ECtHR, *Kruslin v. France*, no. 11801/85 (1990), §29. See also ECtHR, *Gusinskiy v. Russia*, no. 70276/01 (2004), §§63-64; ECtHR, *Baranowski v. Poland*, no. 28358/95 (2000), §54.

1526 ECtHR, *Firoz Muneer v. Belgium*, no. 56005/10 (2013), §§59-62. See also opinion of AG Saugmandsgaard Øe in case C-528/15 *Al Chodor and Others* delivered on 10 November 2016, EU:C:2016:865, fn 21.

1527 See e.g. ECtHR, *Gusinskiy v. Russia*, no. 70276/01 (2004), §63; ECtHR, *A. and Others v. Bulgaria*, no. 51776/08 (2011), §68. See also ECtHR, *Richmond Yaw and Others v. Italy*, nos. 3342/11 etc. (2016), §76.

1528 See e.g. ECtHR, *Soldatenko v. Ukraine*, no. 2440/07 (2008), §113. See also ECtHR, *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05 (2007), §74, where the court emphasized that immigration detention had to have 'a strictly defined statutory basis'. See also ECtHR, *Abdolkhani and Karimnia v. Turkey*, no. 30471/08 (2009), §134.

1529 See e.g. ECtHR, *Firoz Muneer v. Belgium*, no. 56005/10 (2013), §§59-60. See also ECtHR, *Laumont v. France*, no. 43626/98 (2001), §§51-52.

and settled, is most often not enough to constitute a legal basis for detention that is in accordance with Article 5 of the ECHR.[1530] Thus, the Luxembourg Court rightly did not rely on the singled-out cases of the Strasbourg Court accepting the settled case-law as 'the law', but applied the general criteria established under the EU Charter and the ECHR by both the CJ and the ECtHR.

Interestingly, the Luxembourg Court, referring to those general requirements, relied on the ECtHR's judgment in the case of *Del Río Prada v. Spain*[1531] concerning the application of Article 5(1)(a) of the ECHR (an arrest or detention after the conviction), instead of the abundant case-law of the Strasbourg Court on immigration detention. Vavoula claimed that it might be rooted in the need for 'viewing detention of asylum seekers in the abstract, without the limitations attached to the ECtHR case law on Article 5(1)(f)'.[1532] She also pointed out that it might serve the purpose of reconciling the standards between the courts, instead of expressly distinguishing the EU law as providing a higher scope of protection than the ECHR.[1533] In fact, in the *Al Chodor and Others* case, the CJ intentionally puts the emphasis on the higher standard of protection offered to asylum seekers by the Dublin III Regulation in comparison to its predecessor,[1534] instead of on the differences between the EU law and the ECHR.

That focus on the secondary asylum law in the *Al Chodor* case may result from the prevailing interpretation of Article 52(1) of the EU Charter which guarantees that limitations on the exercise of the rights and freedoms recognised by the EU Charter must be provided for by law. That notion of 'law' is understood as not being limited to legislative acts.[1535] Peers and Prechal pointed out, in general, that in the context of the EU Charter it would be difficult to establish a standard that departs from the ECtHR's jurisprudence, which accepts non-legislative measures as law. To do so national authorities would have to

1530 See e.g. ECtHR, *Hilda Hafsteinsdóttir v. Iceland*, no. 40905/98 (2004), §56. See also opinion of AG Saugmandsgaard Øe in case C-528/15 *Al Chodor and Others* delivered on 10 November 2016, EU:C:2016:865, fn 21.

1531 ECtHR (GC), *Del Río Prada v. Spain*, no. 42750/09 (2013), §125. See also CJ, case C-806/18 *JZ* (2020), para 41.

1532 Vavoula (2019), 1059.

1533 Ibid. In fact, the CJ mentioned only once (when it referred to Article 52 of the EU Charter) that the ECHR is a minimum threshold of protection [CJ, case C-528/15 *Al Chodor and Others* (2017), para 37]. Cf. opinion of AG Saugmandsgaard Øe in case C-528/15 *Al Chodor and Others* delivered on 10 November 2016, EU:C:2016:865, paras 42-44.

1534 See CJ, case C-528/15 *Al Chodor* (2017), paras 33-35, 43.

1535 Peers and Prechal (2014), 1471-1472, with the jurisprudence mentioned there. See also Lenaerts (2012), 389-391. Cf. opinion of AG Cruz Villalón in case C-70/10 *Scarlet Extended* delivered on 14 April 2011, EU:C:2011:255, para 113.

apply different procedural tests to limitations of rights depending on whether the rights arise from both the EU Charter and ECHR or are enshrined only in the ECHR.[1536] It might be a reason why in the *Al Chodor* case the CJ chose to only briefly mention Article 52(1) of the EU Charter and concentrated on the Dublin III Regulation instead.

However, even the cautious wording of the *Al Chodor* judgment cannot hide that the Luxembourg Court did raise the standards in regard to the detention of asylum seekers in this case, reproaching national authorities for effecting detention on the basis of the settled case-law, while those practices might have been–after satisfying the above-mentioned criteria–accepted by the Strasbourg Court.

III. Necessity and Proportionality

The ECtHR's approach to the principle of proportionality in the context of immigration detention has been shaped in two landmark cases against the United Kingdom. Since the case of *Chahal v. the United Kingdom*, the Strasbourg Court has reiterated that the second limb of Article 5(1)(f) of the ECHR

> does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing (...). Indeed, all that is required under this provision (art. 5-1-f) is that "action is being taken with a view to deportation".[1537]

Moreover, the court emphasizes that it is immaterial whether an expulsion decision with which the detention is intertwined is justified under a national law or the ECHR.[1538] However, when removal proceedings are not in progress or are not prosecuted with due diligence, detention is not permissible.[1539] Under Article 5(1)(f) of the ECHR, the principle of proportionality applies 'only to the extent that the detention should not continue for an unreasonable length

1536 Peers and Prechal (2014), 1471.

1537 ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §112. See also ECtHR, *Čonka v. Belgium*, no. 51564/99 (2002), §38; ECtHR, *Al Husin v. Bosnia and Herzegovina*, no. 3727/08 (2012), §61; ECtHR (GC), *Khlaifia and Others v. Italy*, no. 16483/12 (2016), §90; ECtHR, *Haghilo v. Cyprus*, no. 47920/12 (2019), §200.

1538 See e.g. ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §112; ECtHR, *Nasrulloyev v. Russia*, no. 656/06 (2007), §69; ECtHR, *M.A. v. Cyprus*, no. 41872/10 (2013), §206. Cf. ECtHR (GC), *A. and Others v. the United Kingdom*, no. 3455/05 (2009), §167.

1539 See e.g. ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §113. For more on the due diligence requirement, see this Chapter, Title IV, point 3.

of time'.[1540] In the case of *Saadi v. the United Kingdom*, regarding the first limb of Article 5(1)(f) of the ECHR, the court confirmed that the necessity test is also not required in regard to an arrest or detention ordered to prevent an unauthorized entry to the country.[1541]

The above-mentioned approach of the Strasbourg Court, in particular in regard to pre-admittance detention, has been criticized for years. Already in the case of *Saadi v. the United Kingdom*, the minority stated–referring to the requirements of necessity and proportionality–that they 'fail to see what value or higher interest can justify the notion that these fundamental guarantees of individual liberty in a State governed by the rule of law cannot or should not apply to the detention of asylum-seekers'.[1542] Cornelisse emphasized that the ECtHR's approach is 'at odds with the very nature of human rights as such, the special status of which means that any interference with them should be kept to the minimum'.[1543] It is also stressed that the requirement of necessity should not be separated from the notion of arbitrariness as it leads to 'a false dichotomy',[1544] and that the approach taken by the court results in giving to much leeway to the states.[1545] Moreover, the respective ECtHR jurisprudence is considered inexplicably inconsistent with the court's case-law regarding other grounds of detention enumerated in the ECHR.[1546] Judge Pinto de Albuquerque noted also that the applicability of the requirement of necessity to immigration detention is widely accepted, *inter alia* in the CJ's jurisprudence. Thus, he concluded that 'the Grand Chamber's interpretation of Article 5(1)(f) of the Convention must be reviewed for the sake of bringing coherence to the Court's messy case-law and aligning it with international human-rights and refugee law. The Court cannot remain deaf to the worldwide call that Saadi must go'.[1547]

However, it must be noted that the principle of proportionality and, in particular, the requirement of necessity are not entirely absent from the

1540 ECtHR (GC), *Saadi v. the United Kingdom*, no. 13229/03 (2008), §72.

1541 Ibid., §§72-73. See also ECtHR, *V.M. v. the United Kingdom*, no. 49734/12 (2016), §87.

1542 See partly dissenting opinion of judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä in ECtHR (GC), *Saadi v. the United Kingdom*, no. 13229/03 (2008).

1543 Cornelisse (2011), 942.

1544 O'Nions (2008), 173. See also partly dissenting opinion of judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä in ECtHR (GC), *Saadi v. the United Kingdom*, no. 13229/03 (2008) and Moreno-Lax (2011), 183-184.

1545 See e.g. Basilien-Gainche (2015), 107; Dembour (2015), 376; Vaoula (2019), 1057.

1546 See e.g. Wilsher (2005), 154; O'Nions (2008), 172-173, 181; Cornelisse (2010), 292, 308-309; Moreno-Lax (2011), 184; Costello (2012) 'Human Rights…', 286-287; Monina (2018), 152.

1547 Concurring opinion of judge Pinto de Albuquerque in ECtHR, *Abdullahi Elmi and Aweys Abubakar v. Malta*, nos. 25794/13 and 28151/13 (2016), §§22, 33.

ECtHR's jurisprudence regarding Article 5(1)(f) of the ECHR. They are–to some extent–inscribed into the lawfulness requirement: directly, when a national law demands that a necessity test be conducted, and indirectly, through the 'arbitrariness' criteria established by the Strasbourg Court.[1548]

When a national law requires a necessity test in regard to immigration detention, the lack of such assessment or an improper one may prompt the Strasbourg Court to find a violation of Article 5(1) of the ECHR. In the literature, the case of *Rusu v. Austria* is often referred to in this context. The ECtHR concluded there, adopting the approach normally taken in regard to other subparagraphs of Article 5(1) of the ECHR, that

> detention of an individual is such a serious measure that–in a context in which the necessity of the detention to achieve the stated aim is required–it will be arbitrary unless it is justified as a last resort where other less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained.[1549]

However, this case is in fact very exceptional in the court's case-law, both due to the circumstances of the case and in the wording of the reasoning.[1550] Most often the ECtHR only points out that the national law required the necessity test and considers whether it was properly conducted. For instance, in the case of *Nabil and Others v. Hungary*, the national courts deciding on the prolongation of detention were reproached for not considering–in a breach of the national law–whether the asylum seekers had indeed been frustrating the enforcement of the expulsion, whether less stringent measures should not have been applied, and whether the removal could eventually be enforced. In consequence, the orders prolonging the applicants' detention were considered unlawful by the ECtHR.[1551]

1548 See e.g. Cornelisse (2010), 297-299; Wilsher (2014), 139-140; De Bruycker (ed.), Bloomfield, Tsourdi, Pétin (2015), 40-41; Markiewicz-Stanny (2020), 149. For more on the requirement of lawfulness and the criteria of 'arbitrariness', see this Chapter, Title II.

1549 ECtHR, *Rusu v. Austria*, no. 34082/02 (2008), §58.

1550 In regard to the uniqueness of this case, see Cornelisse (2010), 312; Markiewicz-Stanny (2020), 150. See also Mole and Meredith (2010), 151, pointing out that the *Rusu v. Austria* case was decided by seven judges, four of whom had been dissenters in the case of *Saadi v. the United Kingdom*.

1551 ECtHR, *Nabil and Others v. Hungary*, no. 62116/12 (2015), §§39-42. See also ECtHR, *Dougoz v. Greece*, no. 40907/98 (2001), §56; ECtHR, *Sadaykov v. Bulgaria*, no. 75157/01 (2008), §25; ECtHR, *Suso Musa v. Malta*, no. 42337/12 (2013), §100; ECtHR, *J.R. and Others v. Greece*, no. 22696/16 (2018), §§111-112; ECtHR, *SH.D. and Others v. Greece etc.*, no. 14165/16 (2019), §69; ECtHR, *H.A. and Others v. Greece*, no. 19951/16 (2019), §§205-208.

Moreover, in some cases concerning the protracted deprivation of liberty of foreigners, the Strasbourg Court took into account that alternatives to detention had been available under the national law.[1552] In other cases, it stressed that the application of those alternatives should have been considered by the domestic authorities due to the circumstances of the case. In the case of *S.K. v. Russia*, the court concluded that since it should have been evident to the national authorities that the removal to Syria could not have been enforced because of the worsening situation in that country, 'it was incumbent on the domestic authorities to consider alternative measures that could be taken in respect of the applicant'.[1553] In the case of *Azimov v. Russia*, the ECtHR emphasized that the 'suspension of the domestic proceedings due to the indication of an interim measure by the Court should not result in a situation were the applicant languishes in prison for an unreasonably long period' *[sic]*. Thus, the court, taking into account the circumstances of the case, reproached the national authorities for not trying to find alternative measures to detention.[1554]

Furthermore, the Strasbourg Court stresses that even though, in general, the requirement of necessity does not arise from Article 5(1)(f) of the ECHR, the specific situation of a detained foreigner must be taken into consideration. In consequence, the ECtHR maintains that the necessity test should be applied in regard to particularly vulnerable detainees.[1555] In the case of *Thimothawes v. Belgium*, the court underlined that an individual assessment of the special needs of a detained asylum seeker must be conducted and alternative means should be considered when needed. Particular vulnerability may preclude detention, especially when it is ordered in regard to children or seriously ill foreigners.[1556]

Detention of minors, both unaccompanied and staying with family members, is not prohibited under Article 5(1)(f) of the ECHR. However, in the case of *Mahamed Jama v. Malta*, the ECtHR explicitly stated that 'the necessity of

1552 See e.g. ECtHR, *Agnissan v. Denmark*, no. 39964/98, dec. (2001); ECtHR, *Mikolenko v. Estonia*, no. 10664/05 (2009), §67; ECtHR, *Raza v. Bulgaria*, no. 31465/08 (2010), §74.

1553 ECtHR, *S.K. v. Russia*, no. 52722/15 (2017), §115. See also ECtHR, *Louled Massoud v. Malta*, no. 24340/08 (2010), §68.

1554 ECtHR, *Azimov v. Russia*, no. 67474/11 (2013), §§171-173. See also ECtHR, *Keshmiri v. Turkey (no. 2)*, no. 22426/10 (2012), §34. For the impact of the indication of interim measures by the ECtHR on immigration detention, see this Chapter, Title IV, point 3.

1555 See e.g. ECtHR, *A.B. and Others v. France*, no. 11593/12 (2016), §120; ECtHR, *A.M. and Others v. France*, no. 24587/12 (2016), §64; ECtHR, *S.M.M. v. the United Kingdom*, no. 77450/12 (2017), §76. See also Peek and Tsourdi (2016), 1426.

1556 ECtHR, *Thimothawes v. Belgium*, no. 39061/11 (2017), §73. See in regard to the detention of seriously ill foreigners, ECtHR, *Yoh-Ekale Mwanje v. Belgium*, no. 10486/10 (2011), §124; ECtHR, *K.G. v. Belgium*, no. 52548/15 (2018), §73; ECtHR, *V.M. v. the United Kingdom (No. 2)*, no. 62824/16 (2019), §38. See also Brandl and Czech (2015), 262; Pétin (2016), 101.

detaining children in an immigration context must be very carefully considered by the national authorities'.[1557] The court reiterates that domestic authorities making decisions about depriving children of liberty must take into account the minors' best interest and investigate whether detention is a measure of last resort or whether it may be substituted with other, less drastic measures.[1558] Those requirements must be scrutinized even more when conditions in the place of confinement are not suitable for children.[1559] Moreover, the ECtHR states that only short-term detention of minors can be compatible with Article 5 of the ECHR and that national authorities must conduct respective proceedings, including asylum proceedings, diligently in order to limit to the minimum the duration of the deprivation of liberty of children.[1560] The review of the lawfulness of detention also should be conducted particularly speedily when children are involved.[1561] It is clear from the case-law of the Strasbourg Court that the necessity requirement applies to the detention of minors as an exception to the general rule that the deprivation of liberty under Article 5(1)(f) of the ECHR does not have to be 'reasonably considered necessary', a rule that is still pertinent for their parents. Accordingly, the ECtHR often finds a violation of this provision only in regard to detained children, even when they were accompanied.[1562]

Interestingly, the Strasbourg Court sometimes seems to be stealthily introducing the requirement of necessity into a more general context.[1563]

1557 ECtHR, *Mahamed Jama v. Malta,* no. 10290/13 (2015), §147.

1558 See e.g. ECtHR, *Rahimi v. Greece,* no. 8687/08 (2011), §§108-109; ECtHR, *Popov v. France,* nos. 39472/07 and 39474/07 (2012), §119; ECtHR, *A.B. and Others v. France,* no. 11593/12 (2016), §§120, 123-124; ECtHR, *Abdullahi Elmi and Aweys Abubakar v. Malta,* nos. 25794/13 and 28151/13 (2016), §146; ECtHR, *G.B. and Others v. Turkey,* no. 4633/15 (2019), §151; ECtHR, *Bilalova and Others v. Poland,* no. 23685/14 (2020), §§79-80.

1559 See e.g. ECtHR, *Mublilanzila Mayeka and Kaniki Mitunga v. Belgium,* no. 13178/03 (2006), §§38, 103-105; ECtHR, *Muskhadzhiyeva and Others v. Belgium,* no. 41442/07 (2010), §74; ECtHR, *Rahimi v. Greece,* no. 8687/08 (2011), §110; ECtHR, *Kanagaratnam and Others v. Belgium,* no. 15297/09 (2011), §94; ECtHR, *Popov v. France,* nos. 39472/07 and 39474/07 (2012), §119. For more on the conditions of detention of minors, see this Chapter, Title VI.

1560 See e.g. ECtHR, *Bilalova and Others v. Poland,* no. 23685/14 (2020), §78-79, 81.

1561 ECtHR, *G.B. and Others v. Turkey,* no. 4633/15 (2019), §§166-167. For more on review, see this Chapter, Title VII, point 2.

1562 See e.g. ECtHR, *Muskhadzhiyeva and Others v. Belgium*, no. 41442/07 (2010), §74; ECtHR, *Popov v. France,* nos. 39472/07 and 39474/07 (2012), §§119-120; ECtHR, *A.M. and Others v. France,* no. 24587/12 (2016), §64; ECtHR, *A.B. and Others v. France,* no. 11593/12 (2016), §120. See also, critically on this differentiation, Vandenhole and Ryngaert (2013), 81-82. Cf. ECtHR, *G.B. and Others v. Turkey,* no. 4633/15 (2019), §168, where the court noticed that 'the move in international law towards adopting alternative measures to the administrative detention of migrants appears to concern not only children, but also their parents'.

1563 See e.g. the jurisprudence of the ECtHR mentioned in Moreno-Lax (2011), 184-187.

Recently, in the case of *Z.A. and Others v. Russia*, concerning the detention of the asylum seekers at the airport, the Grand Chamber stated that

> subparagraph 1(f) does not prohibit deprivation of liberty in a transit zone for a limited period on grounds that such confinement is *generally necessary to ensure the asylum seekers' presence* pending the examination of their asylum claims or, moreover, on grounds that there is a need to examine the admissibility of asylum applications speedily and that, to that end, a structure and adapted procedures have been put in place at the transit zone.[1564]

Moreover, even though the court refers in this case to the *Chahal* and *Saadi v. the United Kingdom* judgments, it does not rely on the paragraphs of those rulings that exclude the necessity test from the requirements arising from Article 5(1)(f) of the ECHR. Whether it may suggest a further exacerbation of the rules in regard to immigration detention (at least the pre-admittance detention) remains to be seen.

The analysis of the Strasbourg Court's jurisprudence shows that the court does not apply blindly the rules concerning the necessity and proportionality required under Article 5(1)(f) of the ECHR established in the cases of *Chahal* and *Saadi v. the United Kingdom*. In fact, over time, the ECtHR has become more stringent in this regard and the principle of proportionality is increasingly resurfacing in the court's judgments concerning immigration detention.[1565] However, the general rule that the deprivation of liberty pursuant to subparagraph (f) need not be reasonably necessary persists—against hopes expressed by some authors.[1566]

Meanwhile, the principle of proportionality is a well-established general principle of the EU law that has 'pervaded' the case-law of the Luxembourg Court in all areas, including immigration detention.[1567] Pursuant to Article 52(1) in conjunction with Article 6 of the EU Charter, any limitation on the exercise of the right to liberty and security must be subject to the principle of proportionality. Restrictions are allowed only if they are necessary and genuinely meet objectives of general interest recognized by the EU or the need to protect the rights and freedoms of others. The CJ reiterates that

> the principle of proportionality requires, according to settled case-law of the Court, that measures adopted by the EU institutions do not exceed

1564 ECtHR (GC), *Z.A. and Others v. Russia*, nos. 61411/15 etc. (2019), §163 (emphasis added).

1565 See also Moreno-Lax (2011), 187; Reid (2019), 505.

1566 See e.g. Costello (2012) 'Human Rights …', 287; Guild (2016), 153.

1567 Cornelisse (2017), 227. See also Wilsher (2007), 408.

> the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question, since the disadvantages caused by the legislation must not be disproportionate to the aims pursued.[1568]

Due to the importance of the right to liberty and the gravity of the interference with this right that detention represents, the limitations to the right enshrined in Article 6 of the EU Charter 'must apply only in so far as is strictly necessary'.[1569]

The secondary asylum law ensures that the principle of proportionality is not overlooked by national authorities in the context of immigration detention. It was already emerging in the skeletal regulation of asylum seekers' detention provided for in the 2003 Reception Directive. Under Article 7(3), the confinement of asylum seekers was permissible when it was necessary, for example for legal reasons or reasons of public order. Pursuant to the 2013 Reception Directive and the Dublin III Regulation, the detention of asylum seekers is unquestionably subject to the principles of necessity and proportionality.[1570] Applicants for international protection can be deprived of liberty only after an individual assessment of the circumstances of a case, when it is necessary and other less coercive alternative measures cannot be applied effectively.[1571] The detention is permissible only for as short a period as possible and it must be closely connected to its grounds.[1572] In particular, asylum-seeking minors can be detained only as a measure of last resort and after the consideration of their best interest. Even when no alternative measures can be used, 'all efforts shall be made to release the detained minors' and place them in a suitable accommodation.[1573]

The CJ invokes the principle of proportionality and the requirement of necessity without any hesitation in the context of the detention of asylum seekers and Dublin transferees. In regard to Article 7(3) of the 2003 Reception Directive, the court emphasized that the deprivation of liberty must be

1568 CJ (GC), case C-601/15 PPU *J.N.* (2016), para 54; CJ, case C-18/16 *K.* (2017), para 37.

1569 CJ (GC), case C-601/15 PPU *J.N.* (2016), para 56; CJ, case C-18/16 *K.* (2017), para 40.

1570 Recital 15 in the preamble to the 2013 Reception Directive, Recital 20 in the preamble to the Dublin III Regulation. See Costello and Mouzourakis (2016), 71, claiming that 'the most significant additional constraint brought by EU law is the requirement that detention be necessary in the individual case'.

1571 Recital 20 in the preamble to the 2013 Reception Directive, Articles 8(2) and (4) of the 2013 Reception Directive, Article 28(2) of the Dublin III Regulation. See also Article 7(3) of the 2003 Reception Directive.

1572 Article 9(1) of the 2013 Reception Directive, Article 28(3) of the Dublin III Regulation.

1573 Article 11(2) of the 2013 Reception Directive. See also Article 28(4) of the Dublin III Regulation. See also CJ (GC), case C-808/18 *Commission v Hungary* (2020), paras 200-203.

decided on a case-by-case basis and is permissible only when it is objectively necessary and proportionate. It maintained that those rules were applicable also to foreigners illegally staying in the Member State who applied for asylum in detention allegedly to evade expulsion proceedings.[1574]

The principle of proportionality was scrutinized in the case of *J.N.* The Luxembourg Court examined whether detention of asylum seekers justified by reasons of national security or public order (pursuant to point (e) of the first subparagraph of Article 8(3) of the 2013 Reception Directive)[1575] is in accordance with this principle. The court took into account that detention of asylum seekers based on this ground must be in compliance with a series of conditions–arising from both the directive and the CJ's case-law–'whose aim is to create a strictly circumscribed framework in which such a measure may be used'.[1576] It highlighted the requirement of necessity and concluded that

> placing or keeping an applicant in detention under point (e) of the first subparagraph of Article 8(3) of Directive 2013/33 is, in view of the requirement of necessity, justified on the ground of a threat to national security or public order only if the applicant's individual conduct represents a genuine, present and sufficiently serious threat, affecting a fundamental interest of society or the internal or external security of the Member State concerned.[1577]

The Luxembourg Court stated also that deprivation of liberty pursuant to point (e) of the first subparagraph of Article 8(3) of the 2013 Reception Directive is not disproportionate in relation to the objectives sought, as it 'results from a fair balance between the general interest objective pursued, namely the protection of national security and public order, and the interference with the right to liberty to which detention gives rise'.[1578] Applying its findings to the facts of the case, the court underlined that the principle of proportionality must be 'strictly observed'.[1579] Similar conclusions were reached by the CJ in the case of *K.* in regard to points (a) and (b) of the first subparagraph of Article 8(3) of the 2013 Reception Directive.[1580]

1574 CJ, case C-534/11 *Arslan* (2013), paras 58–59, 62–63.

1575 For more on public order and national security reasons, see this Chapter, Title IV, point 4.

1576 CJ (GC), case C-601/15 PPU *J.N.* (2016), paras 57–67.

1577 Ibid., para 67, see also paras 61, 63.

1578 Ibid., paras 68, 70.

1579 Ibid., para 73.

1580 CJ, case C-18/16 *K.* (2017), paras 37–49. For more on this case, see this Chapter, Title IV, point 1. See also CJ, case C-36/20 PPU *VL* (2020), paras 102, 105; CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 258–259.

In the case of *Al Chodor and Others*, the Luxembourg Court pointed out that detention of transferees is permissible under the Dublin III Regulation only when there is a significant risk of absconding, which must be assessed individually. Deprivation of liberty has to be in accordance with the principle of proportionality and is justified only where other less coercive alternative measures cannot be applied effectively. Moreover, it must be effected for as short a period as possible.[1581] The duration of detention permissible under the Dublin III Regulation was considered by the CJ in the case of *Amayry*. The court stressed that in the light of Article 6 of the EU Charter, it is

> incumbent upon the competent authority, under the supervision of national courts, to carry out diligently the transfer procedure and not to extend the detention for a period of time beyond what is *necessary for the purposes of that procedure,* assessed by taking account of the specific requirements of that procedure in each specific case.[1582]

The Luxembourg Court assessed that six weeks should be sufficient to proceed with a transfer, while the period of three to twelve months was considered excessive and not reasonably necessary for the required administrative procedures to be carried out.[1583]

The principle of proportionality and the requirement of necessity are also provided for in the Return Directive[1584] and were highlighted by the CJ in the case of *El Dridi*. The Luxembourg Court maintained that this directive strictly regulates the return procedure and 'fixes the order in which the various, successive stages of that procedure should take place'.[1585] Voluntary return and alternatives to detention, if needed, take precedence. Only when the period for a voluntary return is not granted or is not complied with, may the Member State employ 'all necessary measures including, where appropriate, coercive measures, in a proportionate manner and with due respect for, inter alia, fundamental rights'.[1586] Those measures must be the least intrusive

1581 CJ, case C-528/15 *Al Chodor and Others* (2017), para 34.

1582 CJ, case C-60/16 *Amayry* (2017), paras 43-44 (emphasis added).

1583 Ibid., paras 45-47. See also this Chapter, Title V.

1584 Recital 16 in the preamble to the Return Directive, Articles 7(3), 15(1) and (5), 17(1) of the Return Directive. See also Cornelisse (2010), 270, stating that the clarity of those provisions in regard to the principle of proportionality is obscured by the non-exhaustive list of grounds for detention. See also Costello and Mouzourakis (2016), 71. For more on grounds of detention pending return proceedings and removal, see this Chapter, Title IV, point 3.

1585 CJ, case C-61/11 PPU *El Dridi* (2011), paras 34, 42.

1586 Ibid., paras 37-38. See also CJ (GC), case C-329/11 *Achughbabian* (2011), para 36, explaining that the expressions 'measures' and 'coercive measures' provided for in

ones and used for as short a period as possible. The court underlined also that every case of a pre-removal detention has to be individually assessed.[1587] It concluded that

> (i)t 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*.[1588]

As regards the principle of proportionality, the CJ also noticed that the Return Directive, by establishing the maximum period of the permissible deprivation of liberty of foreigners, took into account the ECtHR's case-law requiring the length of detention to be reasonable and necessary to attain its purpose.[1589]

In the case of *Mahdi*, the Luxembourg Court repeated that in regard to every detention ordered pursuant to the Return Directive compliance with the principle of proportionality must be ensured, both with regard to the means used and objectives pursued.[1590] It clarified the scope of a judicial review, by stating that the authority deciding on the extension of deprivation of liberty or the release must assess, *inter alia,* whether alternatives to detention can be applied effectively. The judicial authority reviewing detention must be able to order an alternative measure or the release of the concerned foreigner. An in-depth examination of the matters of fact specific to each individual case is required.[1591]

Thus, under the EU law, it is clear that detention of asylum seekers—independently of the context (whether it is effected in connection with asylum, Dublin or return proceedings)—is subject to the principle of proportionality

Article 8 of the Return Directive 'refer to any intervention which leads, in an effective and proportionate manner, to the return of the person concerned'.

1587 CJ, case C-61/11 PPU *El Dridi* (2011), paras 39-40. See also CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 274-275.

1588 CJ, case C-61/11 PPU *El Dridi* (2011), paras 41 (emphasis added). See also CJ, case C-554/13 *Zh. and O.* (2015), para 49.

1589 CJ, case C-61/11 PPU *El Dridi* (2011), para 43. The CJ referred to ECtHR (GC), *Saadi v. the United Kingdom*, no. 13229/03 (2008). See also CJ (GC), case C-357/09 PPU *Kadzoev* (2009), paras 63-67.

1590 CJ, case C-146/14 PPU *Mahdi* (2014), para 55. See also CJ, case C-18/19 *WM* (2020), para 38.

1591 CJ, case C-146/14 PPU *Mahdi* (2014), paras 61-62, 64. For more on the right to a review, see this Chapter, Title VII, point 2.

and the requirement of necessity.[1592] This is a rule with no exceptions. Meanwhile, under Article 5(1)(f) of the ECHR, the necessity test is not required and the application of the principle of proportionality is limited. This is a rule with some established exceptions, in particular concerning minors. When a national law, in compliance with the EU law, demands that immigration detention must be necessary, the Strasbourg Court takes that fact into account under the requirement of lawfulness. For Cornelisse, it is 'a fascinating example of complementary–rather than conflicting–dynamics between pluralist legal orders'[1593] and, in her opinion, it shows 'a potential for increased protection'[1594]. However, one must not lose sight of the fact that the standard under the ECHR in this regard is significantly lower than that provided for in the EU law.[1595] The ECtHR, not pushed by the national law implementing the secondary EU law, as a rule, excludes the necessity test from the requirements arising from Article 5(1)(f) of the ECHR and imposes meaningful limits on the application of the principle of proportionality to immigration detention. Thus, the approach of the two European asylum courts in this regard is perhaps not conflicting, but neither is it convergent.

IV. Grounds

The Strasbourg Court reiterates that in order to avoid arbitrariness, the detention must be closely connected to its grounds.[1596] Under Article 5(1)(f) of the ECHR, only two grounds for immigration detention are permissible: 'to prevent effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'. The ECtHR stresses that those grounds must be interpreted narrowly.[1597] Meanwhile, under the secondary EU law, asylum seekers (including rejected ones)

1592 Cf. Basilien-Gainche (2015), 110, pointing out that, in practice, detention under the Return Directive is a rule and alternatives to detention are only an exception, in contradiction to the requirement of necessity. She also indicated that the CJ's jurisprudence in this regard was 'insufficiently clear to prevent the exceptional becoming normal'.

1593 Cornelisse (2011), 944.

1594 Cornelisse (2017), 232.

1595 Cf. concurring opinion of judge Lemmens in ECtHR, *Thimothawes v. Belgium*, no. 39061/11 (2017), §§5-7, referring to CJ, case C-534/11 *Arslan* (2013) and CJ (GC), case C-601/15 PPU *J.N.* (2016), where he claimed that the ECtHR's case-law demanding necessity in cases concerning detention of vulnerable foreigners achieved the same goal as the requirement of necessity arising from the EU law and CJ's jurisprudence.

1596 See e.g. ECtHR, *Azimov v. Russia*, no. 67474/11 (2013), §§161, 163-165.

1597 See e.g. ECtHR, *Čonka v. Belgium*, no. 51564/99 (2002), §42.

may be deprived of their liberty in order to: determine or verify their identity or nationality; establish the elements on which their application for international protection is based; decide, in the context of an asylum procedure, on the applicant's right to enter the territory; prepare and execute their removal, in particular when there is a risk of absconding or when a foreigner concerned avoids or hampers the preparation of return or the removal process. Moreover, detention is allowed due to national security or public order considerations.[1598] Nobody should be deprived of liberty for the sole reason that he is an asylum seeker.[1599]

While it is commendable that the grounds for detention of asylum seekers and returnees are expressed in more detail under the EU law, the question has been raised of whether all respective provisions are in compliance with the ECHR. The grounds for immigration detention provided for in the 2013 Reception Directive, the Dublin III Regulation and the Return Directive do not easily fit into the two-fold distinction established under Article 5(1)(f) of the ECHR.[1600] It is even claimed that some of those grounds cannot be assigned to any of the exceptions to the right to liberty and security enumerated in Article 5(1) of the ECHR.[1601]

In this subchapter, firstly, detention pending asylum proceedings is examined. Thus, the case-law of both European asylum courts concerning the first limb of Article 5(1)(f) of the ECHR and points (a-c) of the first subparagraph of Article 8(3) of the 2013 Reception Directive is analysed. Pursuant to the EU law, other grounds for detention of asylum seekers are also allowed, but–for the reasons stated below–those provisions are not examined in this section. Consequently, the first section focusses on the detention of asylum seekers

1598 See Article 8(3) of the 2013 Reception Directive, Article 28(2) of the Dublin III Regulation and Article 15(1) of the Return Directive. See also Article 7(3) of the 2003 Reception Directive.

1599 See Article 26(1) of the 2013 Procedures Directive, Article 8(1) of the 2013 Reception Directive, Article 28(1) of the Dublin III Regulation. See also Article 18(1) of the 2005 Procedures Directive.

1600 See also Cornelisse (2017), 226. See critically of the binary logic adopted by the ECtHR under Article 5(1)(f) of the ECHR, Costello (2015) 'Immigration Detention…', 172.

1601 As regards the first subparagraph of Article 8(3) of the 2013 Reception Directive: point (a), see e.g. Matevžič (2016); point (d), see e.g. Tsourdi (2016), 21-22, indicating that this ground cannot be a sole reason for detention, but must be raised in relation to the grounds (a-c) specified in Article 8(3), as it is neither to prevent effecting an unauthorized entry nor with a view to deportation or extradition. Cf. CJ, case C-18/16 *K.* (2017), para 41, where the CJ claimed that each of the grounds enumerated in Article 8(3) is self-standing. As regards the Dublin III Regulation, see ECRE (2015), 7-8, where it was argued that detention of Dublin transferees did not fit under subparagraph (f) nor (b) of Article 5(1) of the ECHR. See also Costello (2015) *The Human Rights…*, 296-297.

that is intertwined with the verification of their identity and nationality, the determination of their status and situation, and the examination of their requests for international protection (point 1). Detention of asylum seekers in transit zones is examined particularly closely, taking into account the incompatibility of the two courts' views expressed in the recent cases of *Ilias and Ahmed v. Hungary* and *FMS and Others* (point 2).

Points (d) and (f) of the first subparagraph of Article 8(3) of the 2013 Reception Directive and Article 28(2) of the Dublin III Regulation are scrutinized, together with Article 15 of the Return Directive and the second limb of Article 5(1)(f) of the ECHR, in the subsequent section regarding detention pending return proceedings and removal (point 3). It is because, on the one hand, the ECtHR considered the deprivation of liberty of Dublin transferees—point (f)—to fall under the second limb of Article 5(1)(f) of the ECHR. On the other hand, the ground for asylum seekers' detention arising from point (d) of the first subparagraph of Article 8(3) of the 2013 Reception Directive is closely intertwined with the deprivation of liberty ordered under the Return Directive.

Lastly, public order and national security reasons for detention are discussed (point (e) of the first subparagraph of Article 8(3) of the 2013 Reception Directive). They are considered separately (point 4) because the ECtHR clearly states that detention based solely on the public order or national security considerations does not fit into Article 5(1)(f) of the ECHR.

1. Detention Pending Asylum Proceedings

Under the first limb of Article 5(1)(f) of the ECHR, immigration detention is permissible 'to prevent effecting an unauthorised entry into the country'. The seminal case providing the interpretation of this ground is surely *Saadi v. the United Kingdom*. In this judgment the ECtHR emphasized that detention of 'would-be immigrants who have applied for permission to enter, whether by way of asylum or not' is a 'necessary adjunct' to the states' right to control aliens' entry into and residence in the respective territory. It pointed out, relying on the case of *Amuur v. France,* that 'the detention of potential immigrants, including asylum-seekers, is capable of being compatible with Article 5 § 1 (f)'.[1602] Then, it concluded that

> until a State has "authorised" entry to the country, any entry is "unauthorised" and the detention of a person who wishes to effect entry and who needs but does not yet have authorisation to do so can be, without any distortion of language, to "prevent his effecting an unauthorised entry".

1602 ECtHR (GC), *Saadi v. the United Kingdom*, no. 13229/03 (2008), §64.

> It does not accept that as soon as an asylum-seeker has surrendered himself to the immigration authorities, he is seeking to effect an "authorised" entry, with the result that detention cannot be justified under the first limb of Article 5§1(f). To interpret the first limb of Article 5§1(f) as permitting detention only of a person who is shown to be trying to evade entry restrictions would be to place too narrow a construction on the terms of the provision and on the power of the State to exercise its undeniable right of control referred to above.[1603]

Interestingly, the court stated that this approach is compliant with the position of the Executive Committee of the UNHCR, the UNHCR's guidelines and the recommendations of the CoE's Committee of Ministers, which all allow for asylum seekers' detention in some circumstances, 'for example while identity checks are taking place or when elements on which the asylum claim is based have to be determined'.[1604]

Consequently, the Strasbourg Court found that the asylum seeker, who had applied for asylum immediately after arriving at the airport in the United Kingdom, had been detained to prevent effecting an unauthorized entry into that country. This conclusion was reached irrespective of the fact that after claiming asylum he had been temporarily admitted to the United Kingdom; notably he had been asked to stay at a hotel of his choice and return to the airport the following three mornings, which he dutifully had done. Only subsequently was he detained in the Oakington centre. Even though the foreigner was authorized–albeit temporarily–to enter the United Kingdom, his following detention was in the opinion of the court justified to prevent effecting an unauthorized entry.[1605]

Moreover, the ECtHR emphasized that the asylum seeker's detention had been closely connected to the purpose of preventing unauthorized entry, because he had been deprived of liberty in order to enable quick and efficient examination of his asylum application. Domestic authorities acted in good faith as 'the policy behind the creation of the Oakington regime was generally

1603 Ibid., §65.

1604 Ibid. For the criticism of this finding, see partly dissenting opinion of judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä in ECtHR (GC), *Saadi v. the United Kingdom*, no. 13229/03 (2008); Mole and Meredith (2010), 150; Cornelisse (2010), 295-296; PACE (2010) 'The detention…', 20; Markiewicz-Stanny (2020), 149-150; Ruiz Ramos (2020), 10-11. See also Cherubini (2015), 124, pointing out that the detention pursuant to the 1951 Refugee Convention is permissible under much narrower circumstances than the ones arising from the *Saadi* case.

1605 Cf. Dembour (2015), 379, expressing doubts that the Saadi's detention should have fallen under the first limb of Article 5(1)(f) of the ECHR.

to benefit asylum-seekers'.[1606] The court concluded that it was not arbitrary to detain the applicant 'for seven days in suitable conditions to enable his claim to asylum to be processed speedily', in particular taking into account the state's difficulties at the time arising from high numbers of asylum seekers.[1607] Thus, administrative convenience prevailed over the right to liberty of the asylum seeker.[1608]

To say that the case of *Saadi v. the United Kingdom* is controversial would be an understatement. Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä pointed out in the partly dissenting opinion that the majority had unjustifiably assimilated the situation of asylum seekers and illegal immigrants. The dissenting judges stressed that such an approach 'sits uncomfortably with the principle that asylum-seekers who have presented a claim for international protection are ipso facto lawfully within the territory of a State'. Asylum seekers cannot be detained on the sole ground that they seek asylum. Deprivation of liberty in order to speed up asylum proceedings is in fact effected to pursue 'a purely bureaucratic and administrative goal, unrelated to any need to prevent his unauthorised entry into the country'. Detention should not be justified by the state's convenience. The dissenters concluded that after the *Saadi* judgment, the ECHR provides for a lower level of protection than do other international fundamental rights protection instruments. Those arguments have been followed in the literature.[1609]

As it has been rightly put by Costello and Mouzourakis 'the basic notion of the asylum-seeker as detainable has gained support from the ECtHR ruling in *Saadi v. the United Kingdom*'.[1610] However, the tough stance of the Strasbourg Court expressed in this judgment has been slightly alleviated in the following case-law. In the case of *Suso Musa v. Malta*, the ECtHR considered that

> the applicant's argument to the effect that *Saadi* should not be interpreted as meaning that all member States may lawfully detain immigrants pending their asylum claim, irrespective of national law, is not devoid of merit. Indeed, where a State which has gone beyond its obligations in creating further rights or a more favourable position—a possibility open to it under

1606 ECtHR (GC), *Saadi v. the United Kingdom*, no. 13229/03 (2008), §77. For more on the 'good faith' requirement, see this Chapter, Title II.

1607 ECtHR (GC), *Saadi v. the United Kingdom*, no. 13229/03 (2008), §80.

1608 See also Costello (2015) 'Immigration Detention…', 153-154.

1609 See e.g. Mole and Meredith (2010), 150; Edwards (2011), 31; Costello (2012) 'Human Rights…', 286-287; Stevens (2013), 412-413; O'Nions (2014), 148-149; Dembour (2015), 379-381; Costello and Mouzorakis (2016), 54-55; Harris et al. (2018), 333-334; Markiewicz-Stanny (2020), 149-152; Ruiz Ramos (2020), 7-11, 24-26. See also PACE (2010) 'The detention…', 20.

1610 Costello and Mouzorakis (2016), 54.

> Article 53 of the Convention—enacts legislation (of its own motion or pursuant to European Union law) explicitly authorising the entry or stay of immigrants pending an asylum application (...), an ensuing detention for the purpose of preventing an unauthorised entry may raise an issue as to the lawfulness of detention under Article 5§1(f).[1611]

The court pointed out that in those circumstances the detention would be arbitrary as it would not be closely connected to its purpose. Thus, the application of the first limb of Article 5(1)(f) of the ECHR 'is largely dependent on national law',[1612] including the respective international law.[1613] Consequently, 'deprivation of liberty of asylum-seekers to prevent their unauthorised entry into a State's territory is not in itself in contravention with the Convention'.[1614]

The key question is what constitutes an explicit authorization for a foreigner to enter or stay pending asylum proceedings. The court sets the threshold in this regard high. In the *Suso Musa v. Malta* case, the Strasbourg Court analysed the national asylum legislation that stated (as a rule, but with some exceptions) that an applicant for international protection shall not be removed from Malta before his application is finally determined and such applicant shall be allowed to enter or remain in Malta pending the final decision of his application. The possible interpretations of this provision were conflicting. While the court declined to interpret the intentions of the Maltese legislator, it pointed out that it was also conceivable that the provision could be understood as reflecting only 'international standards to the effect that an asylum seeker may not be expelled pending an asylum claim without necessarily requiring that an individual be granted formal authorisation to stay or to enter the territory'. The court noted as well that there had been no 'formal authorization procedure or for the issuance of any relevant documentation'

1611 ECtHR, *Suso Musa v. Malta*, no. 42337/12 (2013), §97. See also ECtHR, *O.M. v. Hungary*, no. 9912/15 (2016), §47; ECtHR, *Aboya Boa Jean v. Malta*, no. 62676/16 (2019), §§57, 61. Cf. ECtHR (GC), *Z.A. and Others v. Russia*, nos. 61411/15 etc. (2019), §147.

1612 ECtHR, *Suso Musa v. Malta*, no. 42337/12 (2013), §97.

1613 Especially, the 1951 Refugee Convention. See ECtHR, *Amuur v. France*, no. 19776/92 (1996), §43, where the court stressed that the detention at the airport was 'acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions.'

1614 ECtHR (GC), *Z.A. and Others v. Russia*, nos. 61411/15 etc. (2019), §160. Cf. Stevens (2013), 412, claiming that the first limb of Article 5(1)(f) of the ECHR was not originally aimed at asylum seekers.

for asylum seekers specified under the domestic law.[1615] Thus, the foreigner's detention fell under the first limb of Article 5(1)(f) of the ECHR.

While the court's reasoning in this regard was considered indecisive and unclear,[1616] the judgment in the recent case of *Aboya Boa Jean v. Malta* seems to be more conclusive. Again, the Strasbourg Court examined the Maltese law: another act and provisions, but having the same wording as the ones in the *Suso Musa* case. The court found that the new law had not given rise to conflicting interpretations and concluded–in a definitive manner–that the respective national provision '*reflects* international standards to the effect that an asylum seeker may not be expelled pending an asylum claim without necessarily requiring that an individual be granted formal authorisation to stay or to enter the territory'. The ECtHR noticed that it was not proved that the asylum seeker 'had actually been granted formal authorisation to stay'. In fact, no relevant documentation had been issued to him.[1617] Thus, the foreigner was detained to prevent his unauthorized entry.

The case of *Aboya Boa Jean v. Malta* casts a considerable shadow on the enthusiastic interpretations that followed the *Suso Musa* judgment. According to some authors,[1618] after this ruling asylum seekers entering and staying in the EU could not be detained under the first limb of Article 5(1)(f) of the ECHR, because pursuant to the EU law–as a rule with some exceptions–they have a right to remain in a hosting state pending asylum proceedings.[1619] While the Maltese law examined in the *Aboya Boa Jean* case is clearly based on the EU law invoked by those commentators and the ECtHR's conclusions were formulated in a clear and definitive manner there, it seems that the above-mentioned interpretation should be considered too broad and overly hopeful. The right to remain during asylum proceedings arising from the EU law, transposed to a domestic law, seems to be insufficient to constitute a 'formal authorization' that would render the following detention arbitrary under the first limb of Article 5(1)(f) of the ECHR. The issuance of some form of document confirming the authorization to enter appears to be indispensable.[1620]

1615 ECtHR, *Suso Musa v. Malta*, no. 42337/12 (2013), §98.

1616 See e.g. Monina (2018), 161; Markiewicz-Stanny (2020), 145.

1617 ECtHR, *Aboya Boa Jean v. Malta*, no. 62676/16 (2019), §§60-61 (emphasis added).

1618 See e.g. Costello and Mouzourakis (2016), 55; Peek and Tsourdi (2016), 1415; Cornelisse (2017), 232; Monina (2018), 166-167.

1619 See Articles 9 and 43 of the 2013 Procedures Directive. Cf. Cornelisse (2016), 78-81, explaining, with reference to Article 2(p) and Article 43 of the 2013 Procedures Directive, that the right to remain under Article 9 does not grant a right of entry for all asylum seekers. See also De Bruycker (ed.), Bloomfield, Tsourdi, Pétin (2015), 50.

1620 See also Matevžič (2016).

The case of *Aboya Boa Jean v. Malta* is particularly important for another reason, as well. The Strasbourg Court concluded there that the detention ordered under the national law implementing point (b) of the first subparagraph of Article 8(3) of the 2013 Reception Directive was compliant with the first limb of Article 5(1)(f) of the ECHR. The asylum seeker planned to travel to Italy and stated that he had been granted refugee status in Armenia, but he did not substantiate this claim. In consequence, he was deprived of liberty because the elements on which his application for international protection had been based could not be determined in the absence of detention, in particular due to the risk of absconding. Those grounds were considered by the ECtHR to be closely connected to preventing unauthorized entry.[1621]

The link between the prevention of an unauthorized entry and asylum proceedings was also stressed in other cases. For instance, in the case of *Longa Yonkeu v. Latvia,* the detention due to the ongoing second set of asylum proceedings was found to be in accordance with the domestic law and justified under the first limb of Article 5(1)(f) of the ECHR.[1622] So was the deprivation of liberty based on the assumption that the applicant might leave the country and misuse the asylum procedure.[1623] Moreover, in the case of *Mahamed Jama v. Malta,* the connection between Article 5(1)(f) of the ECHR and the processing of an asylum application was established in the context of the age assessment of the minor that was necessary before the decision on asylum could be made.[1624] In the case of *Moxamed Ismaaciil and Abdirahman Warsame v. Malta,* the court noted that the purpose of the applicants' detention throughout asylum proceedings

> fell under the first limb of Article 5§1, namely to prevent an unauthorised entry, and in practice to allow for the applicants' asylum claims to be processed. Indeed the Court has no doubt that the applicants' detention at least in the first few months, was to enable the determination of their asylum claim, and thus to find out their identity and other relevant information enabling the processing of the claim.[1625]

In that case, the ECtHR concluded that the detention that lasted twelve months and was justified by the ongoing first- and second-instance asylum proceedings

1621 ECtHR, *Aboya Boa Jean v. Malta*, no. 62676/16 (2019), §§62–63.

1622 ECtHR, *Longa Yonkeu v. Latvia*, no. 57229/09 (2011), §§129, 132. See also ECtHR, *Thimothawes v. Belgium*, no. 39061/11 (2017), §66.

1623 ECtHR, *Nassr Allah v. Latvia*, no. 66166/13 (2015), §§57–58.

1624 ECtHR, *Mahamed Jama v. Malta,* no. 10290/13 (2015), §150.

1625 ECtHR, *Moxamed Ismaaciil and Abdirahman Warsame v. Malta,* nos. 52160/13 and 52165/13 (2016), §140.

was closely connected to its grounds and in compliance with the first limb of Article 5(1)(f) of the ECHR. However, it also made the important stipulation that 'the connection with the ground of detention becomes less evident, as months go by and after a first-instance decision has been issued', particularly because the asylum seeker's identity should have been established by then.[1626] The similar conclusion reached in the case of *M.K. v. Hungary* prompted the court to declare that the period of detention following the asylum case being admitted for examination on the merits could not 'be said to have corresponded to the requirement of close connection "to the purpose of preventing unauthorised entry of the person to the country"'.[1627]

The Strasbourg Court accepts that a foreigner's entering a state requires necessary verifications on the part of national authorities, including checking his identity and nationality.[1628] The court noted that in particular by choosing to travel by air a person concerned in fact consents to security checks, including the verification of his identity and search of his baggage.[1629] When the asylum seeker had had no identification documents 'by his own admission', the ECtHR concluded that there was no reason to question 'the Government's good faith in stating that the authorities had to conduct checks as to his identity before granting him leave to enter the country'.[1630] Moreover, the court found the detention of the asylum seeker ordered on the ground that his identity had not been determined to be unquestionably justified under the first limb of Article 5(1)(f) of the ECHR.[1631]

When the restriction on liberty of a foreigner applied upon arrival in a country does not exceed 'the time strictly necessary to comply with the formalities relevant for the clarification of his situation', Article 5 may be considered inapplicable as the measures used did not amount to the deprivation of liberty within the meaning of this provision.[1632] The clarification of the situation of a foreigner at the border may include examining his asylum application.[1633]

1626 Ibid.

1627 ECtHR, *M.K. v. Hungary*, no. 46783/14 (2020), §21.

1628 See e.g. ECtHR (GC), *Z.A. and Others v. Russia*, nos. 61411/15 etc. (2019), §142; ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §222.

1629 ECtHR, *Gahramanov v. Azerbaijan*, no. 26291/06, dec. (2013), §40.

1630 ECtHR, *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05 (2007), §75.

1631 ECtHR, *Longa Yonkeu v. Latvia*, no. 57229/09 (2011), §§123; ECtHR, *Nassr Allah v. Latvia*, no. 66166/13 (2015), §§57–58. See also ECtHR, *J.R. and Others v. Greece*, no. 22696/16 (2018), §§112, 114.

1632 ECtHR, *Gahramanov v. Azerbaijan*, no. 26291/06, dec. (2013), §§41–42. See also ECtHR (GC), *Z.A. and Others v. Russia*, nos. 61411/15 etc. (2019), §144; ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §225.

1633 See e.g. ECtHR (GC), *Z.A. and Others v. Russia*, nos. 61411/15 etc. (2019), §147; ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §227.

Thus, the ECtHR accepts that detention pending asylum proceedings may not amount to the deprivation of liberty within the meaning of Article 5 of the ECHR and constitutes only the less severe restriction on liberty. However, the court requires that essential safeguards are in place and that the duration of detention is not excessive.[1634] Accordingly, in the case of *Ilias and Ahmed v. Hungary*, the court found that Article 5 of the ECHR was not applicable to the asylum seekers' detention in the Röszke transit zone, *inter alia* because their asylum applications were considered at the administrative and judicial level within only twenty-three days, even though the Hungarian authorities were challenged with a mass influx of asylum seekers at the time. There was no inaction on the part of the national authorities, and all their actions were 'strictly necessary to verify whether the applicants' wish to enter Hungary to seek asylum there could be granted'.[1635] Conversely, in the case of *Z.A. and Others v. Russia*, Article 5 of the ECHR was found to be applicable, *inter alia* because the duration of the asylum seekers' detention at the airport was excessive, notably from 5 to almost 22 months, the delays were imputable to the domestic authorities and there was no provision under the law that would limit the duration of the detention in those circumstances.[1636]

It cannot be overlooked that in the literature the opinion is repeatedly stated that deprivation of liberty in connection with the verification of identity or nationality of asylum seekers and the determination of their status and claims is permissible only under Article 5(1)(b) of the ECHR, which allows for the lawful arrest or detention of a person in order to secure the fulfilment of any obligation prescribed by law.[1637] The applicability of this provision to detention of asylum seekers is not excluded by the ECtHR itself. In the case of *O.M. v. Hungary*, the Hungarian Government invoked Article 5(1)(b) of the ECHR to justify the asylum seeker's deprivation of liberty. The Strasbourg Court noted that subparagraph (f) 'may also provide justification, in some specific circumstances, for detentions of asylum-seekers', but taking into account the Government's argument, the court limited its analysis to subparagraph (b).[1638] In this case, multiple reasons for the Iranian asylum seeker's detention were

1634 See e.g. ECtHR, *Mahdid and Haddar v. Austria*, no. 74762/01, dec. (2005); ECtHR, *Gahramanov v. Azerbaijan*, no. 26291/06, dec. (2013), §43.

1635 ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §§228-229, 233. Cf. partly dissenting opinion of judge Bianku, joined by judge Vučinić, in that case, pointing out that in other cases shorter periods of detention have fallen under Article 5(1)(f) of the ECHR. For more see these Chapter and Title, point 2.

1636 ECtHR (GC), *Z.A. and Others v. Russia*, nos. 61411/15 etc. (2019), §§146, 148.

1637 See e.g. Mole and Meredith (2010), 144-145; Tsourdi (2016), 14-15; Costello and Mouzourakis (2016), 54; Monina (2018), 161-162, 167. See also FRA (2017), 43-44.

1638 ECtHR, *O.M. v. Hungary*, no. 9912/15 (2016), §§47-48.

given by the national authorities: his identity and nationality were not clarified, and he entered Hungary unlawfully, had no connection to that country and lacked means of subsistence. Their decision was based on the assumption that 'Iranian asylum seekers tended to frustrate the procedure and leave for unknown places'.[1639] The Strasbourg Court examined whether the detention was necessary to secure the fulfilment of any obligation prescribed by law.[1640] The court found that under the Hungarian law there was no established obligation of an asylum seeker to present documentary evidence of his identity and nationality. Cooperation with the domestic authorities was required, but the ECtHR decided that the production of documents had not been the only way for asylum seekers to prove their identities and nationalities. The concerned foreigner coherently presented his reasons for fleeing from Iran and there was no indication that he would not cooperate. Moreover, it was clear from the circumstances of the case that the applicant's situation was not assessed on an individual basis.[1641] Consequently, the court found that Article 5(1)(b) of the ECHR had been violated. While the case of *O.M. v. Hungary* is noteworthy, it is also rather exceptional. In most cases, the court still follows the approach taken in the case of *Saadi v. the United Kingdom* and applies the first limb of subparagraph (f) to detention pending asylum proceedings.[1642]

To sum up, the detention of asylum seekers to prevent their unauthorized entry is permissible under the first limb of Article 5(1)(f) of the ECHR. The entry is unauthorized until it is authorized under national law. Thus, asylum seekers who were formally authorized under domestic law to enter or remain in a state examining their application for international protection cannot be detained under the first limb of Article 5(1)(f) of the ECHR. A verification of asylum seekers' identity or nationality, determination of the elements on which their applications for international protection are based, acceleration of asylum proceedings and even the ongoing subsequent asylum procedure were considered by the ECtHR to be closely connected to the aim of preventing unauthorized entry. Moreover, it should not be disregarded that some cases of detention of asylum seekers at the border fall just outside the scope of Article 5(1)(f) of the ECHR, as a result of the restrictive approach to its applicability adopted–in particular recently–by the Strasbourg Court.

1639 Ibid., §§10-16.

1640 The ECtHR considers that–in contrast to subparagraph (f)–under subparagraph (b) the proportionality and necessity test is required, see ECtHR, *O.M. v. Hungary*, no. 9912/15 (2016), §§42-43.

1641 ECtHR, *O.M. v. Hungary*, no. 9912/15 (2016), §§49-53.

1642 See e.g. ECtHR, *Aboya Boa Jean v. Malta*, no. 62676/16 (2019), §64, where the court gave precedence to the considerations concerning subparagraph (f) over (b).

Some of the shortcomings of the ECtHR's jurisprudence concerning the first limb of Article 5(1)(f) of the ECHR are addressed by the EU law.[1643] Detention of asylum seekers based solely on the fact that they are seeking international protection or are subject to Dublin proceedings is explicitly prohibited.[1644] The grounds for permissible deprivation of liberty are enumerated exhaustively in Article 8(3) of the 2013 Reception Directive.[1645] Those include *inter alia* a determination or verification of identity or nationality (a); a determination of those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of the applicant absconding (b); and deciding, in the context of asylum proceedings, on the applicant's right to enter the territory (c).

Only points (a) and (b) of the first subparagraph of Article 8(3) of the 2013 Reception Directive have been scrutinized by the CJ.[1646] In the case of *K.* the Luxembourg Court was challenged with the question of the validity of those provisions in the light of Article 6 of the EU Charter and Article 5(1)(f) of the ECHR. The referring court invoked the ECtHR's case of *Nabil and Others v. Hungary* concerning detention with a view to deportation and extradition,[1647] but the CJ consciously noticed that the second limb of Article 5(1)(f) of the ECHR was not applicable in the main proceedings as the asylum seeker was not subject to return proceedings. It added, confusingly, that by 'adopting the first subparagraph of Article 8(3)(a) and (b) of Directive 2013/33, the EU legislature did not disregard the level of protection afforded by the second limb of Article 5(1)(f) of the ECHR'.[1648] Moreover, the court stressed that the first limb of this provision together with the respective ECtHR jurisprudence (i.e. *Saadi v. the United Kingdom*, *Mahamed Jama v. Malta*)

> does not preclude necessary detention measures being taken against third-country nationals who have made an application for international

1643 See also Costello and Mouzourakis (2016), 56.

1644 See Article 26(1) of the 2013 Procedures Directive, Article 8(1) of the 2013 Reception Directive, Article 28(1) of the Dublin III Regulation. See also Article 18(1) of the 2005 Procedures Directive.

1645 See e.g. CJ, case C-36/20 PPU *VL* (2020), para 104.

1646 Point (c) of the first subparagraph of Article 8(3) of the 2013 Reception Directive has been referred to only in CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), para 238, and CJ (GC), case C-808/18 *Commission v Hungary* (2020), paras 177-186, in the context of the detention pending border procedures provided for in Article 43 of the 2013 Procedures Directive. For more in this regard, see this Chapter, Title V.

1647 For more, see these Chapter and Title, point 3.

1648 CJ, case C-18/16 *K.* (2017), paras 50-51.

> protection, provided that such a measure is lawful and implemented in accordance with the objective of protecting the individual from arbitrariness.[1649]

The court has found that those requirements are satisfied under points (a) and (b) of the first subparagraph of Article 8(3) of the 2013 Reception Directive.[1650] Thus, those provisions are in compliance with the first limb of Article 5(1)(f) of the ECHR.[1651] This conclusion may imply that the CJ did not yield to some authors' suggestions expressed after the *Suso Musa v. Malta* case examined by the Strasbourg Court that asylum seekers staying in the EU cannot be detained under the first limb of Article 5(1)(f) of the ECHR because they have the right to remain during asylum proceedings arising from the 2013 Procedures Directive. In fact, in the case of *J.N.* the Luxembourg Court held that immigration detention and the right to remain are not mutually exclusive.[1652] Therefore, in this regard the CJ's jurisprudence seems to be in line with the ECtHR's case of *Aboya Boa Jean v. Malta*.

The Luxembourg Court also did not find that points (a) and (b) of the first subparagraph of Article 8(3) of the 2013 Reception Directive conflict with Article 6 in conjunction with Article 52(1) of the EU Charter. Detention on the grounds specified in points (a) and (b) 'meets the objective of ensuring the proper functioning of the Common European Asylum System', because it enables the identification and qualification for international protection while also preventing illegal entry and stay in the EU.[1653] Assessing the proportionality of the interference with the right to liberty and security, the court highlighted the asylum seekers' obligation to cooperate provided for in Article 13(1) of the 2013 Procedures Directive. Detention based on points (a) and (b) of the first subparagraph of Article 8(3) of the 2013 Reception Directive 'allows the applicant to be available to the national authorities so that they are able, inter alia, to interview him and, consequently, to contribute to the prevention of possible secondary movements of applicants'.[1654] Convenience of national authorities, as in the case of *Saadi v. the United Kingdom*, prevails over the right to liberty of asylum seekers. However, the CJ pointed out that any limitations to this right apply only when it is strictly necessary. The 2013 Reception

1649 Ibid., para 52.

1650 Ibid., para 53.

1651 See also opinion of AG Sharpston delivered on 4 May 2017 in case C-18/16 *K.*, EU:C:2017:349, para 83.

1652 CJ (GC), case C-601/15 PPU *J.N.* (2016), para 74.

1653 CJ, case C-18/16 *K.* (2017), para 36, see also paras 39 and 47.

1654 Ibid., paras 38-39.

Directive establishes a sufficient and 'strictly circumscribed framework' in which a detention may be ordered.[1655] The court concluded that 'the EU legislature struck a fair balance' between asylum seekers' right to liberty and the requirements that are essential for the proper functioning of the CEAS.[1656]

The Luxembourg Court also provided a modest guidance on the interpretation of point (a) of the first subparagraph of Article 8(3) of the 2013 Reception Directive. It emphasized that national authorities, to guarantee proper functioning of the CEAS, must have at their disposal reliable information about the applicant and his reasons for seeking asylum. Thus, asylum seekers are obliged to cooperate in providing them with the required information. If an asylum seeker 'failed to communicate his identity or nationality or the identification papers justifying that', he could be detained under point (a) of the first subparagraph of Article 8(3) of the directive.[1657]

The CJ's accentuation of the obligation to cooperate in the case of *K.* brings to mind its approach to detention under the Return Directive.[1658] In the case of *Achughbabian* the court held that

> the competent authorities must have a brief but reasonable time to identify the person under constraint and to research the information enabling it to be determined whether that person is an illegally-staying third-country national. Determination of the name and nationality may prove difficult where the person concerned does not cooperate. Verification of the existence of an illegal stay may likewise prove complicated, particularly where the person concerned invokes a status of asylum seeker or refugee.[1659]

Thus, national authorities can deprive foreigners of their liberty in accordance with the Return Directive in order to determine whether or not their stay is lawful.[1660] Verification of their identity and nationality is indispensable in this process.

Lack of cooperation by the asylum seeker is directly mentioned in the Return Directive as a ground justifying a prolongation of detention and was scrutinized in the *Mahdi* case.[1661] The court has found that the lack of an

1655 Ibid., paras 40–48.

1656 Ibid., para 49.

1657 Ibid., paras 42, 48.

1658 For more, see these Chapter and Title, point 3.

1659 CJ (GC), case C-329/11 *Achughbabian* (2011), para 31.

1660 Ibid., para 29; CJ (GC), case C-47/15 *Affum* (2016), para 53.

1661 CJ, case C-146/14 PPU *Mahdi* (2014), paras 75–85. For more see these Chapter and Title, point 3.1.

identity document may be taken into account in the assessment of whether the risk of absconding exists.[1662] As point (b) of the first subparagraph of Article 8(3) of the 2013 Reception Directive mentions the risk of absconding, the findings made in the *Mahdi* case may be considered useful in the interpretation of this provision.

Both European asylum courts perceive the verification of identity and nationality of foreigners (including asylum seekers) as well as the determination of their situation as an indispensable part of migration control and as such justifying–under specific requirements–deprivation of liberty. The courts' case-law regarding detention pending asylum proceedings is seemingly coherent. On the one hand, the CJ found in the case of *K.*, relying on the *Saadi v. the United Kingdom* judgment, that points (a) and (b) of the first subparagraph of Article 8(3) of the 2013 Reception Directive do not conflict with the first limb of Article 5(1)(f) of the ECHR. On the other hand, the ECtHR decided in the case of *Aboya Boa Jean v. Malta* that the national law based on point (b) of the first subparagraph of Article 8(3) of this directive was in accordance with the same ECHR provision. In other cases, verification of identity and nationality–the grounds for detention provided for in point (a) of the first subparagraph of Article 8(3) of 2013 Reception Directive–was found by the Strasbourg Court to be closely connected to the prevention of an unauthorized entry, and thus, justified under the first limb of Article 5(1)(f) of the ECHR.

However, the Luxembourg Court reiterates also, albeit without an in-depth analysis of this rule, that asylum seekers cannot be detained solely on the ground that they are seeking international protection or being subject to Dublin proceedings.[1663] Meanwhile, under the ECtHR's jurisprudence the fact that a foreigner has applied for asylum and is awaiting a decision in this regard (thus, a required authorization to enter and stay) may constitute a ground for detention in accordance with the first limb of Article 5(1)(f) of the ECHR.[1664] In those circumstances the applicability of the first limb of Article 5(1)(f) of the

1662 Ibid., paras 65-74. For more see these Chapter and Title, point 3.2.

1663 CJ (GC), case C-357/09 PPU *Kadzoev* (2009), para 44; CJ, case C-534/11 *Arslan* (2013), para 54; CJ (GC), case C-601/15 PPU *J.N.* (2016), paras 61, 74; CJ, case C-528/15 *Al Chodor and Others* (2017), para 34; CJ, case C-60/16 *Amayry* (2017), paras 23, 25; CJ, case C-18/16 *K.* (2017), para 44; CJ, case C-36/20 PPU *VL* (2020), para 100.

1664 Cf. Edwards (2011), 43, noting in regard to the *Saadi v. the United Kingdom* case that it can be argued that the asylum seeker was detained not because of his status but in order to accelerate asylum proceedings. See, however, ECtHR, *Longa Yonkeu v. Latvia,* no. 57229/09 (2011), §§129, 132; ECtHR, *Moxamed Ismaaciil and Abdirahman Warsame v. Malta,* nos. 52160/13 and 52165/13 (2016), §140, where in fact no additional–to the ongoing asylum proceedings–justification was provided by the respective Governments.

ECHR may even be excluded.[1665] Therefore, states have been granted relatively wider powers to detain asylum seekers in connection with asylum proceedings under the ECHR than the EU law.[1666]

Furthermore, the detention under the first limb of Article 5(1)(f) of the ECHR must have some connection with a foreigner's entry to a state. In the case of *K.G. v. Belgium*, the ECtHR found that the situation of the long-term irregular migrant who had unsuccessfully applied for asylum multiple times throughout the years he had spent in Belgium was not comparable to the situation of asylum seekers that had just asked for international protection at the border. The court concluded that the foreigner's detention, which began many years after he entered Belgium, did not fall under the first limb of Article 5(1)(f) of the ECHR.[1667] Meanwhile, it seems that under points (a) and (b) of the first subparagraph of Article 8(3) of the 2013 Reception Directive, asylum seekers may be detained at any time during the asylum procedure, even when the procedure was initiated many years after the entry to the state concerned.

2. Detention in Transit Zones

In the cases regarding the first limb of Article 5(1)(f) of the ECHR, the responding states often rely on the argument that the concerned foreigners were in fact not deprived of liberty within the meaning of Article 5 of the ECHR as they could leave the transit zone any time they wanted, to the country of their choice—other than the state where the zone was located. This argument was initially rejected in regard to asylum seekers in the case of *Amuur v. France*.[1668] The court emphasized there that

> (t)he mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty (…). Furthermore, this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to

1665 See also partly dissenting opinion of judge Bianku, joined by judge Vučinić, in ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), pointing out that the majority's approach excluding the applicability of Article 5 of the ECHR is contrary to the EU law stating that the Member States cannot place a person in detention on the sole grounds that he is an asylum seeker. The dissenters referred to CJ, case C-528/15 *Al Chodor and Others* (2017).

1666 However, see Cherubini (2015), 237, claiming that under point (c) of the first subparagraph of Article 8(3) of the 2013 Reception Directive the guarantee provided for in paragraph 1 may be easily circumvented.

1667 ECtHR, *K.G. v. Belgium*, no. 52548/15 (2018), §§78–80.

1668 ECtHR, *Amuur v. France*, no. 19776/92 (1996), §46.

> find in the country where they are seeking asylum is inclined or prepared to take them in.[1669]

However, in another case, the Grand Chamber explained that this reasoning must be read in the context of the specific circumstances of the Amuur case, where the Somali asylum seekers had no possibility to leave the airport to another destination than Syria. Meanwhile departing to Syria, which was not bound by the 1951 Refugee Convention, was dependent on diplomatic relations between states, so not on the individuals' will.[1670] In the case of *Z.A. and Others v. Russia*, the court added that leaving the airport, unlike departing from the land border, requires 'planning, contacting aviation companies, purchasing tickets and possibly applying for a visa depending on the destination'. Thus, states must convincingly substantiate their assertion that the departure from the airport is a practical and real possibility that does not involve any direct threat to the foreigners' life or health.[1671]

As regards land border crossings, in the case of *Ilias and Ahmed v. Hungary*, the Grand Chamber noticed that the asylum seekers could–both in theory and practice–leave the Röszke transit zone and go back to Serbia which was 'immediately adjacent' to this area and bound by the 1951 Refugee Convention.[1672] The court held that

> it is probable that the applicants had no legal right to enter Serbia. The Court notes, however, that Serbia was bound at the relevant time by a readmission agreement concluded with the European Union (...). While it is not for the Court to interpret this agreement and decide whether or not the applicants' case was covered by its provisions, it considers that the *de facto* possibility of them leaving the transit zone for Serbia existed, not only in theory but also in practice.[1673]

1669 Ibid., §48. See also ECtHR, *Rashed v. the Czech Republic*, no. 298/07 (2008), §71; ECtHR (GC), *Z.A. and Others v. Russia*, nos. 61411/15 etc. (2019), §153.

1670 ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §240. The stay in the transit zone was considered imputable on the foreigners e.g. when they refused to leave it despite being granted a right to enter one country because they wanted to go to another state [ECtHR, *Mogos and Others v. Romania*, no. 20420/02, dec. (2004)] or when they destroyed their passports in order to force the national authorities to admit them [ECtHR, *Mahdid and Haddar v. Austria*, no. 74762/01, dec. (2005)]. Cf. partly dissenting opinion of judge Bianku, joined by judge Vučinić, in ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), claiming that the Grand Chamber misunderstood the reasoning in the *Amuur v. France* case. See also Stoyanova (2019).

1671 ECtHR (GC), *Z.A. and Others v. Russia*, nos. 61411/15 etc. (2019), §154.

1672 ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §§235-236.

1673 Ibid., §237.

Some other foreigners were reported to have made such a re-crossing. There was no direct threat to the applicants' life and health in Serbia. Their fears that the Serbian asylum proceedings were flawed did not render their possibility of leaving the transit zone merely theoretical. While their apprehensions were relevant (and, in fact, justified) from the perspective of Article 3 of the ECHR, they could not lead to the conclusion that their stay in the transit zone was involuntary.[1674]

The fact that the asylum seekers could voluntarily leave the transit zone in the direction of Serbia seems to be decisive for the Grand Chamber's controversial conclusion reached in the *Ilias and Ahmed v. Hungary* case that the concerned asylum seekers were not deprived of liberty within the meaning of Article 5 of the ECHR in Röszke.[1675] However, the Strasbourg Court also pointed out in this regard that the applicants left Serbia on their own initiative and not due to a direct and immediate danger for their life or health in that country. The Hungarian authorities did not seek to detain them but to deport them. The applicants stayed in the transit zone because they initiated appeal proceedings. The respective procedure was conducted speedily and with due diligence, even though the Hungarian authorities were challenged with the mass influx of asylum seekers at the time. The court also addressed the conditions of the stay in the Röszke transit zone (i.e. its limited surface surrounded by a fence and barbed wire, being fully guarded, the possibility of visits only upon permission) and concluded that 'the applicants' freedom of movement was restricted to a very significant degree, in a manner similar to that characteristic of certain types of light-regime detention facilities'. However, those conditions 'did not limit their liberty unnecessarily or to an extent or in a manner unconnected to the examination of their asylum claims' and were not inhuman and degrading. Taking all those factors into account, the ECtHR decided that Article 5 of the ECHR did not apply to the applicants' stay in the Röszke transit zone.[1676]

Less than six months later, the situation in the Röszke transit zone was scrutinized by the CJ. In the case of *FMS and Others,* the Luxembourg Court addressed the issue of whether the asylum seekers' stay there was a 'detention'

1674 Ibid., §§237-248.

1675 For the criticism of the Grand Chamber's conclusion in this regard, see partly dissenting opinion of judge Bianku, joined by judge Vučinić, in ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019); Stoyanova (2019); Cornelisse (2020); Ruiz Ramos (2020), 36-38.

1676 ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §§220-249. Judges Bianku and Vučinić did not agree with this conclusion. In their partly dissenting opinion, they referred to CJ, case C-528/15 *Al Chodor and Others* (2017) to support their opposition.

regularized under the 2013 Reception Directive and the Return Directive. Pursuant to Article 2(h) of the 2013 Reception Directive, the notion of 'detention' is understood as a 'confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement'. Thus, detention constitutes a coercive measure that deprives the applicant for international protection of freedom of movement and isolates him from the rest of the population, obliging him to permanently remain in a limited and closed area. In the court's view, this meaning must also be applied to the notion of 'detention' used throughout the Return Directive, even though this act does not provide for a definition similar to the one expressed in Article 2(h) of the 2013 Reception Directive.[1677]

With regard to the specific circumstances of the *FMS and Others* case, the CJ noticed that the Röszke transit zone was surrounded by a high fence and barbed wire, the concerned foreigners could not receive guests without permission and their movement around the zone was limited and controlled by guards. The court held that such stay is no different than a 'detention' within the meaning of Article 2(h) of the 2013 Reception Directive. This conclusion could not be undermined by the Hungarian Government's arguments that the applicants in the main proceedings were free to leave the transit zone in Röszke to go to Serbia. In fact, it was clear that their departure to Serbia would not be lawful and would entail some sanctions (all concerned foreigners were denied access to Serbia under the readmission agreement). Thus, they did not have a real possibility of leaving the transit zone. Moreover, under the domestic law, the departure from the transit zone could deprive the concerned foreigners of access to asylum proceedings in Hungary. Accordingly, the court decided that imposing an obligation on a third-country national to stay permanently in a transit zone whose area is restricted and closed, within which that foreigner's movement is limited and supervised and from which he may not lawfully leave in any direction at his own discretion, must be considered a 'detention' within the meaning of the 2013 Reception Directive as well as the Return Directive.[1678]

Therefore, the Luxembourg Court found that the stay in the transit zone in Röszke was a 'detention' under the EU law, while the Strasbourg Court decided that the stay there was not a deprivation of liberty within the meaning of Article 5 of the ECHR. The incompatibility of those conclusions is apparent. However, it cannot be overlooked that some factual findings made in the two

1677 CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 223-225.

1678 CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 226-231. See also CJ (GC), case C-808/18 *Commission v Hungary* (2020), paras 164-165.

cases were different. Most importantly, while in the *FMS and Others* case it was held that the asylum seekers did not have a real possibility of returning to Serbia, in the *Ilias and Ahmed v. Hungary* case the Grand Chamber decided that such a possibility existed. Leaving aside the assessment of whether those findings were correct, they surely affected the courts' conclusions. The lack of possibility to leave the transit zone in the *FMS and Others* case supported the CJ's decision that the stay in Röszke had to be considered a 'detention' under the secondary EU law.[1679] The fact that such a possibility existed was decisive for the Strasbourg Court to conclude that the applicants in the *Ilias and Ahmed* case were not deprived of liberty within the meaning of Article 5 of the ECHR.[1680] Therefore, it seems that the two courts agree that the possibility of leaving a transit zone at the foreigner's own will is a factor that affects the qualification of the measures applied to asylum seekers as a detention or not.

Notwithstanding, notable differences between those judgments can also be identified. Firstly, the CJ stressed that the possibility of leaving the transit zone may be considered real only when the foreigner can depart lawfully.[1681] Meanwhile, the ECtHR held that it was possible that 'the applicants had no legal right to enter Serbia'. It declined to examine the respective provisions of the readmission agreement and focussed on the 'the *de facto* possibility' of leaving the transit zone.[1682] Nagy pointed out that this '*de facto* possibility' meant in practice breaching the Serbian law, so asylum seekers 'could only regain their liberty at the expense of a crime or misdemeanour'.[1683] The Luxembourg Court clearly opposed such an approach.

Secondly, the CJ mentioned in the *FMS and Others* ruling that the departure from the transit zone could deprive the concerned foreigners of access to asylum proceedings in Hungary.[1684] It is not clear to what extent that factor should affect the analysis of the existence of a real possibility to leave. However, it may conflict with the ECtHR's conclusion that the applicants' fears that the Serbian asylum proceedings were flawed did not render their possibility of leaving the transit zone merely theoretical.[1685]

1679 CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 228–231.

1680 ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §§234–248.

1681 CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 229, 231. See also CJ (GC), case C-808/18 *Commission v Hungary* (2020), para 164.

1682 ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §237.

1683 Nagy (2020). See also Stoyanova (2019), Cornelisse (2020).

1684 CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), para 230. See also Cornelisse (2020), claiming that it would forfeit the right to asylum arising from Article 18 of the EU Charter. See also CJ (GC), case C-808/18 *Commission v Hungary* (2020), para 165.

1685 ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §248.

Thirdly, while the two courts similarly assessed the conditions in the Röszke transit zone as 'detention-like',[1686] the Strasbourg Court alleviated this finding by noticing that the applicants' stay there was connected to asylum proceedings and not lengthy.[1687] The Luxembourg Court did not invoke those criteria. However, it may result from different circumstances of the considered cases: in the *FMS and Others* case the concerned foreigners were detained in the transit zone for approximately 18 months,[1688] while in the *Ilias and Ahmed v. Hungary* case their stay lasted 23 days.

It is clear that the CJ considered the ECtHR's approach expressed in the Grand Chamber's judgment issued in the case of *Ilias and Ahmed v. Hungary* not fully acceptable from the perspective of the EU law. It is regrettable though that it did not address the referring court's comment that the case at hand was different from the ECtHR's *Ilias and Ahmed v. Hungary* case[1689] and did not rely on either the ECHR or the EU Charter in this part of the *FMS and Others* ruling. That would have provided more clarity with regard to how far from the jurisprudence of the Strasbourg Court it aimed to go.

3. Detention Pending Return Proceedings and Removal

Under the second limb of Article 5(1)(f) of the ECHR it is permissible to detain a person 'against whom action is being taken with a view to deportation or extradition'. In practice, the Strasbourg Court applies this provision to all removals (irrespective of the wording used in a national law[1690]), including Dublin transfers[1691]. However, it also stated clearly that the granting of a

1686 Ibid., §232; CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 226-227.

1687 ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §233.

1688 For similar circumstances, see ECtHR (GC), *Z.A. and Others v. Russia*, nos. 61411/15 etc. (2019), §§146, 148, where the asylum seekers were detained at the airport for 5 to almost 22 months. In this case, the ECtHR found Article 5 of the ECHR applicable and the length of detention was an important factor in this regard.

1689 CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), para 71.

1690 See e.g. ECtHR, *L.M. and Others v. Russia*, nos. 40081/14, 40088/14 and 40127/14 (2015), §145.

1691 See e.g. ECtHR, *Muskhadzhiyeva and Others v. Belgium*, no. 41442/07 (2010), §74; ECtHR, *Firoz Muneer v. Belgium*, no. 56005/10 (2013), §53; ECtHR, *M.D. v. Belgium*, no. 56028/10 (2013), §49; ECtHR, *A.M. and Others v. France*, no. 24587/12 (2016), §64. See also Tsourdi (2016), 20. Cf. ECRE (2015), 7-8, where it is argued that detention of Dublin transferees does not fit into subparagraph (f). See also Vavoula (2019), 1059, noticing that the CJ has refrained in the case C-528/15 *Al Chodor and Others* (2017) from assigning the detention of Dublin transferees to a specific ground enumerated in Article 5(1) of the ECHR.

period for a voluntary return does not correspond to a deportation order and cannot be a ground for a deprivation of liberty under subparagraph (f).[1692]

Expulsion, extradition or other proceedings concerning a removal must be in progress to justify detention.[1693] In the case of *Aden Ahmed v. Malta*, the Maltese authorities were reproached for detaining the rejected asylum seeker for fourteen and half months. The deprivation of liberty was effected, allegedly, in order to deport the foreigner, but return proceedings were not initiated. The ECtHR emphasized that 'given the total failure of the domestic authorities to take any steps to pursue removal it cannot be said that deportation proceedings were in progress'. Thus, such deprivation of liberty did not fall under Article 5(1)(f) of the ECHR.[1694]

The Strasbourg Court requires not only initiating appropriate proceedings but also prosecuting them with due diligence.[1695] National authorities are expected to act 'vigorously' towards effecting a removal.[1696] Substantial periods of inactivity are considered at odds with the requirements of the second limb of Article 5(1)(f) of the ECHR.[1697] The frequency of the steps taken matters. The court routinely examines how often respective embassies were contacted in order to obtain a travel document for a detainee. Domestic authorities should at least attempt to enter into negotiations with the representatives of a foreigner's country of origin in order to accelerate the delivery of a travel document. Moreover, states are expected to try to secure admission to a third country or at least explore such a possibility.[1698]

1692 ECtHR, *Al Husin v. Bosnia and Herzegovina*, no. 3727/08 (2012), §63.

1693 See e.g. ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §112; ECtHR, *Auad v. Bulgaria*, no. 46390/10 (2011), §128; ECtHR, *Suso Musa v. Malta*, no. 42337/12 (2013), §104; ECtHR, *Mohamad v. Greece*, no. 70586/11 (2014), §85; ECtHR, *L.M. and Others v. Russia*, nos. 40081/14, 40088/14 and 40127/14 (2015), §146.

1694 ECtHR, *Aden Ahmed v. Malta*, no. 55352/12 (2013), §§144-146. See also ECtHR, *Al Husin v. Bosnia and Herzegovina*, no. 3727/08 (2012), §§62-64; ECtHR, *Abdi Mahamud v. Malta*, no. 56796/13 (2016), §§138-139.

1695 See e.g. ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §112; ECtHR, *Al Husin v. Bosnia and Herzegovina*, no. 3727/08 (2012), §61.

1696 See e.g. ECtHR, *Louled Massoud v. Malta*, no. 24340/08 (2010), §66; ECtHR, *Auad v. Bulgaria*, no. 46390/10 (2011), §132; ECtHR, *Amie and Others v. Bulgaria*, no. 58149/08 (2013), §77; ECtHR, *Kim v. Russia*, no. 44260/13 (2014), §50.

1697 See e.g. ECtHR, *Kolompar v. Belgium*, no. 11613/85 (1992), §39; ECtHR, *Singh v. the Czech Republic*, no. 60538/00 (2005), §63; ECtHR, *Mikolenko v. Estonia*, no. 10664/05 (2009), §64; ECtHR, *Azimov v. Russia*, no. 67474/11 (2013), §167; ECtHR, *T.M. and Others v. Russia*, nos. 31189/15 etc. (2017), §34.

1698 See e.g. ECtHR, *Louled Massoud v. Malta*, no. 24340/08 (2010), §66; ECtHR, *Auad v. Bulgaria*, no. 46390/10 (2011), §132; ECtHR, *M. and Others v. Bulgaria*, no. 41416/08 (2011), §§70-72; ECtHR, *M.S. v. Belgium*, no. 50012/08 (2012), §155; ECtHR, *Amie and Others v. Bulgaria*, no. 58149/08 (2013), §77; ECtHR, *Mohamad v. Greece*, no. 70586/11 (2014), §85; ECtHR, *Kim v. Russia*, no. 44260/13 (2014), §§50-52.

In order to assess whether national authorities have acted with sufficient diligence, the ECtHR takes into account the number and complexity of legal proceedings that were conducted in a specific case and the reasonable time needed for those actions. In the case of *Al Hanchi v. Bosnia and Herzegovina,* the court pointed out that in less than eight months the deportation order had been issued, the applicant's asylum claim had been considered at two levels of jurisdiction and the removal directions had been given. Thus, the time was not considered excessive from the perspective of Article 5 of the ECHR.[1699] In the case of *Chahal v. the United Kingdom,* the court stressed that asylum cases must be considered in detail, carefully and thoroughly, and for these reasons their examination requires time. The Strasbourg Court found that the applicant's case had involved 'considerations of an extremely serious and weighty nature'. It underlined that such cases should not be considered in haste, 'without due regard to all the relevant issues and evidence'.[1700] Taking that into account, the detention of the asylum seeker, which had lasted for more than three and half years, during which his asylum claims had been examined by multiple national authorities, was not considered excessive by the ECtHR.[1701]

While domestic authorities must act diligently, a foreigner is also expected to conduct himself in a way that does not prolong the proceedings that are intertwined with his detention. In the case of *Kolompar v. Belgium,* the ECtHR noticed that states 'cannot be held responsible for the delays to which the applicant's conduct gave rise. The latter cannot validly complain of a situation which he largely created'. In this case, the foreigner was reproached for waiting nearly three months to answer the states' submissions and for requesting a postponement of the hearing, as well as for failing to notify the authorities that he had not been able to pay for legal assistance.[1702] In the case of *Gordyeyev*

1699 ECtHR, *Al Hanchi v. Bosnia and Herzegovina,* no. 48205/09 (2011), §49. See also ECtHR, *Louled Massoud v. Malta,* no. 24340/08 (2010), §66; ECtHR, *Alim v. Russia,* no. 39417/07 (2011), §60; ECtHR, *Al Husin v. Bosnia and Herzegovina,* no. 3727/08 (2012), §67; ECtHR, *HA. A. v. Greece,* no. 58387/11 (2016), §§39–40.

1700 ECtHR (GC), *Chahal v. the United Kingdom,* no. 22414/93 (1996), §117. See also ECtHR, *Gordyeyev v. Poland,* nos. 43369/98 and 51777/99, dec. (2005); ECtHR, *K.G. v. Belgium,* no. 52548/15 (2018), §87.

1701 ECtHR (GC), *Chahal v. the United Kingdom,* no. 22414/93 (1996), §§115–117. The application of the due diligence test in the *Chahal* case was criticized as too lenient [e.g. Wilsher (2005), 153; Rainey, Wicks and Ovey (2017), 264] and contrary to the framework of the 1951 Refugee Convention that requires speedy asylum proceedings [Forowicz (2010), 258]. Cf. Wilsher (2011), 145, and Costello (2015) 'Immigration Detention…', 153, indicating that the requirement of due diligence has been tightened up by the ECtHR over time.

1702 ECtHR, *Kolompar v. Belgium,* no. 11613/85 (1992), §42. See also ECtHR, *Mefaalani v. Cyprus,* nos. 3473/11 and 75381/11 (2016), §89; and in regard to the first limb of Article 5(1)(f) of the ECHR: ECtHR, *Mahdid and Haddar v. Austria,* no. 74762/01, dec. (2005); ECtHR (GC), *Z.A. and Others v. Russia,* nos. 61411/15 etc. (2019), §149. Cf. ECtHR, *S.M.M. v. the*

v. Poland, where the extradition proceedings, lasting in total over 2 years and 9 months, had been suspended due to the asylum application's being considered, the court noticed that 'the applicant should have been aware that by bringing his asylum claim he might contribute to the length of the extradition proceedings'. Moreover, the ECtHR pointed out that the foreigner himself had asked for the issuance of the extradition decision to be adjourned pending the asylum procedure. The applicant's complaint under Article 5(1)(f) of the ECHR was considered manifestly ill-founded.[1703]

Domestic authorities must examine whether there is a realistic prospect of removal. If there is not, detention under the second limb of subparagraph (f) is not justified. Deprivation of liberty may be unfounded from the outset due to the lack of a prospect of removal.[1704] The ECtHR concluded that there was no realistic prospect of deportation or extradition for instance when the respective foreign authorities had refused to issue a travel document for a foreigner[1705] or when he had been stateless[1706]. Importantly, from asylum seekers' perspective, there is no realistic prospect of removal when a real risk of ill-treatment contrary to Article 3 of the ECHR exists in a receiving country.[1707] When sufficient information is available that a removal cannot be enforced due to the worsening situation in the country of origin of a detainee, national authorities should take that into account and release him, as the detention is no longer 'with a view to deportation or extradition'.[1708]

The question arises whether applying for asylum automatically causes the detention pending expulsion to cease to be justified under the second limb of Article 5(1)(f) of the ECHR. Analysis of the ECtHR's jurisprudence proves that that is not a result directly required under the ECHR. In the case of *Nabil and Others v. Hungary,* concerning three Somali nationals who had applied

United Kingdom, no. 77450/12 (2017), §§81, 85. See also Wilsher (2011), 144, and Dembour (2015), 386, criticizing the court for blaming foreigners for their detention.

1703 ECtHR, *Gordyeyev v. Poland,* nos. 43369/98 and 51777/99, dec. (2005).

1704 See ECtHR, *Amie and Others v. Bulgaria,* no. 58149/08 (2013), §77.

1705 See e.g. ECtHR, *Singh v. the Czech Republic,* no. 60538/00 (2005), §64; ECtHR, *Mikolenko v. Estonia,* no. 10664/05 (2009), §§64-68; ECtHR, *Louled Massoud v. Malta,* no. 24340/08 (2010), §§67-69; ECtHR, *Suso Musa v. Malta,* no. 42337/12 (2013), §104.

1706 See e.g. ECtHR (GC), *A. and Others v. the United Kingdom,* no. 3455/05 (2009), §167; ECtHR, *Amie and Others v. Bulgaria,* no. 58149/08 (2013), §77; ECtHR, *Kim v. Russia,* no. 44260/13 (2014), §52.

1707 ECtHR (GC), *A. and Others v. the United Kingdom,* no. 3455/05 (2009), §167. See also ECtHR, *M.S. v. Belgium,* no. 50012/08 (2012), §§154-155.

1708 ECtHR, *L.M. and Others v. Russia,* nos. 40081/14, 40088/14 and 40127/14 (2015), §148; ECtHR, *S.K. v. Russia,* no. 52722/15 (2017), §115; ECtHR, *S.Z. v. Greece,* no. 66702/13 (2018), §§57-58. See also ECtHR, *A.H. and J.K. v. Cyprus,* nos. 41903/10 and 41911/10 (2015), §212.

for international protection after being detained and served with expulsion orders, the Strasbourg Court pointed out that

> the pending asylum case does not as such imply that the detention was no longer "with a view to deportation"–since an eventual dismissal of the asylum applications could have opened the way to the execution of the deportation orders. The detention nevertheless had to be in compliance with the national law and free of arbitrariness.[1709]

Thus, for instance, when a national law disallows or does not provide for a deprivation of liberty of asylum seekers, Article 5(1) of the ECHR would be considered violated in the above-mentioned circumstances. Moreover, as the ECtHR logically maintains, when pursuant to a national or international law an expulsion is prohibited during asylum proceedings, detention pending a decision on asylum cannot be ordered or continued for deportation purposes.[1710]

The approach taken by the court in the *Nabil* case was criticized as conflicting with its case-law pursuant to which due diligence and a realistic prospect of removal are required.[1711] Asylum procedures tend to be unduly lengthy and until they are concluded the respective country of origin should not be contacted by the hosting state. However, the Strasbourg Court maintains that for as long as national authorities have not determined within asylum proceedings that there is a real risk of ill-treatment contrary to Article 3 of the ECHR upon a foreigner's return, the realistic prospect of removal exists.[1712] In regard to the requirement of due diligence, the court explained that asylum proceedings are a necessary prerequisite for the effective removal of the applicant. National authorities cannot be criticized within this period for not acting diligently towards a removal itself, but should be diligent in conducting the asylum proceedings.[1713]

The court's conclusions in the case of *Nabil* find support, by analogy, in its case-law regarding the suspension of a removal resulting from the indication

1709 ECtHR, *Nabil and Others v. Hungary*, no. 62116/12 (2015), §38. See also ECtHR, *M.S. v. Belgium*, no. 50012/08 (2012), §§152-153.

1710 ECtHR, *Nabil and Others v. Hungary*, no. 62116/12 (2015), §35. See also ECtHR, *S.D. v. Greece*, no. 53541/07 (2009), §65; ECtHR, *R.U. v. Greece*, no. 2237/08 (2011), §§94-96. In the latter case the court mentioned that the 1951 Refugee Convention prohibits expulsion of an asylum seeker until his claim is considered. Cf. ECtHR, *M.S. v. Belgium*, no. 50012/08 (2012), §152.

1711 See e.g. Matevžič (2016); Ruiz Ramos (2020), 14-15.

1712 See e.g. ECtHR, *M.S. v. Belgium*, no. 50012/08 (2012), §§153-155.

1713 See e.g. ECtHR, *Ermakov v. Russia*, no. 43165/10 (2013), §253; ECtHR, *K.G. v. Belgium*, no. 52548/15 (2018), §§83, 85.

of the interim measure by the ECtHR.[1714] The court reiterates that the provisional measure in itself does not have any bearing on whether the detention complies with Article 5(1) of the ECHR, and in those circumstances national authorities invariably should act in accordance with domestic law. A detention that continues despite the fact that Rule 39 has been implemented may be still considered to be 'with a view to a deportation', as the proceedings concerning the removal are only temporarily suspended, thus, still in progress.[1715] Moreover, the applicant may be removed to a country other than the one indicated by the ECtHR.[1716] However, this does not mean that a foreigner can languish in detention for an unreasonably long period of time waiting for the Strasbourg Court's ruling.[1717]

To sum up, under the jurisprudence of the Strasbourg Court, detention is justified pursuant to the second limb of Article 5(1)(f) of the ECHR, when removal proceedings are in progress and are prosecuted with due diligence. The prospect of expulsion or extradition must be realistic. The suspension of a removal pending asylum proceedings or due to the indication of an interim measure by the ECtHR does not automatically render detention ordered pursuant to the second limb of Article 5(1)(f) of the ECHR unjustified.

Some of the above-mentioned rules find their reflection in the Return Directive. Under Article 15(1), only the detention of a foreigner who is a subject of return proceedings is permissible. The main ground for detention is that it must be effected in order to prepare the return and/or carry out the removal process.[1718] The directive expressly requires that removal arrangements must be in progress and executed with due diligence to justify detention, and that a reasonable prospect of removal has to exist.[1719] The duration of detention may be prolonged only when regardless of all reasonable efforts of domestic authorities the removal operation is likely to last longer for specific

1714 For more on interim measures, see Chapter 3, Title III, point 1.1.

1715 See e.g. ECtHR, *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05 (2007), §§74-75; ECtHR, *Abdolkhani and Karimnia v. Turkey,* no. 30471/08 (2009), §132, 134; ECtHR, *Al Hanchi v. Bosnia and Herzegovina,* no. 48205/09 (2011), §§50-51; ECtHR, *Al Husin v. Bosnia and Herzegovina*, no. 3727/08 (2012), §§68-69; ECtHR, *Azimov v. Russia*, no. 67474/11 (2013), §170; ECtHR, *A.H. and J.K. v. Cyprus*, nos. 41903/10 and 41911/10 (2015), §§186-187.

1716 See e.g. ECtHR, *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05 (2007), §74; ECtHR, *Abdolkhani and Karimnia v. Turkey,* no. 30471/08 (2009), §134.

1717 See e.g. ECtHR, *Azimov v. Russia*, no. 67474/11 (2013), §171; ECtHR, *A.H. and J.K. v. Cyprus*, nos. 41903/10 and 41911/10 (2015), §188.

1718 Additional grounds, namely a risk of absconding and avoiding or hampering the preparation of return or the removal process are analyzed below (points 3.1 and 3.2).

1719 Article 15(1) and (4) of the Return Directive.

reasons.[1720] Moreover, under the Dublin III Regulation, an asylum seeker may be detained in order to secure transfer procedures when a significant risk of absconding exists. Deprivation of liberty of a transferee shall last no longer than the time reasonably necessary to fulfil the required administrative procedures with due diligence.[1721]

The requirement of due diligence has been frequently mentioned–in diverse detention contexts–in the CJ's case-law concerning the Return Directive. It was reaffirmed in regard to the actions taken by the domestic authorities towards a detainee whose identity and nationality could not be confirmed[1722] and the one who was refused a travel document by the embassy of his country of origin due to his unwillingness to return there[1723]. In the case of *Affum*, the foreigner, staying illegally in the EU, was apprehended while in transit from one Member State to another. The French authorities decided that she would be sent back to Belgium, where the proper return proceedings would be carried out. While waiting for a transfer, she was imprisoned. The CJ emphasized that her imprisonment occurred during a preparatory stage to the foreigner's removal from the territory of the EU and that in those circumstances 'the Member State concerned must, in the light of the directive's objectives, adopt that decision with diligence and speedily so that he is transferred as soon as possible to the Member State responsible for the return procedure'.[1724] In the same case the court recalled that in the *Achughbabian* judgment it had been concluded that the Return Directive

> does not preclude a third-country national being placed in administrative detention with a view to determining whether or not his stay is legal. In that regard, the competent authorities are required to act with diligence and take a position without delay on the legality of the stay of the person concerned.[1725]

The CJ's tough stance in regard to the due diligence demanded from domestic authorities in return proceedings, regardless of the context, seems to be more closely intertwined with the requirement of effectiveness, referred to in Recital 4 of the Preamble to the Return Directive, than with the protection of fundamental rights. The court emphasizes that removals have to be

1720 Article 15(6) of the Return Directive.

1721 Article 28(2) and (3) of the Dublin III Regulation.

1722 CJ (GC), case C-357/09 PPU *Kadzoev* (2009), para 64.

1723 CJ, case C-146/14 PPU *Mahdi* (2014), para 58.

1724 CJ (GC), case C-47/15 *Affum* (2016), para 87.

1725 Ibid., para 53; CJ (GC), case C-329/11 *Achughbabian* (2011), para 31.

enforced as soon as possible; thus authorities must carry out return proceedings and subsequent arrangements diligently to achieve this aim.[1726]

In most of the above-mentioned cases the Luxembourg Court did not analyse the requirement of due diligence in detail. However, in the case of *Mahdi*, the court specified that if they intend to prolong the duration of detention under Article 15(6) of the Return Directive domestic authorities must first, before exploring whether there is a lack of cooperation on the part of a detainee,

> be able to demonstrate that the removal operation is lasting longer than anticipated, despite all reasonable efforts: that means that, in the case before the referring court, the Member State in question should have sought, and should still actively be seeking, to secure the issue of identity documents for the third-country national.[1727]

In the Dublin case of *Amayry*, concerning detention in order to secure transfer procedures, the Luxembourg Court also went a step further from simply reiterating the general rule that due diligence is demanded from national authorities. The CJ noted, taking into account the simplified procedure between the Member States, that a period of six weeks should be sufficient to proceed with a Dublin transfer. A period of two months was also found by the CJ to be not necessarily excessive, but 'its suitability in relation to the facts of each specific case' must be assessed. Meanwhile, the period of three to twelve months allowed under the Swedish law was considered by the Luxembourg Court excessive and not reasonably necessary for the required administrative procedures to be carried out.[1728] Thus, a detention with such a timeframe would not be in accordance with the Dublin III Regulation and Article 6 of the EU Charter.

In the *Amayry* ruling, the Luxembourg Court referred to the case of *Lanigan*, which had concerned the deprivation of liberty pending a decision on an execution of a European Arrest Warrant. In this case, the court relied to a large extent on the ECtHR's jurisprudence regarding Article 5(1)(f) of the ECHR and the requirement of due diligence arising from it. The CJ also explained what factors should be taken into account in the assessment of whether a procedure

1726 See e.g. CJ (GC), case C-329/11 *Achughbabian* (2011), para 45, and, in regard to Dublin transferees, CJ, case C-60/16 *Amayry* (2017), paras 30-31, 37. See also Dušková (2017), 26. Cf. CJ (GC), case C-601/15 PPU *J.N.* (2016), paras 76-78, where the court invoked both the requirements of effectiveness and Article 5(1)(f) of the ECHR in conjunction with Article 6 of the EU Charter.

1727 CJ, case C-146/14 PPU *Mahdi* (2014), para 83.

1728 CJ, case C-60/16 *Amayry* (2017), paras 41-42, 45-47. For more see this Chapter, Title V.

is carried out sufficiently diligently, i.e. a 'failure to act on the part of the authorities of the Member States concerned', any contribution of a person concerned to the duration of a procedure, and the period of detention hitherto, in particular when it exceeds the time-limits provided for in law.[1729] By analogy, those factors may be found to be applicable to the due diligence required in asylum-related proceedings.

As under the ECtHR's jurisprudence, pursuant to Article 15(4) of the Return Directive 'a reasonable prospect of removal' is expected in order to justify detention.[1730] The CJ was asked to clarify this notion in the case of *Kadzoev*, where the foreigner presented himself to the Bulgarian authorities under two different names. The Russian Federation did not confirm the foreigner's nationality and none of the contacted third countries agreed to receive him, either. Finally, the Supreme Administrative Court concluded that it was not possible to establish his identity and nationality, so he must be considered a stateless person. Despite that and even though the time-limits applicable to detention provided for in the Return Directive had been already exceeded, the foreigner continued to be deprived of liberty. In those circumstances, the Luxembourg Court stated that when the maximum duration of detention permissible under the Return Directive had been reached, the question of whether there is a 'reasonable prospect of removal' is immaterial. The person concerned must be released immediately.[1731] Moreover, it is necessary that 'a real prospect exists that the removal can be carried out successfully' and such a prospect does not exist 'where it appears unlikely that the person concerned will be admitted to a third country'.[1732] National authorities deciding on detention should assess this prospect having in mind the periods of permissible detention provided for in Article 15(5) and (6) of the Return Directive (notably 6 and 18 months).[1733]

1729 CJ (GC), case C-237/15 PPU *Lanigan* (2015), paras 57-60.

1730 Under the Return Directive, the 'reasonable prospect of removal' is required, while the ECtHR most often uses the phrase 'realistic prospect of removal'. However, AG Mazák equated those expressions in his view delivered on 10 November 2009 in case C-357/09 PPU *Kadzoev,* EU:C:2009:691, para 95.

1731 CJ (GC), case C-357/09 PPU *Kadzoev* (2009), para 60.

1732 Ibid., paras 65-66. See also view of AG Mazák delivered on 10 November 2009 in case C-357/09 PPU *Kadzoev,* EU:C:2009:691, para 95, where he explained that 'the existence of an abstract or theoretical possibility of removal, without any clear information on its timetabling or probability, cannot suffice in that regard'.

1733 CJ (GC), case C-357/09 PPU *Kadzoev* (2009), paras 65-66. See also European Commission (2017), 144, pointing out that time-limits under national law are more relevant in this assessment as they can be lower than the eighteen-month period provided for in the Return Directive.

Despite the fact that the CJ reaffirms the requirements of due diligence and reasonable prospect of removal in the *Kadzoev* judgment, it does not refer, regrettably[1734], to the respective ECtHR case-law.[1735] In the literature, some authors highlight the convergence of the views expressed by the two European asylum courts in this regard,[1736] but others indicate that the ruling in the case of *Kadzoev* is at odds with the Strasbourg Court's jurisprudence. The Luxembourg Court is reproached mainly for reading the requirement of 'reasonable prospect of removal' together with the provisions of the Return Directive concerning the permissible duration of detention.[1737] The connection made by the CJ was considered—exaggeratedly—to constitute a 'blanket permission to continue detention as long as it does not exceed eighteen months' and as such to be inconsistent with the ECtHR's case-law.[1738] The court's judgment in this regard can be distinguished from the view of the AG Mazák, who suggested that the assessment of the prospect of removal should be made with regard to 'a reasonable period' of detention.[1739] In fact, the ECtHR does reiterate that 'the length of the detention should not exceed that reasonably required for the purpose pursued'.[1740] However, it must be borne in mind that the Strasbourg Court has occasionally accepted as reasonable a duration of deprivation of liberty exceeding 18 months.[1741] National authorities may be inclined to do the same. Thus, referring to 'the reasonable period' in the assessment of a prospect of removal may also not be a sufficient safeguard against a protracted detention. Despite the doubts arising from the *Kadzoev* judgment, the

1734 See also de Witte (2011), 32. Cf. Krommendijk (2015), 829, stating that the ECtHR's case-law was considered by the CJ in the *Kadzoev* case, but not quoted.

1735 Cf. view of AG Mazák delivered on 10 November 2009 in case C-357/09 PPU *Kadzoev*, EU:C:2009:691, para 52, referring in fn 17 to ECtHR's cases: *Chahal v. the United Kingdom*, no. 22414/93 (1996, GC), and *Mikolenko v. Estonia*, no. 10664/05 (2009). See also Mincheva (2010), 366.

1736 See Mitsilegas (2016), 41, referring to the ECtHR's case of *Amie and Others v. Bulgaria*, no. 58149/08 (2013). See also Mananashvili (2016), 748.

1737 See e.g. Majcher and de Senarclens (2014), 8–9; Wilsher (2014), 146; Basilien-Gainche (2015), 115–116.

1738 Majcher and de Senarclens (2014), 9. Cf. Mananashvili (2016), 752–753, stating that the prognosis of prospect of removal should be made with regard to a six-month period when the success of a removal depends on the due diligence of authorities, and with regard to an eighteen-month period—when a foreigner does not cooperate or a country of origin does not provide him with the needed documentation.

1739 View of AG Mazák delivered on 10 November 2009 in case C-357/09 PPU *Kadzoev*, EU:C:2009:691, paras 95, 97, 99.

1740 See e.g. ECtHR, *Haghilo v. Cyprus*, no. 47920/12 (2019), §203. See also this Chapter, Title V.

1741 See e.g. ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §§114-123.

Luxembourg Court did not decide to clarify this issue in the case of *Mahdi*, where it only repeated its previous findings.[1742]

A reasonable prospect of removal was also not referred to when the CJ considered whether detention ordered pursuant to the Return Directive could continue after a detainee had applied for asylum. In this regard, the court reiterates that when an asylum seeker is authorized under the law to remain on the territory of the Member State, he cannot be detained pursuant to the Return Directive.[1743] Pre-removal detention governed by the Return Directive and the deprivation of liberty of asylum seekers fall under different legal rules.[1744] Therefore, in the case of *VL* the Luxembourg Court concluded that the detention of the concerned third-country national, who stated his intention to apply for international protection before the court as it was about to decide on depriving him liberty under the Return Directive,[1745] could be ordered only pursuant to the secondary asylum law.[1746] Even when a foreigner applies for asylum in detention that has already been ruled on and effected pursuant to the Return Directive, the deprivation of liberty can continue only in accordance with the Reception Directive.[1747] However, as explained in the case of *Arslan*, that 'does not mean that the return procedure is thereby definitively terminated, as it may continue if the application for asylum is rejected'.[1748]

In the case of *J.N.*, concerning a foreigner who applied for asylum after being placed in a detention centre, the Luxembourg Court criticized the national practice that all return decisions lapsed with the initiation of asylum

1742 CJ, case C-146/14 PPU *Mahdi* (2014), paras 59-60.

1743 See e.g. CJ, case C-534/11 *Arslan* (2013), paras 48-49; CJ (GC), case C-181/16 *Gnandi* (2018), paras 45, 62; CJ, case C-269/18 PPU *C and J and S*, order (2018), paras 51-55. See also opinion of AG Mengozzi delivered on 15 June 2017 in case C-181/16 *Gnandi*, EU:C:2017:467, para 55, and CJ, case C-36/20 PPU *VL* (2020), para 96.

1744 CJ (GC), case C-357/09 PPU *Kadzoev* (2009), para 45; CJ, case C-534/11 *Arslan* (2013), para 52. See also CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 206-213.

1745 The CJ decided that this court was the 'other authority' within the meaning of the second subparagraph of Article 6(1) of the 2013 Procedures Directive, thus the one that is likely to receive applications for international protection, but it is not competent for their registration under national law [CJ, case C-36/20 PPU *VL* (2020), paras 52-68].

1746 CJ, case C-36/20 PPU *VL* (2020), paras 98-99.

1747 See e.g. CJ (GC), case C-357/09 PPU *Kadzoev* (2009), para 46; CJ, case C-534/11 *Arslan* (2013), paras 57-59.

1748 CJ, case C-534/11 *Arslan* (2013), para 60. See also view of AG Sharpston delivered on 26 January 2016 in case C-601/15 PPU *J.N.*, EU:C:2016:85, para 122, where she noticed the analogy between this reasoning and the one given in ECtHR, *Nabil and Others v. Hungary*, no. 62116/12 (2015).

proceedings. It pointed out that such a practice is against the requirements of effectiveness and a duty of sincere cooperation of the Member States.[1749] It also relied on the above-mentioned ECtHR case of *Nabil and Others v. Hungary*.[1750] The CJ recalled that under Article 5(1)(f) of the ECHR, expulsion proceedings must be in progress and have to be carried out diligently and that the Strasbourg Court did not exclude detaining a foreigner in respect of whom a return decision was issued before he applied for international protection. Such deprivation of liberty may still be 'with a view to deportation' because the refusal of international protection 'may open the way to the enforcement of removal orders that have already been made'.[1751] Consequently, a procedure opened under the Return Directive

> must be resumed at the stage at which it was interrupted, as soon as the application for international protection which interrupted it has been rejected at first instance and, accordingly, action under that procedure is still 'being taken' for the purposes of the second limb of Article 5(1)(f) ECHR.[1752]

Peers concluded that those findings of the CJ result in an ambiguous status of an asylum seeker: he is simultaneously allowed to stay in the Member State because his asylum application is being considered and he is also subject to a return decision that is only temporarily suspended. Thus, after claiming asylum, an expulsion order still justifies, at least partially, the asylum seeker's detention, but now it must be effected in compliance with the asylum law, not the Return Directive.[1753]

In the following judgments, the Luxembourg Court explained that an asylum seeker cannot be detained with a view to his removal under the Return Directive, if he is authorized to remain on a territory of a Member State during

1749 CJ (GC), case C-601/15 PPU *J.N.* (2016), paras 75-76.

1750 ECtHR, *Nabil and Others v. Hungary*, no. 62116/12 (2015). The CJ was encouraged to mention this judgment by the referring court [see CJ (GC), case C-601/15 PPU *J.N.* (2016), para 36]. However, see view of AG Sharpston delivered on 26 January 2016 in case C-601/15 PPU *J.N.*, EU:C:2016:85, paras 61-63, where she pointed out that Article 5(1)(f) of the ECHR was not applicable in the case of *J.N.* as the foreigner was not detained to prevent his unauthorized entry nor were any return proceedings in progress after his application for asylum had been lodged. In the case of *Nabil and Others v. Hungary* the removal was suspended pending asylum proceedings, while in the case of *J.N.* the return decision lapsed with the initiation of those proceedings. Thus, as Monina noticed, the cases were hardly comparable [Monina (2018), 171].

1751 CJ (GC), case C-601/15 PPU *J.N.* (2016), paras 77-79. See also, critically, Matevžič (2016).

1752 CJ (GC), case C-601/15 PPU *J.N.* (2016), para 80.

1753 See Peers (2016).

the period prescribed for bringing an appeal and the appeal asylum proceedings themselves,[1754] including within the subsequent asylum procedure.[1755]

To sum up, the two European asylum courts' approaches to pre-removal detention seems to tend toward one another, at least in general terms. Both courts highlight the requirements of due diligence[1756] and realistic prospect of removal. They also state that detention can continue despite return proceedings having been temporarily stayed, even when the suspension results from seeking international protection.

However, under EU law additional grounds for pre-removal detention are established. Pursuant to Article 15(1) of the Return Directive, a foreigner may be detained in order to prepare the return and/or carry out the removal process, in particular when there is a risk of absconding or a third-country national concerned avoids or hampers the preparation of return or the removal process. Under Article 15(6), the duration of detention can be extended only when a removal operation is likely to last longer due to a lack of cooperation by a foreigner concerned or delays in obtaining the necessary documentation from third countries. Moreover, when a foreigner applies for asylum in detention ordered pursuant to the Return Directive, his deprivation of liberty can continue under point (d) of the first subparagraph of Article 8(3) of the 2013 Reception Directive when the application for international protection was made merely in order to delay or frustrate the enforcement of the return decision.[1757] Furthermore, detention under Article 28(2) of the Dublin III Regulation must be justified by 'a significant risk of absconding'.

In the literature it is often stressed that those grounds for detention are imprecise and unclear and, in consequence, are diversely interpreted on a national level.[1758] The Return Directive is also contested for the wording of Article 15(1), which may imply that grounds other than the risk of absconding

1754 CJ (GC), case C-181/16 *Gnandi* (2018), paras 45, 62; CJ, case C-269/18 PPU *C and J and S*, order (2018), paras 51-55; CJ, case C-36/20 PPU *VL* (2020), para 96. For more on asylum appeal proceedings, see Chapter 6.

1755 CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 212-213.

1756 See e.g. ECtHR, *J.N. v. the United Kingdom*, no. 37289/12 (2016), §82, where the court pointed out that the CJ (in the cases of *Kadzoev* and *J.N.*) 'has made similar points' on due diligence as the ECtHR. See also ECtHR, *Auad v. Bulgaria*, no. 46390/10 (2011), §128; ECtHR, *Amie and Others v. Bulgaria*, no. 58149/08 (2013), §72.

1757 Cf. De Bruycker (ed.), Bloomfield, Tsourdi, Pétin (2015), 53, who indicated that this ground cannot be a sole reason for detention, it must be raised in relation to the grounds (a-c) specified in Article 8(3) to be compatible with the ECHR. Conversely, Monina (2018), 173.

1758 See e.g. in regard to the notion of 'risk of absconding', Majcher (2013), 25; Basilien-Ganache (2015), 112; Lutz (2016), 680; Vavoula (2019), 1063-1064. In regard to 'avoiding or hampering the preparation of return or the removal process', see Wilsher (2011), 193; Majcher and de Senarclens (2014), 8; Mananashvili (2016), 745. In regard to Article 15(6)

and avoiding or hampering of a removal, can be inscribed in national law.[1759] Thus, intelligible and thorough guidance in this regard from the Strasbourg and Luxembourg Courts seems to be indispensable.

Meanwhile, as already explained, under the ECHR, immigration detention need not be 'reasonably considered necessary',[1760] for example to prevent committing an offence, fleeing or evading a removal. However, the notions of 'lack of cooperation', 'evading a return operation' and 'risk of absconding' do appear in the ECtHR's case-law, albeit incidentally, either through the lawfulness criterion or the requirements of due diligence and realistic prospect of removal. While the CJ is more fit to interpret the above-mentioned grounds of detention, as they are provided for explicitly in the secondary EU law, its jurisprudence in this regard hitherto disappoints. Some of the respective provisions have not been interpreted by the court yet. In regard to those that have been considered, the answers of the court are insufficient.[1761] Thus, the guidelines of both courts on how to understand the notions of 'lack of cooperation', 'avoiding or hampering the preparation of return or the removal process' (here referred to as 'evading a removal') or 'risk of absconding' are in fact scarce.

3.1 Lack of Cooperation and Evading Removal

On the one hand, as already has been shown, the foreigner's conduct may be an important factor in the ECtHR's assessment of whether expulsion or extradition proceedings were prosecuted diligently. The court maintained that states 'cannot be held responsible for the delays to which the applicant's conduct gave rise. The latter cannot validly complain of a situation which he largely created'.[1762] In the case of *Agnissan v. Denmark*, where the rejected asylum seeker had given a false identity and nationality to the domestic authorities, the Strasbourg Court found his pre-removal detention justified. The court emphasized that

of the Return Directive, see e.g. Basilien-Ganache (2015), 113-114. In regard to point (d) of the first subparagraph of Article 8(3) of the 2013 Reception Directive, see e.g. Wilsher (2014), 144; De Bruycker (ed.), Bloomfield, Tsourdi, Pétin (2015), 53.

1759 As the list of those grounds is preceded with the expression 'in particular'. For the critique, see e.g. Cornelisse (2010), 270; Baldaccini (2010), 130; Majcher (2013), 25-26; Basilien-Gainche (2015), 111.

1760 See e.g. ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §112. See more this Chapter, Title III.

1761 See also Basilien-Gainche (2015), 114, stating: 'As the Court offers insufficient guidance on the grounds for deciding and extending pre-removal detention, its duration can last far beyond what is reasonable and necessary to proceed with the TCN's return; meanwhile the limitations the CJEU established are rather too flexible'.

1762 ECtHR, *Kolompar v. Belgium*, no. 11613/85 (1992), §42. See more this Chapter and Title, point 3.

> (i)f an alien against whom action is taken with a view to deportation proves unwilling to co-operate in procuring information about his or her identity or in general fails to attend scheduled interviews, in the Court's opinion it may be considered appropriate to detain such an alien for a reasonable time in order to ensure his or her participation at scheduled interviews with the police or with other authorities, notably since such arrangements usually require preparation and/or summoning of other people for example interpreters, representatives at embassies or personnel trained to perform language tests.[1763]

Thus, administrative convenience in the face of the lack of cooperation on the foreigner's part prevailed in this case over the right to liberty. However, it must be noted that the foreigner's lack of cooperation does not absolve domestic authorities from acting diligently.[1764]

On the other hand, when a foreigner is not cooperating in obtaining a travel document that is needed to remove him, national authorities should consider whether there is a realistic prospect of removal. In the case of *Louled Massoud v. Malta,* the domestic authorities blamed the rejected asylum seeker for his protracted detention as he had been unwilling to cooperate. However, the ECtHR stated that in those circumstances 'it must have become clear quite early on that the attempts to repatriate him were bound to fail as the applicant had refused to cooperate and/or the Algerian authorities had not been prepared to issue him documents'. The deportation was no longer feasible, so the deprivation of liberty ceased to be justified.[1765] Similar conclusions were reached in the case of *Mikolenko v. Estonia*.[1766] In the case of *Abdi v. the United Kingdom,* the ECtHR explained that the court did not suggest in the *Mikolenko* case that 'the applicant's refusal to co-operate with his deportation was irrelevant; however, in view of the extraordinary length of his detention and the fact that his removal had for all practical purposes become virtually impossible, it accepted that his continued detention was no longer being effected with a view to his deportation'.[1767] Moreover, in the case of *J.N. v. the United Kingdom,* the Strasbourg Court stressed that the applicant's repeated refusal to sign a disclaimer consenting to his return that had been required by the Iranian

1763 ECtHR, *Agnissan v. Denmark,* no. 39964/98, dec. (2001). See also ECtHR, *Bencheref v. Sweden,* no. 9602/15, dec. (2017), §§38-40.

1764 See e.g. ECtHR, *Djalti v. Bulgaria,* no. 31206/05 (2013), §§53-54; ECtHR, *J.N. v. the United Kingdom,* no. 37289/12 (2016), §§106-107.

1765 ECtHR, *Louled Massoud v. Malta,* no. 24340/08 (2010), §§67-69.

1766 ECtHR, *Mikolenko v. Estonia,* no. 10664/05 (2009), §64-68.

1767 ECtHR, *Abdi v. the United Kingdom,* no. 27770/08 (2013), §74

Embassy to issue a travel document could not be 'a "trump card" capable of justifying any period of detention, however long'.[1768]

The notions of 'evading' or 'frustrating' a removal were approached by the ECtHR mostly through the lawfulness requirement.[1769] In the case of *Rusu v. Austria*, the Strasbourg Court found—contrary to the national court—that the illegal entry to Austria and lack of means of subsistence were insufficient reasons to conclude that the foreigner would try to evade the expulsion proceedings.[1770] In the case of *Jusic v. Switzerland*, the rejected asylum seekers were deprived of liberty under the domestic provision that required real evidence that a foreigner intended to evade a return. The national court ordered detention due to the fact that the applicant had repeatedly informed authorities that he did not intend to return to his country of origin and because his wife had refused to sign a document needed for the removal. The ECtHR found those reasons insufficient to conclude that the applicant had an intention to evade the removal. The court took into account facts overlooked by the domestic authorities, notably that the foreigner had provided his particulars already when he had arrived in Switzerland, had submitted his identity card, arrived at all appointments with the national authorities and had dependent children and a wife suffering from a mental disability. Thus, there was no 'real evidence' that he would evade the enforcement of the expulsion order. The court emphasized that exceptions to the right to a liberty must be interpreted restrictively. In particular, the asylum seeker's statement that he did not want to leave the hosting country could not be equated with an intention to evade the removal.[1771]

Under the secondary EU law, it is clear that the conduct of a foreigner has a bearing on ordering or extending his detention.[1772] In the case of *El Dridi* the Luxembourg Court has explicitly stated that

> (i)t 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.[1773]

1768 ECtHR, *J.N. v. the United Kingdom*, no. 37289/12 (2016), §106.

1769 See this Chapter, Title II.

1770 ECtHR, *Rusu v. Austria*, no. 34082/02 (2008), §§54-59.

1771 ECtHR, *Jusic v. Switzerland*, no. 4691/06 (2010), §§76-83. See also ECtHR, *Singh v. the Czech Republic*, no. 60538/00 (2005), §§64-65; ECtHR, *Nabil and Others v. Hungary*, no. 62116/12 (2015), §§39-42.

1772 See Article 15(1)(b) and (6) of the Return Directive, point (d) of the first subparagraph of Article 8(3) of the 2013 Reception Directive.

1773 CJ, case C-61/11 PPU *El Dridi* (2011), para 39. See also CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), para 269.

Moreover, in the case of *Lanigan*, which was referred to in the *Amayry* ruling, the court directly linked the due diligence test with the detainee's conduct that affects the duration of the procedure that is intertwined with their detention.[1774]

In the *Mahdi* case, the CJ took a closer look at the notion of 'lack of cooperation' provided for in Article 15(6) of the Return Directive. The case concerned the prolongation of detention with respect to the Sudanese national whose nationality was confirmed by the embassy but to whom a travel document was not issued due to the foreigner's refusal to go back to Sudan voluntarily. The Luxembourg Court explained that national authorities deciding on the extension of detention must firstly analyse whether the Member State has sought and is still actively seeking to secure the issue of identity documents for the foreigner, thus, whether all reasonable efforts were made to enforce a return order.[1775] Thus, it seems that the CJ–like the ECtHR–maintains that the lack of cooperation on the part of a foreigner does not absolve domestic authorities from acting diligently.[1776] Secondly, it must be established that a foreigner has failed to cooperate 'during the initial period of detention (…) with the competent authorities as regards implementation of the removal operation'. Any other lack of cooperation is immaterial. Lastly, it must be assessed whether the removal operation has lasted longer than anticipated because of this conduct. The court emphasized that

> (i)f the removal of the third-country national is taking, or has taken, longer than anticipated for another reason, no causal link may be established between the latter's conduct and the duration of the operation in question and therefore no lack of cooperation on his part can be established.[1777]

The court stated that it is for the referring court to assess in detail all factual matters relating to the initial detention period in question. Consequently, the CJ did not settle whether a refusal to voluntarily return because of which there is no travel document enabling a removal is an example of a lack of cooperation that entitles domestic authorities to prolong a pre-removal detention.[1778]

1774 CJ (GC), case C-237/15 PPU *Lanigan* (2015), paras 58-60, and CJ, case C-60/16 *Amayry* (2017), paras 44-45. For more see this Chapter and Title, point 3.

1775 CJ, case C-146/14 PPU *Mahdi* (2014), para 83.

1776 See also view of AG Szpunar delivered on 14 May 2014 in case C-146/14 PPU *Mahdi*, EU:C:2014:1936, paras 88-90, referring the ECtHR's judgment in the case of *Auad v. Bulgaria*, no. 46390/10 (2011), and Mananashvili (2016), 754.

1777 CJ, case C-146/14 PPU *Mahdi* (2014), para 82.

1778 For the criticism of this avoidance, see Vavoula (2014); Basilien-Ganache (2015), 114. Cf. Moraru and Renaudiere (2016) 'European Synthesis Report…', 41.

If it does, it may be at odds with the above-mentioned ECtHR judgment rendered in the case of *Jusic v. Switzerland*, where the foreigner's declaration that he had not wanted to return to his country of origin was considered an insufficient ground for the conclusion that he intended to evade the removal. Moreover, in the *Mahdi* ruling, the Luxembourg Court did not analyse whether in the circumstances of the case the reasonable prospect of removal existed. Meanwhile, as was shown above, under the jurisprudence of the Strasbourg Court a refusal to cooperate in obtaining a travel document may render a removal unrealistic.[1779]

Pursuant to the secondary EU law, detention may be also justified when a foreigner avoids or hampers the preparation of return or the removal process, as specified in Article 15(1) of the Return Directive, or when he applies for asylum in order to delay or frustrate the enforcement of the return decision, as provided for in point (d) of the first subparagraph of Article 8(3) of the 2013 Reception Directive. Regrettably, neither of those provisions has been interpreted in detail by the CJ yet.[1780] However, the court has given some guidance in this regard in the case of *Arslan*. Firstly, the court maintained that the 2003 Reception Directive and 2005 Procedures Directive, applicable at the time, did not provide for harmonized grounds for the detention of asylum seekers. Those needed to be established under domestic law. Next, it pointed out that when a foreigner had been initially detained pursuant to the Return Directive because of concerns that he would abscond and frustrate his removal, and subsequently had applied for asylum 'with the sole intention of delaying or even jeopardising enforcement of the return decision taken against him, such circumstances can indeed justify that national being kept in detention even after an application for asylum has been made'. Such deprivation of liberty would be in line with Article 18(1) of the 2005 Procedures Directive, as it would be based on the individual assessment of a particular case, and with Article 7(3) of the 2003 Reception Directive, as in those circumstances the detention seems to be 'objectively necessary to prevent the person concerned from permanently evading his return'.[1781] The CJ also made the important stipulation that

1779 See ECtHR, *Mikolenko v. Estonia*, no. 10664/05 (2009), §64-68, which concerned similar circumstances to the *Mahdi* case (the Russian Embassy declined to issue a travel document due to the foreigner's refusal to apply for it). See also ECtHR, *Louled Massoud v. Malta*, no. 24340/08 (2010), §§67-69.

1780 Cf. CJ, case C-36/20 PPU *VL* (2020), paras 109-111. For some guidance on point (d) of the first subparagraph of Article 8(3) of the 2013 Reception Directive, see also view of AG Sharpston delivered on 26 January 2016 in case C-601/15 PPU *J.N.*, EU:C:2016:85, paras 104-105.

1781 CJ, case C-534/11 *Arslan* (2013), paras 57-59.

> the mere fact that an asylum seeker, at the time of the making of his application, is the subject of a return decision and is being detained on the basis of Article 15 of Directive 2008/115 does not allow it to be presumed, without an assessment on a case-by-case basis of all the relevant circumstances, that he has made that application solely to delay or jeopardise the enforcement of the return decision and that it is objectively necessary and proportionate to maintain detention.[1782]

Thus, automatic detention of all foreigners who applied for asylum after being deprived of freedom is not permissible. A case-by-case examination of their intentions is required. Those findings seem to prevail in regard to the detention ordered under point (d) of the first subparagraph of Article 8(3) of the 2013 Reception Directive.

The jurisprudence of the two European asylum courts concerning the notions of 'lack of cooperation' and 'evading a removal' is convergent in some aspects, notably in regard to the impact of the foreigner's conduct on the assessment of the authorities' due diligence. Other than that, it is hardly comparable, as the courts concentrate on different aspects of those notions. However, it may be concluded that the case-law of the CJ and the ECtHR in this regard is complementary and taken together it may constitute a standard that sufficiently protects foreigners against arbitrary detention. While the Luxembourg Court limits the notion of a 'lack of cooperation' by specifying that it must be established only during the initial period of detention, in regard to the competent authorities and as regards implementation of the removal operation, the Strasbourg Court adds that it may lead to the conclusion that there is no realistic prospect of removal, thus to the conclusion that the detention is unjustified. Importantly for asylum seekers, as explained by the CJ, applying for international protection in detention does not automatically mean that the applicant is intending to frustrate the removal and consequently that the deprivation of liberty must continue. Meanwhile, the ECtHR emphasized that the asylum seeker's statement that he did not want to return to a country of origin, being in fact the crux of seeking asylum, could not be equated with an intention to evade the enforcement of a removal.

3.2 Risk of Absconding

The ECtHR directly and resolutely states that from the perspective of Article 5(1)(f) of the ECHR the risk of absconding is immaterial.[1783] This is a

1782 Ibid., para 62.

1783 See e.g. ECtHR, *Nasrulloyev v. Russia*, no. 656/06 (2007), §69.

straightforward consequence of the lack of a necessity test in regard to immigration detention.[1784] However, the risk of absconding is occasionally discussed by the Strasbourg Court, in particular when it justifies detention under a national law.[1785] Thus, some guidelines in this regard may be inferred from its case-law.

The Strasbourg Court's analysis of the risk of absconding is dependent on the very circumstances of a case, including the wording of a domestic law requiring such a risk to justify immigration detention. In the case of *O.M. v. Hungary* the court reproached national authorities for relying on the ground of the risk of absconding but providing only scarce reasoning to show that the asylum seeker was actually a flight risk.[1786] In the case of *Popov v. France,* the court took into account that the compulsory residence in a hotel that had been initially ordered in regard to the foreigners had not caused any problems. Despite this, the family with two minor children was subsequently detained in a secure centre. The court concluded that there had been no indication suggesting that the family would abscond.[1787] In the case of *Louled Massoud v. Malta,* the court stated that it is 'hard to conceive that in a small island like Malta, where escape by sea without endangering one's life is unlikely and fleeing by air is subject to strict control, the authorities could not have had at their disposal measures other than the applicant's protracted detention'.[1788] This may suggest that the practical difficulties in fleeing that the detainee may encounter are an important factor in the assessment of whether a risk of absconding really exists. Conversely, in the case of *Aboya Boa Jean v. Malta*, the court concluded that the assumption that the foreigner may abscond had been justified taking into account his clear intention to travel to Italy.[1789]

While the ECtHR's case-law on immigration detention in regard to a risk of absconding is rather selective and casuistic, some more specific guidelines on how to understand this notion may be found in its jurisprudence regarding other exceptions to the right to liberty. For instance, in the case of *Segeda v. Russia,* concerning pre-trial detention, the court took a closer look at the criteria determining that risk. The ECtHR recalled that 'the need to continue the deprivation of liberty cannot be assessed from a purely abstract point of

1784 See this Chapter, Title III.

1785 Cf. ECtHR, *Mefaalani v. Cyprus*, nos. 3473/11 and 75381/11 (2016), §83, where the court declined to examine whether the risk of absconding had existed that had been an obligation of the national authorities.

1786 ECtHR, *O.M. v. Hungary*, no. 9912/15 (2016), §52.

1787 ECtHR, *Popov v. France,* nos. 39472/07 and 39474/07 (2012), §145.

1788 ECtHR, *Louled Massoud v. Malta,* no. 24340/08 (2010), §68.

1789 ECtHR, *Aboya Boa Jean v. Malta*, no. 62676/16 (2019), §63.

view, taking into consideration only the gravity of the offence'. Other factors have to be examined, for instance the detainee's state of health, the permanency of his place of residence, the existence of actual attempts to escape, the strength of family ties, the previous criminal record etc.[1790]

The risk of absconding is a ground for detention under the Return Directive, the Dublin III Regulation and the 2013 Reception Directive.[1791] The first two of those instruments provide the definition of this notion as well. Risk of absconding exists when there are reasons in an individual case based on objective criteria defined by law to believe that a third-country national who is the subject of return or transfer procedures may abscond.[1792] Thus, both the Return Directive and Dublin III Regulation cede to the Member States the obligation to define when a risk of absconding occurs. In consequence, very diverse and controversial legislations and practice in this regard have been established on the domestic level.[1793]

Some guidance on what should be understood as a 'risk of absconding' as well as how it should be determined and regulated may be found in the CJ's jurisprudence. The risk of absconding must be examined individually.[1794] Moreover, in the Dublin case of *Al Chodor and Others*, the Luxembourg Court has resolved that the objective criteria to believe that a foreigner may abscond must be established in a binding provision of general application.[1795] Taking into account the resemblance of the definitions of the risk of absconding under the Dublin III Regulation and the Return Directive[1796] it must be concluded that this obligation is applicable to the risk of absconding justifying the detention pursuant to both of those acts.

In the case of *Mahdi*, the CJ analysed the national legislation where a risk of absconding was directly linked with the lack of an identity document. The court concluded that the failure to present an identity document may be taken

1790 ECtHR, *Segeda v. Russia*, no. 41545/06 (2013), §§63, 65.

1791 See Article 15(1)(a) of the Return Directive, Article 28(2) of the Dublin III Regulation and point (b) of the first subparagraph of Article 8(3) of the 2013 Reception Directive.

1792 Article 3(7) of the Return Directive and Article 2(n) of the Dublin III Regulation.

1793 See e.g. Basilien-Ganache (2015), 112; Lutz (2016), 680; Vavoula (2019), 1063-1064. See also ECRE (2015), 4. For a detailed overview of the national practices, see Moraru and Renaudiere (2016) 'European Synthesis Report…', 11-18.

1794 CJ, case C-146/14 PPU *Mahdi* (2014), para 70; CJ, case C-528/15 *Al Chodor and Others* (2017), para 34.

1795 CJ, case C-528/15 *Al Chodor and Others* (2017), paras 42-45. For more see this Chapter, Title II.

1796 The Dublin III Regulation repeats the definition contained in the Return Directive, in an adjusted manner, with the addition that the risk of absconding may concern also a stateless person.

into account in the assessment of whether the period of detention should be extended but it cannot be the sole ground for the extension. Under Article 15(6) of the Return Directive, national authorities deciding on the prolongation of detention must examine, firstly, whether a less coercive measure may be applied effectively and next, if the answer is negative, whether the risk of absconding continues to exist. Only then may the lack of identity documents be taken into consideration.[1797] Thus, the court has affirmed the existence of the connection between the lack of identity documents and the risk of absconding. Moreover, in the case of *Zh. and O.*, the court found that the concept of 'risk of absconding' is distinct from that of 'risk to public policy' provided for in Article 7(4) of the Return Directive.[1798]

The notion of 'absconding' was considered in the case of *Jawo*. The case concerned the interpretation of Article 29(2) of the Dublin III Regulation, which entitles the Member States to extend the time-limit for enforcing a transfer when the person concerned absconds. The CJ's general findings concerning the concept of absconding may shed some light on the interpretation of the provisions that constitute the legal basis for detention of transferees and returnees.[1799] As none of the provisions of the Dublin III Regulation explains the concept of 'absconding', in the *Jawo* ruling, the Luxembourg Court referred to the ordinary meaning of the term 'absconds'. The court found that it

> implies the intent of the person concerned to escape from someone or to evade something, namely, in the present context, the reach of the competent authorities and, accordingly, his transfer, that that provision is, in principle, applicable only where that person deliberately evades the reach of those authorities[1800].

The court emphasized that the concept of a 'risk of absconding' as defined in Article 2(n) refers to 'the belief that the person concerned, by absconding, 'withdraws from' the transfer procedure'.[1801] With reference to the circumstances of the *Jawo* case, where the asylum seeker had left the accommodation allocated to him without giving any notice to the competent domestic

1797 CJ, case C-146/14 PPU *Mahdi* (2014), paras 72-74. The findings of the court in this regard were considered 'crucially important' by Costello, who took into account the practice of the Member States that most often considered the risk of absconding in the light of the lack of identity documents [Costello (2015) *The Human Rights…*, 309]. Cf. Basilien-Gainche (2014); Moreno-Lax and Guild (2015), 525; Thym (2019), 191.

1798 CJ, case C-554/13 *Zh. and O.* (2015), para 56.

1799 See also den Heijer (2020), 539, 552.

1800 CJ (GC), case C-163/17 *Jawo* (2019), paras 54, 56.

1801 Ibid., para 56.

authorities, the CJ concluded that those authorities were 'entitled to assume that that person had the intention of evading their reach for the purpose of preventing his transfer'. Nevertheless, the court made two relevant stipulations. First, the asylum seeker must have been instructed that he should inform the authorities about his absence. Second, 'he must retain the possibility of demonstrating that he did not intend to evade the reach of those authorities', as it is possible that the foreigner had important reasons to neglect his duties.[1802] Thus, the Luxembourg Court made clear that there must be the intention to frustrate a removal to constitute 'absconding'; the mere fact of leaving the designated place of stay is not sufficient.[1803] Concurrently, it confirmed that the lines between grounds for detention specified in Article 15(1)(a) and (b) of the Return Directive are in fact blurred.

On the one hand, the guidelines that may be inferred from the CJ's jurisprudence in regard to the interpretation of the notion of a 'risk of absconding' are as yet scarce, in particular taking into account the diversity of interpretations on a domestic level. On the other hand, under the ECtHR's case-law the risk of absconding is immaterial from the perspective of Article 5(1)(f) of the ECHR. It is considered by the court only incidentally and on a case-by-case basis. As a result, the interpretation of this notion is mostly left to the discretion of the Member States, which in practice tend to apply it in a broad manner, disregarding that under the ECHR and EU Charter any limitations to the right to liberty should be interpreted narrowly.[1804]

4. Public Order and National Security

The reasons of public order or national security are not explicitly listed in Article 5(1) of the ECHR as permissible grounds for an arrest or detention. The Strasbourg Court clearly states that deprivation of liberty based solely on those reasons does not fit into Article 5(1)(f) of the ECHR—neither the first nor the second limb. In the case of *A. and Others v. the United Kingdom*, the court found that the detention of the suspected terrorists had not been 'with a view to deportation' because in their countries of origin there had been a real risk that they would be subject to ill-treatment contrary to Article 3 of the ECHR, so there had been no realistic prospect of their removal there. They were

1802 Ibid., paras 62, 65. See also den Heijer (2020), 553, claiming that the CJ reached here a 'workable compromise' between the protection against arbitrariness and the effective application of the Dublin Regulation.

1803 See also CJ, case C-60/16 *Amayry* (2017), para 31.

1804 See also Majcher and de Senarclens (2014), 5; ECRE (2015), 4; Vavoula (2019), 1064.

deprived of liberty solely due to security considerations. Thus, their detention did not fall under Article 5(1)(f) of the ECHR.[1805] The ECtHR stressed that

> sub-paragraphs (a) to (f) amount to an exhaustive list of exceptions and that only a narrow interpretation of these exceptions is compatible with the aims of Article 5. If detention does not fit within the confines of the sub-paragraphs as interpreted by the Court, it cannot be made to fit by an appeal to the need to balance the interests of the State against those of the detainee.[1806]

Accordingly, the Government's argument that it had been permissible under Article 5 of the ECHR to strike a balance between a person's right to liberty and the protection of population from terrorists was rejected.

In the case of *Al Husin v. Bosnia and Herzegovina,* the ECtHR analysed additionally whether detention of the asylum seeker based solely on security grounds could fit into other subparagraphs of Article 5(1) of the ECHR. Only subparagraph (c) was found to be relevant.[1807] The court recalled that this provision 'does not permit a policy of general prevention directed against a person or a category of persons who are perceived by the authorities, rightly or wrongly, as being dangerous or having propensity to unlawful acts. It does no more than afford the Contracting States a means of preventing offences which are concrete and specific as regards, in particular, the place and time of their commission and their victims.' Moreover, subparagraph (c) allows for an arrest or detention only in connection with criminal proceedings. Meanwhile, in the case of *Al Husin,* the Government did not invoke any particular offence that the asylum seeker had to be prevented from committing. Moreover, the expulsion proceedings were initiated only after he had been detained for more than two years. Thus, the asylum seeker's deprivation of liberty could be justified under neither subparagraph (c) nor (f).[1808]

1805 ECtHR (GC), *A. and Others v. the United Kingdom,* no. 3455/05 (2009), §§166-170. See also ECtHR, *Al Husin v. Bosnia and Herzegovina,* no. 3727/08 (2012), §64; ECtHR, *M.S. v. Belgium,* no. 50012/08 (2012), §155.

1806 ECtHR (GC), *A. and Others v. the United Kingdom,* no. 3455/05 (2009), §171. See also ECtHR, *Al Husin v. Bosnia and Herzegovina,* no. 3727/08 (2012), §64

1807 The provision enables 'the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so'. Occasionally, subparagraph (b) could be found relevant too, see e.g. ECtHR, *Ostendorf v. Germany,* no. 15598/08 (2013), §90-103. See also Peek and Tsourdi (2016), 1416.

1808 ECtHR, *Al Husin v. Bosnia and Herzegovina,* no. 3727/08 (2012), §65. Cf. dissenting opinion of judge Mijović, pointing out that the precedence should have been given in this case to subparagraph (c) not (f). See also ECtHR (GC), *A. and Others v. the United*

Both in the *A. and Others* and *Al Husin* cases the concerned foreigners were deprived of liberty solely on the grounds of public order or national security, and thus their detention could not be covered by Article 5(1)(f) of the ECHR. However, when security considerations are invoked by the national authorities as a reason to detain, but also expulsion proceedings are concurrently in progress or the foreigner is waiting for a formal authorization to enter a state, the ECtHR unreservedly applies subparagraph (f).[1809] Then, the fact that a foreigner is considered a threat to public order or national security may affect the court's assessment of the requirements arising from Article 5(1) of the ECHR.[1810] In the case of *K.G. v. Belgium,* the court took the security considerations into account while examining the due diligence of the national authorities. It pointed out that the applicant's case had required important deliberations in respect to national security and risks upon return to Sri Lanka; thus, the case had demanded a careful examination. The period of thirteen months of detention in those circumstances was not considered unreasonable.[1811]

While the reasons of public order or national security are not mentioned in Article 5(1)(f) of the ECHR, the 2013 Reception Directive explicitly entitles states to detain asylum seekers on this ground.[1812] In the case of J.N., the CJ was challenged with a preliminary question of whether such deprivation of liberty is compatible with Article 6 of the EU Charter and, consequently, Article 5(1)(f) of the ECHR. The concerned asylum seeker was detained under the national legislation transposing point (e) of the first subparagraph of Article 8(3) of the 2013 Reception Directive, during his fourth asylum proceedings, due to his previous numerous criminal activities.

The Luxembourg Court did not find that point (e) of the first subparagraph of Article 8(3) of the 2013 Reception Directive conflicted with Article 6 in conjunction with Article 52(1) of the EU Charter. The court held that a detention order based on security reasons 'genuinely meets an objective of general interest recognised by the European Union. Moreover, the protection of national security and public order also contributes to the protection of the rights and

Kingdom, no. 3455/05 (2009), §172, where the court highlighted that preventive detention without charge is 'incompatible with the fundamental right to liberty under Article 5 § 1, in the absence of a valid derogation under Article 15' of the ECHR.

1809 See e.g. ECtHR, *Ahmed v. Romania*, no. 34621/03 (2010), §§7, 29; ECtHR, *M. and Others v. Bulgaria*, no. 41416/08 (2011), §§11-13; 66-77; ECtHR, *M.S. v. Belgium*, no. 50012/08 (2012), §§151-153.

1810 E.g. the requirement of lawfulness, see ECtHR, *Ahmed v. Romania*, no. 34621/03 (2010), §33. For more on this requirement, see this Chapter, Title II.

1811 ECtHR, *K.G. v. Belgium,* no. 52548/15 (2018), §§87, 89.

1812 Point (e) of the first subparagraph of Article 8(3) of the 2013 Reception Directive. See also Article 7(3) of the 2003 Reception Directive.

freedoms of others. Article 6 of the Charter states in this regard that everyone has the right not only to liberty but also to security of person'.[1813] As regards the principle of proportionality, the CJ stressed that

> the detention of an applicant where the protection of national security or public order so requires is, by its very nature, an appropriate measure for protecting the public from the threat which the conduct of such a person represents and is thus suitable for attaining the objective pursued by point (e) of the first subparagraph of Article 8(3) of Directive 2013/33.[1814]

However, the CJ pointed out that any limitations to the right to liberty apply only when they are strictly necessary and the 2013 Reception Directive establishes a sufficient and 'strictly circumscribed framework' in which detention may be ordered. The rigorous circumscription of the states' powers to detain is also guaranteed by the CJ's strict reading of the concepts of 'national security' and 'public order'.[1815] The court concluded that 'the EU legislature struck a fair balance' between asylum seekers' right to liberty and the requirements relating to the protection of public order and national security.[1816]

Pursuant to the domestic jurisprudence applicable in the *J.N.* case, return decisions lapsed with the initiation of asylum proceedings. The Luxembourg Court pointed out that such a practice is unacceptable from the standpoint of the duty of sincere cooperation of the Member States, arising from Article 4(3) of the TEU, as well as being at odds with the requirements for effectiveness under the Return Directive. The court stressed that it is essential that 'a procedure opened under that directive, in the context of which a return decision, accompanied, as the case may be, by an entry ban, has been adopted, can be resumed at the stage at which it was interrupted, as soon as the application for international protection which interrupted it has been rejected at first instance'.[1817]

1813 CJ (GC), case C-601/15 PPU *J.N.* (2016), para 53.

1814 Ibid., para 55. See also Cornelisse (2017), 234, claiming that this passage is in direct contradiction with the ECtHR's judgment in the case of *A. and Others v. the United Kingdom*.

1815 CJ (GC), case C-601/15 PPU *J.N.* (2016), paras 56-67, and the case-law mentioned there. See also CJ (GC), case C-233/18 *Haqbin* (2019), paras 44, 52, where the court noticed that serious breaches of the rules of accommodation or seriously violent behaviour of an asylum seeker were 'capable of disrupting public order', thus, in those circumstances, he might be detained under point (e) of the first subparagraph of Article 8(3) of the 2013 Reception Directive. See also CJ, case C-18/19 *WM* (2020), para 46, where the CJ allowed for detention in prisons pending return proceedings due to public policy or public security (for more see this Chapter, Title VI).

1816 CJ (GC), case C-601/15 PPU *J.N.* (2016), paras 68, 70.

1817 Ibid., paras 75-76.

Only after making this conclusion did the court answer the question of the compatibility of point (e) of the first subparagraph of Article 8(3) of the 2013 Reception Directive with Article 5(1)(f) of the ECHR. Prompted by the referring court, the CJ briefly discussed the ECtHR's case of *Nabil and Others v. Hungary* and concluded that the fact that proceedings regarding an application for international protection are pending does not imply that the detention ceases to be 'with a view to deportation since an eventual rejection of that application may open the way to the enforcement of removal orders that have already been made'. Thus, when a procedure that has been opened under the Return Directive is resumed after the rejection of the asylum claim at first instance, 'action under that procedure is still 'being taken' for the purposes of the second limb of Article 5(1)(f) ECHR'. The court added that the detention under point (e) of the first subparagraph of Article 8(3) of the 2013 Reception Directive satisfies the requirements arising from the case-law of the Strasbourg Court in respect to Article 5(1) of the ECHR. The court maintained that 'the EU legislature, in adopting point (e) of the first subparagraph of Article 8(3) of Directive 2013/33, did not disregard the level of protection afforded by the second limb of Article 5(1)(f) of the ECHR'.[1818]

The Luxembourg Court addressed in the *J.N.* ruling only the desirable–from the perspective of the EU law–situation where return decisions do not lapse with the initiation of asylum proceedings. Thus, it did not answer fully the preliminary questions that relied on the circumstances of the case, i.e. the facts that the order to leave the EU issued in regard to *J.N.* had lapsed, that he had a right to remain in the Netherlands pending asylum proceedings and that no return proceedings were ongoing nor was a removal being prepared at the time of his detention. In those circumstances, it would be difficult to establish that the foreigner's detention was compatible with the second limb of Article 5(1)(f) of the ECHR.[1819] Taking into account the referring court's claim that under domestic law *J.N.* was lawfully resident in the Netherlands, the application of the first limb of Article 5(1)(f) of the ECHR in regard to his detention would also be questionable.[1820] Meanwhile, the ECtHR reiterates

1818 Ibid., paras 77-81. Cf. FRA (2017), 43-44, stating that it is difficult to fit the detention to protect national security or public order into any of the grounds set out in Article 5(1) of the ECHR other than expressed in subparagraph (c).

1819 See also view of AG Sharpston delivered on 26 January 2016 in case C-601/15 PPU *J.N.*, EU:C:2016:85, paras 61-63; Monina (2018), 171. For more on the second limb of Article 5(1)(f) of the ECHR, see this Chapter and Title, point 3.

1820 See also ECtHR, *K.G. v. Belgium*, no. 52548/15 (2018), §§78-80, where it was concluded that the situation of the long-term migrant who had unsuccessfully applied for asylum multiple times throughout the years he had spent in a hosting state (as had J.N. himself),

that deprivation of liberty based solely on public order or national security considerations does not fit into subparagraph (f). Therefore, it seems that referring to the desirable, not the factual, situation was the only way to find that point (e) of the first subparagraph of Article 8(3) of the 2013 Reception Directive was in compliance with Article 5(1)(f) of the ECHR in the specific circumstances of the *J.N.* case. Irrespective of the other reasons that prompted the CJ to decide that return decisions cannot lapse with the initiation of asylum proceedings, its struggle to find a way to interpret the secondary EU law in a manner that is in accordance with Article 5 of the ECHR[1821] shows that the Luxembourg Court is more regardful of the ECtHR's jurisprudence than it admits in the reasoning given in the *J.N.* judgment where it referred merely to the *Nabil and Others v. Hungary* and *Saadi v. the United Kingdom* cases.

However, it cannot be overlooked that in the *J.N.* case the CJ provides national courts with guidance only in a situation when a return decision had been issued before asylum proceedings were initiated. It does not answer the question of whether detention ordered on the grounds provided for in point (e) of the first subparagraph of Article 8(3) of the 2013 Reception Directive would be in compliance with the ECHR when return proceedings were not concluded or even initiated before the asylum proceedings. In fact, it is conceivable that it could be compatible with the first limb of Article 5(1)(f) of the ECHR but only if the detention were to be associated with the prevention of an unauthorized entry.[1822] Taking into consideration that point (e) of the first subparagraph of Article 8(3) of the 2013 Reception Directive is worded in a broad manner and that it is possible to interpret it inconsistently with the first

was not comparable—from the perspective of the first limb of Article 5(1)(f) of the ECHR—to the situation of asylum seekers that had asked for international protection at the border upon entry to a state. For more on the first limb of Article 5(1)(f) of the ECHR, see this Chapter and Title, point 1.

1821 In fact, it is clear from the observations submitted to the court that the governments and EU institutions struggled to fit the detention of J.N. into Article 5(1) of the ECHR as well. They tried to justify deprivation of liberty based on public order or national security considerations *inter alia* by referring to subparagraphs (b) or even (e) of this provision [see view of AG Sharpston delivered on 26 January 2016 in case C-601/15 PPU *J.N.*, EU:C:2016:85, paras 124–125].

1822 See also Peek and Tsourdi (2016), 1416, who noticed that to be compatible with Article 5(1)(f) of the ECHR point (e) of the first subparagraph of Article 8(3) of the 2013 Reception Directive must be invoked in a strict relation to point (c) of this provision. In fact, taking into account the ECtHR's case-law regarding the first limb of Article 5(1)(f) of the ECHR (see this Chapter and Title, point 1), it seems that points (a) and (b) could also be invoked next to the point (e). However, Peek and Tsourdi's view is in conflict with the CJ's jurisprudence stressing that each of the grounds of detention enumerated in Article 8(3) is self-standing [CJ (GC), case C-601/15 PPU *J.N.* (2016), para 59; CJ, case C-18/16 *K.* (2017), para 41].

limb of Article 5(1)(f) of the ECHR,[1823] it is regrettable that the CJ did not take a stand in this regard in the *J.N.* ruling.[1824]

Taking into account the significance that in the case of *J.N.* was accorded to the existence of a final return decision, it is interesting to look at this ruling from the perspective of the Return Directive. Under Article 15(1) of this act, security reasons are not explicitly provided for as grounds for detention. In the case of *Kadzoev,* the court stated outright that 'the possibility of detaining a person on grounds of public order and public safety cannot be based on Directive 2008/115'. The CJ stressed that the fact that a foreigner is not in possession of valid documents, that his conduct is aggressive and that he has no means of subsistence–the reasons for a continued detention invoked by the referring court–cannot constitute 'in itself' a ground for deprivation of liberty under this directive.[1825] Thus, pursuant to the Return Directive a foreigner cannot be detained solely for security reasons. It is arguable, though, that he may be deprived of liberty in order to prepare the return and/or carry out the removal process when public order and national security considerations exist.[1826] The CJ's insistence in the case of *J.N.* on finding a connection between the detention ordered for public order or national security reasons and the procedure continuously being open under the Return Directive may lead to a similar conclusion: pursuant to the 2013 Reception Directive an asylum seeker cannot be detained solely for security reasons.[1827] In fact, only one interpretation of point (e) of the first subparagraph of Article 8(3) of the 2013 Reception Directive seems to be compatible with the ECtHR's jurisprudence. Deprivation of liberty of an asylum seeker effected due to public order or national security considerations must be ordered 'to prevent effecting an unauthorised entry

1823 See also Moreno-Lax and Guild (2015), 521, pointing out that the grounds enumerated in Article 8(3) of the 2013 Reception Directive are 'vague and numerous and remain open to interpretation', in particular in regard to the reasons of public order and national security.

1824 See also Cornelisse (2017), 233; ECRE (2017) 'The Detention…', 9. Cf. Krommendijk (2018), 143, noticing that the *J.N.* judgment was considered useful for national judges despite its shortcomings.

1825 CJ (GC), case C-357/09 PPU *Kadzoev* (2009), paras 70–71.

1826 See view of AG Sharpston delivered on 26 January 2016 in case C-601/15 PPU *J.N.*, EU:C:2016:85, para 73. See also Majcher and de Senarclens (2014), 12; Basilien-Gainche (2015), 113. Cf. Cornelisse (2011), 939–940; Moreno-Lax and Guild (2015), 527; European Commission (2017), 140.

1827 Cf. Cornelisse (2017), 234. See also Peers (2016), stating that under the EU law, arguably, criminal offences alone (not accompanied with a return decision) could justify detention. However, the principle of proportionality would imply that deprivation of liberty in that case would be harder to justify. See also view of AG Mazák delivered on 10 November 2009 in case C-357/09 PPU *Kadzoev,* EU:C:2009:691, fn 38.

into the country or of a person against whom action is being taken with a view to deportation or extradition' as well to be considered in accordance with Article 5(1)(f) of the ECHR.

V. Time-Limits and Duration

The duration of the deprivation of liberty is in fact an important factor in the assessment of the lawfulness, proportionality and justification of detention. Accordingly, it has already been examined to some extent above, in Titles II-IV. Title V supplements the information in the preceding subchapters.

Under the ECHR, no fixed time-limits for immigration detention are established.[1828] The Strasbourg Court reiterates that such time-limits are also not required in national legislations.[1829] However, in some cases, the fact that a maximum duration of immigration detention was or was not guaranteed under domestic law did affect the court's assessment of the lawfulness of the deprivation of liberty.[1830] Firstly, when time-limits for immigration detention are provided for in the national law, they must be complied with for the detention to be considered lawful under Article 5(1) of the ECHR.[1831] Secondly, as the court explained in the case of *J.N. v. the United Kingdom*,

> the existence or absence of time-limits is one of a number of factors which the Court might take into consideration in its overall assessment of whether domestic law was "sufficiently accessible, precise and foreseeable" (in other words, whether there existed "sufficient procedural safeguards against arbitrariness"). However, in and of themselves they are neither necessary nor sufficient to ensure compliance with the requirements of Article 5 § 1(f) (...).[1832]

1828 See e.g. ECtHR, *Auad v. Bulgaria*, no. 46390/10 (2011), §128; ECtHR, *Amie and Others v. Bulgaria*, no. 58149/08 (2013), §72; ECtHR, *J.N. v. the United Kingdom*, no. 37289/12 (2016), §§83, 90. See also ECtHR, *Mefaalani v. Cyprus*, nos. 3473/11 and 75381/11 (2016), §80, where the court directly stated: 'Unlike Article 15 of Directive 2008/115/EC, Article 5 § 1(f) of the Convention does not lay down maximum timelimits (...)'.

1829 See e.g. ECtHR, *A.H. and J.K. v. Cyprus*, nos. 41903/10 and 41911/10 (2015), §190; ECtHR, *J.N. v. the United Kingdom*, no. 37289/12 (2016), §93.

1830 See the overview of the respective case-law in ECtHR, *J.N. v. the United Kingdom*, no. 37289/12 (2016), §§83-86. For the requirement of lawfulness, see this Chapter, Title II.

1831 See e.g. ECtHR, *John v. Greece*, no. 199/05 (2007), §§33-36; ECtHR, *Longa Yonkeu v. Latvia*, no. 57229/09 (2011), §129. Cf. ECtHR, *Nur and Others v. Ukraine*, no. 77647/11 (2020), §§92-93, 118-119.

1832 ECtHR, *J.N. v. the United Kingdom*, no. 37289/12 (2016), §90. See also ECtHR, *Mathloom v. Greece*, no. 48883/07 (2012), §71; ECtHR, *K.G. v. Belgium*, no. 52548/15 (2018), §72.

Thus, whether there are time-limits to immigration detention under national law or not is an important–albeit not decisive in itself–factor in the examination of the 'quality of law'.

The lack of time-limits must be seen 'in the context of the immigration detention system taken as a whole'.[1833] Therefore, on the one hand, a system where time-limits are absent from the national legislation but sufficient procedural safeguards from arbitrariness are there is capable of being in compliance with the requirements arising from Article 5(1)(f) of the ECHR.[1834] In those circumstances, the due diligence of national authorities is of particular importance.[1835] On the other hand, the existence of time-limits in a domestic law and the authorities' compliance with them does not guarantee that the respective law is of sufficient quality nor that the deprivation of liberty would not be considered unlawful or arbitrary.[1836] For instance, in the case of *Auad v. Bulgaria*, the asylum seeker was detained for the maximum period permissible under the national law that had transposed the Return Directive, i.e. 18 months. The ECtHR stressed that respecting domestic time-limits was not enough to ensure compliance with the ECHR. As the national authorities had not been acting with due diligence, the court found that Article 5(1)(f) of the ECHR had been violated in this case.[1837]

Irrespective of the existence or absence of fixed time-limits in national law, the duration of immigration detention always must be reasonable taking into account the circumstances of a particular case. The Strasbourg Court reiterates that under Article 5(1)(f) of the ECHR, the length of deprivation of liberty should not exceed that reasonably required for the purpose pursued.[1838] Furthermore, the principle of proportionality applies to immigration

1833 ECtHR, *J.N. v. the United Kingdom*, no. 37289/12 (2016), §92.

1834 See e.g. ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §§119-123; ECtHR, *Amuur v. France*, no. 19776/92 (1996), §53; ECtHR, *Abdolkhani and Karimnia v. Turkey*, no. 30471/08 (2009), §§133-135; ECtHR, *Louled Massoud v. Malta*, no. 24340/08 (2010), §71; ECtHR, *J.N. v. the United Kingdom*, no. 37289/12 (2016), §§97-99; ECtHR, *R. v. Russia*, no. 11916/15 (2016), §§106-107.

1835 ECtHR, *S.M.M. v. the United Kingdom*, no. 77450/12 (2017), §84.

1836 See e.g. ECtHR, *J.N. v. the United Kingdom*, no. 37289/12 (2016), §83; ECtHR, *K.G. v. Belgium*, no. 52548/15 (2018), §72.

1837 ECtHR, *Auad v. Bulgaria*, no. 46390/10 (2011), §§131-135. See also ECtHR, *Raza v. Bulgaria*, no. 31465/08 (2010), §74, where the court took into account that two and half years of detention pending deportation had been a period 'markedly longer' than the time-limit provided for in the Return Directive that had been transposed into the national legislation after the deprivation of liberty in question.

1838 See e.g. ECtHR, *Haghilo v. Cyprus*, no. 47920/12 (2019), §203. For more on the 'arbitrariness' criteria, see this Chapter, Title II.

detention only to the extent that it should not continue for an unreasonable length of time.[1839]

Under the second limb of Article 5(1)(f) of the ECHR, the vagueness of the requirement of a 'reasonable duration' may be to some extent balanced with the 'due diligence' test and the concept of a realistic prospect of removal. Those requirements were scrutinized in Title IV (point 3), so they are not analysed here again. However, it must be recalled that under the jurisprudence of the Strasbourg Court the fact that the duration of detention pending deportation has to be reasonable does not automatically mean that it must be short.[1840] In some cases, the ECtHR accepted as compatible with requirements arising from the second limb of the subparagraph (f) periods of a pre-removal detention amounting to years, even in regard to asylum seekers.[1841]

Under the first limb of Article 5(1)(f) of the ECHR, until a foreigner is granted a formal authorization to enter or stay in a state in accordance with national law,[1842] he can be detained for a reasonable period of time. In the *Suso Musa v. Malta* case, the applicant's detention pending asylum proceedings for more than six months was considered unreasonably lengthy, taking into account the inappropriateness of the conditions in the place of confinement.[1843] The same conclusion was reached in regard to the deprivation of liberty for three and half months of the asylum-seeking family in the case of *Kanagaratnam and Others v. Belgium*.[1844] Conversely, in the case of *Moxamed Ismaaciil and Abdirahman Warsame v. Malta,* the court found that the foreigners' detention pending first-and second-instance asylum proceedings lasting

1839 See e.g. ECtHR (GC), *Saadi v. the United Kingdom*, no. 13229/03 (2008), §72. For more on the principle of proportionality, see this Chapter, Title III.

1840 However, even short periods of pre-removal detention may be found in violation of Article 5 of the ECHR, in particular as regards children, see e.g. ECtHR, *Rahimi v. Greece*, no. 8687/08 (2011), §§107-110 (two days of detention of the unaccompanied minor). See also, critically on this ruling, Bossuyt (2012), 230.

1841 See e.g. ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §§115-117.

1842 See e.g. ECtHR, *Suso Musa v. Malta*, no. 42337/12 (2013), §96, where the court held that 'the question as to when the first limb of Article 5 ceases to apply, because the individual has been granted formal authorisation to enter or stay, is largely dependent on national law'. For more see this Chapter, Title IV, point 1.

1843 ECtHR, *Suso Musa v. Malta*, no. 42337/12 (2013), §102. Cf. ECtHR, *M.K. v. Hungary*, no. 46783/14 (2020), §21, where the court stated that the five and half months of detention of the asylum seeker 'alone is capable of raising concerns, even in the absence of any indication that the detention took place in inappropriate conditions'.

1844 ECtHR, *Kanagaratnam and Others v. Belgium*, no. 15297/09 (2011), §§94-95. See also, similarly, ECtHR, *Abdullahi Elmi and Aweys Abubakar v. Malta*, nos. 25794/13 and 28151/13 (2016), §§145-147 (eight months of detention); ECtHR, *Abdi Mahamud v. Malta*, no. 56796/13 (2016), §§132, 135 (sixteen months); ECtHR (GC), *Z.A. and Others v. Russia*, nos. 61411/15 etc. (2019), §§168-169 (from five to twenty-one months).

nearly twelve months that was effected in appropriate conditions had not exceeded the length reasonably required for the purpose pursued.[1845] Thus, it is more probable that the length of pre-admittance detention would be considered unreasonable when conditions of confinement are not suitable.[1846] Moreover, domestic authorities must prove—to justify the lengthy period of detention—that they took, without unnecessary delays, all the required steps during asylum proceedings. The court also notices that 'the connection with the ground of detention becomes less evident, as months go by and after a first-instance decision has been issued', in particular when the detention was based on the need to verify an asylum seeker's identity.[1847]

A careful examination of the court's jurisprudence pertaining to the first limb of Article 5(1)(f) of the ECHR enables elucidating the ambiguity regarding the permissible duration of detention pending asylum proceedings that arose after the *Saadi v. the United Kingdom* judgment.[1848] Firstly, the post-*Saadi* interpretation that pre-admittance detention is allowed only up to seven days[1849] was overly hopeful. The ECtHR has accepted much longer periods of detention pending asylum proceedings. Secondly, as feared by some authors[1850], the deprivation of liberty throughout the entire asylum procedure may be found to be in compliance with the ECHR.[1851] Thirdly, under the first limb of subparagraph (f) the infinite detention of asylum seekers is not permissible as its duration must be reasonable from the perspective of the purpose pursued. However, the answer to the question of whether the length was in fact reasonable depends on the very circumstances of a case.

1845 ECtHR, *Moxamed Ismaaciil and Abdirahman Warsame v. Malta,* nos. 52160/13 and 52165/13 (2016), §§142-144. See also, similarly, ECtHR, *Nassr Allah v. Latvia*, no. 66166/13 (2015), §60 (five months of detention pending asylum proceedings); ECtHR, *Thimothawes v. Belgium,* no. 39061/11 (2017), §81 [five months of detention both under the first and second limb of subparagraph (f)]; ECtHR, *Aboya Boa Jean v. Malta*, no. 62676/16 (2019), §63 (detention lasting less than two months).

1846 See also, in the context of detention of children, Vandenhole and Ryngaert (2013), 78.

1847 ECtHR, *Moxamed Ismaaciil and Abdirahman Warsame v. Malta,* nos. 52160/13 and 52165/13 (2016), §140. See also ECtHR, *M.K. v. Hungary,* no. 46783/14 (2020), §21, in regard to detention after the asylum case was admitted for the examination on the merits.

1848 See partly dissenting opinion of judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä in ECtHR (GC), *Saadi v. the United Kingdom*, no. 13229/03 (2008), where the dissenters asked: 'if a seven-day period of detention is not considered excessive, where and how do we draw the line for what is unacceptable?'.

1849 See e.g. Wilsher (2014), 144.

1850 See e.g. PACE (2010) 'The detention…', 20.

1851 See e.g. ECtHR, *Longa Yonkeu v. Latvia,* no. 57229/09 (2011), §129; ECtHR, *Nassr Allah v. Latvia*, no. 66166/13 (2015), §60; ECtHR, *Moxamed Ismaaciil and Abdirahman Warsame v. Malta,* nos. 52160/13 and 52165/13 (2016), §§142-144; ECtHR, *Thimothawes v. Belgium,* no. 39061/11 (2017), §§66-82.

While under Article 5(1)(f) of the ECHR time-limits are considered neither necessary nor sufficient, the main restriction on the duration of detention is vague and the respective case-law of the Strasbourg Court is casuistic,[1852] the Return Directive seems to provide more legal certainty. Pursuant to Article 15,[1853] deprivation of liberty pending return shall be maintained for as short a period as possible and only as long as removal arrangements are in progress and executed with due diligence, provided that it is necessary to ensure successful removal.[1854] Time-limits of at maximum six months must be set in national legislations. They can be extended only in the circumstances specified in the directive for a restricted period not exceeding a further twelve months. Accordingly, under EU law a foreigner can be detained pending return proceedings and a removal for the maximum period of eighteen months.

In the case of *Kadzoev,* the CJ stressed that eighteen-month period cannot be extended in any circumstances, including the lack of valid documents and means of subsistence or aggressive conduct. When the eighteen-month time-limit expires, a foreigner must be immediately released.[1855] The question of whether a reasonable prospect of removal exists is immaterial in those circumstances.[1856] When a detainee applies for asylum, the deprivation of liberty ceases to be justified under the Return Directive, but may be continued in accordance with the secondary asylum law. However, then, in principle, the period of detention pending asylum proceedings is not calculated to the six- or twelve-month time-limits allowed pursuant to the Return Directive.[1857] In the case of *FMS and Others,* the court precluded national legislation that did not determine that the detention of a returnee is automatically considered unlawful after the expiration of the eighteen-month period and did not guarantee that deprivation of liberty is effected only as long as removal arrangements are in progress and executed with due diligence.[1858]

1852 See Ruiz Ramos (2020), 27-30.

1853 Article 15(1), (5) and (6) of the Return Directive.

1854 See also CJ (GC), case C-357/09 PPU *Kadzoev* (2009), para 64.

1855 CJ (GC), case C-357/09 PPU *Kadzoev* (2009), paras 69, 71. See also CJ, case C-146/14 PPU *Mahdi* (2014), para 58. See also ECtHR, *Auad v. Bulgaria*, no. 46390/10 (2011), §128, where the ECtHR first stated that 'the length of the detention should not exceed that reasonably required for the purpose pursued' and next pointed out that 'a similar point was recently made by the ECJ in relation to Article 15 of Directive 2008/115/EC' in the *Kadzoev* case.

1856 CJ (GC), case C-357/09 PPU *Kadzoev* (2009), paras 60-61. For the reasonable prospect of removal, see Title IV, point 3.

1857 CJ (GC), case C-357/09 PPU *Kadzoev* (2009), paras 40-48.

1858 CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), para 280.

In the case of *El Dridi* the court explained that the maximum period of detention imposed on the Member States by the Return Directive 'serves the purpose of limiting the deprivation of third-country nationals' liberty in a situation of forced removal'. The Luxembourg Court highlighted also that the directive was intended to take account 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'.[1859]

The 2013 Reception Directive does not lay down time-limits for a duration of detention pending asylum proceedings.[1860] Under Article 9(1), an applicant for international protection shall be detained for as short a period as possible and shall be kept in detention only for as long as the grounds for deprivation of liberty set out in the directive are applicable. Respective authorities must act diligently and delays that are not attributable to asylum seekers should not justify continued detention. Thus, it is arguable that applicants for international protection can be deprived of liberty for the entire asylum procedure in accordance with the secondary EU law, especially pursuant to points (b), (d) and (e) of the first subparagraph of Article 8(3) of the 2013 Reception Directive.[1861] However, interpretations to the contrary were also voiced by some authors.[1862]

Until recently, the CJ had not given much thought to the duration of detention of asylum seekers. It limited its respective considerations to repeating the rules arising from Article 9(1) of the 2013 Reception Directive[1863] and briefly stating that 'it must be ensured that that detention does not exceed, in any

1859 CJ, case C-61/11 PPU *El Dridi* (2011), para 43. The court referred to ECtHR (GC), *Saadi v. the United Kingdom*, no. 13229/03 (2008). See also CJ, case C-60/16 *Amayry* (2017), para 72, and Morano-Foadi (2015), 132.

1860 However, such time-limits are laid down in some national legislations [FRA (2017), 59]. Moreover, under Article 31(3-5) of the 2013 Procedures Directive the time-limits for the first-instance asylum procedure are laid down. Establishing the deadlines for examining appeals was left to the discretion of the Member States [Article 46(10) of the 2013 Procedures Directive].

1861 Not under point (f) concerning the detention of Dublin transferees (see below). See also view of AG Sharpston delivered on 26 January 2016 in case C-601/15 PPU *J.N.*, EU:C:2016:85, para 72.

1862 See e.g. Wilsher (2014), 144, claiming that detention under points (a) and (c) should not be longer than seven days; Moreno-Lax and Guild (2015), 521, pointing out that the maximum duration of detention of asylum seekers is in fact nine months as they must be granted access to a labour market by then; Peek and Tsourdi (2016), 1414, claiming that grounds specified in points (a) and (b) can be invoked only for a short period of time.

1863 CJ (GC), case C-601/15 PPU *J.N.* (2016), para 62; CJ, case C-18/16 *K.* (2017), para 45.

case, as short a period as possible'[1864] as well as that the reasons for it must continue to be valid throughout the whole period of detention[1865].

The case of *FMS and Others* provided some more guidance. The Luxembourg Court stressed that the lack of a maximum detention period in the case of asylum seekers is in accordance with Article 6 of the EU Charter provided that the detainee can benefit from real procedural guarantees that enable his release as soon as the deprivation of liberty is no longer necessary or proportional to its objective. In particular, where time-limits are absent from a national legislation, domestic authorities are required to act with due diligence. Therefore, it is acceptable that under national law the maximum period of detention is not determined when it is guaranteed that the detention is effected only for as long as the grounds for deprivation of liberty are applicable and the authorities act with due diligence.[1866]

Next, the CJ addressed the doubts concerning the period of detention related to border procedures. Under point (c) of the first subparagraph of Article 8(3) of the 2013 Reception Directive, applicants for international protection may be detained 'in order to decide, in the context of a procedure, on the applicant's right to enter the territory'. It has been voiced in the literature that this provision is closely intertwined with Article 43 of the 2013 Procedures Directive regulating border procedures and, accordingly, detention at the border can last only as long as those procedures, thus four weeks.[1867] The Luxembourg Court confirmed this interpretation in the *FMS and Others* ruling and specified that the four-week period should be counted from the day the asylum application is submitted.[1868]

In contrast to the 2013 Reception Directive, the Dublin III Regulation lays down deadlines that force national authorities to act diligently in securing a transfer and that limit the duration of detention preceding its enforcement. Under Article 28(3), when an asylum seeker is deprived of liberty, the period for submitting a take charge or take back request shall not exceed one month from the lodging of the application. The reply should be given in two weeks. The transfer shall be carried out as soon as practically possible, and at the latest within six weeks of the implicit or explicit acceptance of the request by

1864 CJ, case C-18/16 *K.* (2017), para 48.

1865 CJ (GC), case C-601/15 PPU *J.N.* (2016), para 73.

1866 CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 264-266. The court referred to ECtHR, *S.M.M. v. the United Kingdom,* no. 77450/12 (2017), §84, where the relation between the lack of time-limits and due diligence was highlighted. See also, critically to the court's 'license to long-lasting detention', Nagy (2020).

1867 See e.g. Moreno-Lax and Guild (2015), 526.

1868 CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 235-241. See also CJ (GC), case C-808/18 *Commission v Hungary* (2020), para 181.

the Member State to take charge or to take back the person concerned or of the moment when the appeal or review no longer has a suspensive effect in accordance with Article 27(3).[1869] When the requesting Member State fails to comply with the deadlines of one month or six weeks, the Dublin transferee must be released.

The wording of Article 28(3) is far from clear. In the case of *Amayry* the Luxembourg Court confirmed that the Dublin III Regulation fails to provide short, precise and uniform time-limits for detention. Firstly, the court found that under this provision two distinct periods of six weeks are established: the first counted from the acceptance of the request to take charge or take back, and the second counted from the moment when the suspensive effect of the appeal or review against a transfer decision ended. The number of days that an asylum seeker spent in detention under the first six-week period is not to be deducted from the second one.[1870] Thus, it seems that a Dublin transferee may be deprived of liberty for up to six weeks after the acceptance of a request, and if he appeals against a transfer decision within this period he may be deprived of freedom for the entire appeal procedure (if a suspensive effect is granted)[1871] and subsequently for additional six weeks. As to the starting point of detention, in the case of *Hassan*, the court added that foreigners can be detained 'even before the request to take charge or take back is submitted to the requested Member State'.[1872]

Moreover, in the *Amayry* judgment the CJ specified that not all Dublin transferees are protected from protracted detention by the time-limits provided for in Article 28(3) of the Dublin III Regulation. The Luxembourg Court decided that 'the period no longer than six weeks within which the transfer of a detained person must be carried out, laid down by that provision, applies only in the situation where the person concerned is already detained when one of the two events covered by that provision takes place'. Consequently, this time-limit is not binding when a detention was ordered after the acceptance of the request to take charge or take back or after the suspensive effect of the appeal or review against a transfer decision had ended. However, then, deprivation of liberty must still be effected for as short a period as possible and not for longer than the time reasonably necessary to complete the required administrative procedures with due diligence until the transfer is

1869 As regards Article 27(4) of the Dublin III Regulation, see CJ, case C-60/16 *Amayry* (2017), paras 60-73. For more on the suspensive effect of the appeal, see Chapter 6, Title IV.

1870 CJ, case C-60/16 *Amayry* (2017), paras 52-59.

1871 Cf. Hruschka and Maiani (2016), 1578.

1872 CJ, case C-647/16 *Hassan* (2018), para 67.

carried out.[1873] In this context, a period of three to twelve months, as allowed under the Swedish law, was considered by the Luxembourg Court excessive and not reasonably necessary for the prescribed administrative procedures to be conducted. Thus, the detention in those timeframes would not be in accordance with the Dublin III Regulation and Article 6 of the EU Charter. The CJ stressed that taking into account the simplified procedure between the Member States, the period of six weeks should be sufficient to proceed with a transfer. A period of two months may not necessarily be considered excessive but 'its suitability in relation to the facts of each specific case' must be assessed.[1874] Therefore, the time-limits arising from Article 28(3) of the Dublin III Regulation are not applicable to the detention of all transferees, but they might be instructive in the assessment of how much time is reasonably necessary to complete the required administrative procedures with due diligence until the transfer is carried out, as also demanded by this provision. Despite the ECtHR's highlighting of the reasonableness of duration of immigration detention in its case-law, the CJ did not refer to this jurisprudence in the case of *Amayry*.[1875]

It is difficult to answer in a definitive manner the question of for how long asylum seekers can be detained pending asylum and return proceedings in accordance with the ECHR and EU law. It depends to a great extent on national legislations and practice, as the requirements in this regard arising from the ECHR and EU law are vague and the respective case-law of both European asylum courts is either casuistic or insufficient. Only pursuant to the Return Directive are clear and absolute boundaries set in regard to the duration of detention, and the CJ guards them firmly.[1876] Nevertheless, the eighteen-month time-limit for detention was criticized from the outset.[1877] The PACE has even stated that the EU adopted 'the lowest common standard with regard to length of detention thereby allowing European Union member states to practice long-term detention, and increasing the possibility for states to increase their minimum duration of detention'.[1878] In fact, as is often high-

1873 CJ, case C-60/16 *Amayry* (2017), paras 39, 41-44. See also CJ (GC), case C-670/16 *Mengesteab* (2017), paras 91-92.

1874 CJ, case C-60/16 *Amayry* (2017), paras 45-47.

1875 See, critically in this regard, Sadowski (2019), 51-52.

1876 See also Iglesias Sánchez (2015), 446. After the *FMS and Others* judgment, it may be concluded that the duration of detention related to border procedures is now also clearly set, see CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 235-241.

1877 See e.g. Baldaccini (2010), 130-131; Cornelisse (2010), 271; Mincheva (2010), 361; Wilsher (2011), 196; Mitsilegas (2016), 28-29.

1878 PACE (2010) 'Resolution 1707…', para 5.

lighted in the literature, with the transposition of the Return Directive the domestic time-limits for detention pending return were extended in nine Member States. However, what is missed is that two states had to lower their respective time-limits and eight states had to establish theirs, as time-limits had been absent from their legislations before. Moreover, some Member States opted for a lower maximum duration of pre-removal detention than eighteen months.[1879] While the Return Directive provides for the upper ceiling in this regard, it cannot be overlooked that the Strasbourg Court in some cases considered as 'reasonable' longer periods of deprivation of liberty preceding the return than eighteen months.

VI. Place and Conditions

Under Article 5(1) of the ECHR, the Strasbourg Court reiterates that 'there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention'.[1880] Thus, when asylum seekers are to be detained pursuant to subparagraph (f), national authorities choosing the place of their confinement should bear in mind that 'the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country'.[1881] A deprivation of liberty that is effected in an inappropriate place or under inappropriate conditions may be considered arbitrary.

While the court's explanations with regard to conditions of detention under Article 5 of the ECHR are mostly short and concise, the more developed guidance on the minimum standard that is required in this respect may be found in its jurisprudence concerning Article 3. It is the minimum standard indeed, as it determines what conditions constitute an inhuman or degrading treatment prohibited under this provision. The ECtHR stresses in general that detention conditions must be 'compatible with respect for human dignity' and should not 'subject the detainees to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention'. Moreover, the health and well-being of detainees must be 'adequately secured'.[1882] For a violation of Article 3 of the ECHR to be found, a particular level of severity

1879 FRA (2017), 59.

1880 ECtHR, *Riad and Idiab v. Belgium*, nos. 29787/03 and 29810/03 (2008), §77.

1881 See e.g. ECtHR, *Amuur v. France*, no. 19776/92 (1996), §43; ECtHR (GC), *Saadi v. the United Kingdom*, no. 13229/03 (2008), §74; ECtHR, *S.K. v. Russia*, no. 52722/15 (2017), §111; ECtHR, *Haghilo v. Cyprus*, no. 47920/12 (2019), §203.

1882 See e.g. ECtHR (GC), *Z.A. and Others v. Russia*, nos. 61411/15 etc. (2019), §182.

must be attained. Its assessment is relative and depends on the circumstances of a particular case.[1883]

The ECtHR concentrates less on the place of detention than on the factual conditions therein. It seems that none of the places would be branded by the court as inappropriate for immigration detention *a priori,* without a thorough examination of the specific conditions that the applicants had to endure there.[1884] However, the Strasbourg Court is aware that the choice of a place of detention determines conditions there. For instance, it has stated that 'police stations and other similar establishments which, by their very nature, are places designed to accommodate people for very short durations, are not appropriate places for the detention of people who are waiting for the application of an administrative measure, such as deportation'.[1885] Similar conclusions were reached by the court in regard to transit zones at airports.[1886] Nevertheless, even those general findings were preceded or followed by the rigorous examination of the specific conditions in which the deprivation of liberty had been effected in a particular case.[1887]

When the Strasbourg Court assesses the compliance of the conditions in which the detention order was implemented with the requirements arising from Article 3 of the ECHR, it takes account of 'the cumulative effects of these conditions, as well as of specific allegations made by the applicant' and the length of detention.[1888] The court underlines that detainees must have sufficient personal space, access to outdoor exercise, natural light and fresh air. Ventilation must be in place, as must the possibility to use a toilet in private. Heating arrangements should be adequate and basic sanitary and hygiene requirements have to be complied with.[1889] Overcrowding in itself may entail a violation of Article 3 of the ECHR.[1890] Moreover, the ECtHR reproached states

1883 See e.g. ECtHR (GC), *Khlaifia and Others v. Italy*, no. 16483/12 (2016), §§159-160.

1884 See e.g. ibid., §§202-211, where the conditions of detention on the ships were examined.

1885 ECtHR, *Haghilo v. Cyprus*, no. 47920/12 (2019), §160, with further references there. See also ECtHR, *Tabesh v. Greece*, no. 8256/07 (2009), §43; ECtHR, *Charahili v. Turkey*, no. 46605/07 (2010), §§76-77; ECtHR, *SH.D. and Others v. Greece etc.*, no. 14165/16 (2019), §50.

1886 ECtHR, *Riad and Idiab v. Belgium*, nos. 29787/03 and 29810/03 (2008), §104.

1887 See e.g. ECtHR, *S.Z. v. Greece*, no. 66702/13 (2018), §40. ECtHR, *H.A. and Others v. Greece*, no. 19951/16 (2019), §§166-170.

1888 See e.g. ECtHR (GC), *Khlaifia and Others v. Italy*, no. 16483/12 (2016), §163.

1889 ECtHR, *Aden Ahmed v. Malta*, no. 55352/12 (2013), §88; ECtHR (GC), *Z.A. and Others v. Russia*, nos. 61411/15 etc. (2019), §186. See also ECtHR, *Haghilo v. Cyprus*, no. 47920/12 (2019), §§162-168.

1890 See e.g. ECtHR, *Aden Ahmed v. Malta*, no. 55352/12 (2013), §87; ECtHR (GC), *Khlaifia and Others v. Italy*, no. 16483/12 (2016), §§164-167; ECtHR, *HA. A. v. Greece*, no. 58387/11 (2016), §§28-31.

when they had hold foreigners for months without: any or appropriate sleeping facilities; access to organized and balanced meals, drinking water, medical care and social assistance; the possibility to counteract heat or cold; or the possibility to contact family or legal representatives.[1891]

The Strasbourg Court emphasizes that asylum seekers are vulnerable and conditions of their detention must be adapted accordingly.[1892] In the case of *M.S.S. v. Belgium and Greece*, the Grand Chamber stated outright that 'the applicant, being an asylum-seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously'. The conditions of detention that the applicant had to endure—even though he had been deprived of liberty for only short periods of time—were found to be degrading and his 'distress was accentuated by the vulnerability inherent in his situation as an asylum-seeker'.[1893] In the more recent case of *Z.A. and Others v. Russia*, concerning foreigners held for months in degrading conditions in the airport's transit zone, this approach to the vulnerability of asylum seekers *per se* was confirmed.[1894] However, the court's stance in this regard is in fact much more nuanced. In some cases, the situation of the detained asylum seeker was considered further aggravated by his personal circumstances, which had made the conditions that he had to endure even more inappropriate.[1895] In

1891 See e.g. ECtHR, *Dougoz v. Greece*, no. 40907/98 (2001), §48; ECtHR, *Tabesh v. Greece*, no. 8256/07 (2009), §109; ECtHR, *S.D. v. Greece*, no. 53541/07 (2009), §51; ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §§230-231; ECtHR, *Aden Ahmed v. Malta*, no. 55352/12 (2013), §94; ECtHR, *Mahamed Jama v. Malta*, no. 10290/13 (2015), §98; ECtHR, *S.F. and Others v. Bulgaria*, no. 8138/16 (2017), §§84-90; ECtHR (GC), *Z.A. and Others v. Russia*, nos. 61411/15 etc. (2019), §191; ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §194; ECtHR, *SH.D. and Others v. Greece etc.*, no. 14165/16 (2019), §49. Cf. ECtHR, *Z.N.S. v. Turkey*, no. 21896/08 (2010), §§82-87.

1892 See also Brandl and Czech (2015), 254-256. In regard to Article 5(1)(f) of the ECHR, see ECtHR, *Nassr Allah v. Latvia*, no. 66166/13 (2015), §59. See also Pétin (2016), 92, pointing out that under the secondary asylum law not all asylum seekers are considered vulnerable. Cf. Brandl and Czech (2015), 262-264; Ruiz Ramos (2020), 40.

1893 ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §§232-233. For critical comments in this regard, see Bossuyt (2012), 231. See also Peroni and Timmer (2013), 1069, expressing a doubt that the judgment implied that all asylum seekers should be considered vulnerable. Cf. Brandl and Czech (2015), 249-251. See also Ruiz Ramos (2020), 33, stating that 'the general vulnerability of all asylum-seekers has been effectively emptied of meaning' in the judgments following the M.S.S. case.

1894 ECtHR (GC), *Z.A. and Others v. Russia*, nos. 61411/15 etc. (2019), §193. Interestingly, the status of 'irregular migrant' was not considered by the ECtHR as entailing the vulnerability *per se* [Iglesias Sánchez (2015), 438].

1895 See Brandl and Czech (2015), 251-253. See also Venturi (2016), pointing out that the vulnerability under the ECtHR's jurisprudence is a 'nuanced, flexible and layered notion' and referring to the 'double vulnerability' resulting from the status of asylum seeker and from being an LGBT person in the case of *O.M. v. Hungary* (see more below). See also ECtHR, *Aden Ahmed v. Malta*, no. 55352/12 (2013), §97.

other cases, when the conditions of the asylum seekers' confinement were found to be generally acceptable from the perspective of Article 3 of the ECHR, the ECtHR emphasized that the applicant must show that he had been more vulnerable than other asylum seekers detained in the same place and that on account of this vulnerability the conditions of his confinement were unsuitable.[1896]

It is clear from the court's jurisprudence that vulnerabilities must be tended to in immigration detention. The Strasbourg Court has stressed that the conditions there have to be adequate from the perspective of the specific needs of ill foreigners[1897], the elderly[1898] or women[1899]. In the case of *O.M. v. Hungary,* concerning the deprivation of liberty of the homosexual asylum seeker, the Strasbourg Court stated

> in the course of placement of asylum seekers who claim to be a part of a vulnerable group in the country which they had to leave, the authorities should exercise particular care in order to avoid situations which may reproduce the plight that forced these persons to flee in the first place.[1900]

Therefore, the national authorities should have considered whether the applicant as an LGBT person would be safe in a detention centre, because other foreigners staying there could 'have come from countries with widespread cultural or religious prejudice against such persons'.[1901]

The ECtHR is particularly strict in regard to conditions in which minors are deprived of liberty.[1902] The court reiterates that 'children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status' and 'the child's extreme vulnerability is the

1896 See e.g. ECtHR, *Mahamed Jama v. Malta,* no. 10290/13 (2015), §100; ECtHR (GC), *Ilias and Ahmed v. Hungary,* no. 47287/15 (2019), §192. Cf. Brandl and Czech (2015), 250-251.

1897 See e.g. ECtHR, *S.D. v. Greece,* no. 53541/07 (2009), §§52-53; ECtHR, *Yoh-Ekale Mwanje v. Belgium,* no. 10486/10 (2011), §98; ECtHR, *Aden Ahmed v. Malta,* no. 55352/12 (2013), §97; ECtHR (GC), *Ilias and Ahmed v. Hungary,* no. 47287/15 (2019), §192. See also, in regard to Article 5(1)(f) of the ECHR, ECtHR, *Thimothawes v. Belgium,* no. 39061/11 (2017), §§79-80; ECtHR, *K.G. v. Belgium,* no. 52548/15 (2018), §88.

1898 See e.g. ECtHR (GC), *Khlaifia and Others v. Italy,* no. 16483/12 (2016), §194.

1899 See e.g. ECtHR, *Mahmundi and Others v. Greece,* no. 14902/10 (2012), §70; ECtHR, *Aden Ahmed v. Malta,* no. 55352/12 (2013), §95.

1900 ECtHR, *O.M. v. Hungary,* no. 9912/15 (2016), §53. The case concerned a violation of Article 5(1)(b) of the ECHR. For more see this Chapter, Title IV, point 1.

1901 ECtHR, *O.M. v. Hungary,* no. 9912/15 (2016), §53.

1902 See also Brandl and Czech (2015), 255-256, pointing out: 'Children's vulnerability leads to a particularly low threshold of applicability of Article 3'. Cf. Bossuyt (2012), 238-239, stating that the court's approach in this regard renders the application of Article 5(1)(f) of the ECHR to detention of families practically impossible.

decisive factor and takes precedence over considerations relating to the status of illegal immigrant'.[1903] Detention conditions for asylum-seeking minors must be adapted to their age and needs to ensure that they do not entail 'stress and anxiety, with particularly traumatic consequences'.[1904] The ECtHR holds that children should have regular access to sufficient indoor and outdoor play areas, receive proper counselling and educational assistance from qualified personnel specially mandated for that purpose, and be sufficiently separated from unrelated adults to enjoy enough privacy with their family. Moreover, furnishings in rooms occupied by children have to be appropriate and secure for them.[1905]

Minors should not be held in the prison-like conditions.[1906] In the recent case of *Bilalova and Others v. Poland,* the court clearly stated that it has now been well-established that, in principle, the confinement of young children in such conditions should be avoided and only a short-term detention of minors in a suitable environment could be found compatible with the ECHR.[1907] Therefore, even very short periods of deprivation of liberty in conditions that are inappropriate for children may amount to a violation of Article 3 of the ECHR.[1908] Furthermore, even if accompanied minors are placed in a detention centre earmarked for families, Article 3 of the ECHR still may be found to be breached if the conditions there are not adapted to their needs and age.[1909] Moreover, unaccompanied minors cannot be detained in places designed for

1903 ECtHR, *Abdullahi Elmi and Aweys Abubakar v. Malta,* nos. 25794/13 and 28151/13 (2016), §103. See also ECtHR, *Mublilanzila Mayeka and Kaniki Mitunga v. Belgium,* no. 13178/03 (2006), §55; ECtHR, *S.F. and Others v. Bulgaria,* no. 8138/16 (2017), §79; ECtHR, *H.A. and Others v. Greece,* no. 19951/16 (2019), §171.

1904 ECtHR, *Abdullahi Elmi and Aweys Abubakar v. Malta,* nos. 25794/13 and 28151/13 (2016), §104.

1905 See e.g. ECtHR, *Mublilanzila Mayeka and Kaniki Mitunga v. Belgium,* no. 13178/03 (2006), §§50-52; ECtHR, *Popov v. France,* nos. 39472/07 and 39474/07 (2012), §§95-96, 100-103; ECtHR, *Mahmundi and Others v. Greece,* no. 14902/10 (2012), §§72-73; ECtHR, *Abdullahi Elmi and Aweys Abubakar v. Malta,* nos. 25794/13 and 28151/13 (2016), §§111-114; ECtHR, *A.B. and Others v. France,* no. 11593/12 (2016), §§112-115; ECtHR, *A.M. and Others v. France,* no. 24587/12 (2016), §§49-53; ECtHR, *G.B. and Others v. Turkey,* no. 4633/15 (2019), §§116-117.

1906 Those conditions include e.g. a strong police presence, wire netting over a courtyard, a tight grill over windows or constant announcements made through the loudspeakers, see e.g. ECtHR, *Popov v. France,* nos. 39472/07 and 39474/07 (2012), §§95, 102-103; ECtHR, *A.B. and Others v. France,* no. 11593/12 (2016), §113.

1907 ECtHR, *Bilalova and Others v. Poland,* no. 23685/14 (2020), §79.

1908 See e.g. ECtHR, *Rahimi v. Greece,* no. 8687/08 (2011), §86 (2 days); ECtHR, *S.F. and Others v. Bulgaria,* no. 8138/16 (2017), §84-90 (at least 32 hours).

1909 ECtHR, *Popov v. France,* nos. 39472/07 and 39474/07 (2012), §§92-103. See also ECtHR, *A.B. and Others v. France,* no. 11593/12 (2016), §§111-115.

adults. When a five-year-old had been deprived of liberty in such a place for two months without any member of her family, the court concluded that her 'detention in such conditions demonstrated a lack of humanity to such a degree that it amounted to inhuman treatment'.[1910]

The ECtHR's case-law clearly shows that achieving the minimum standard that is required under Article 3 of the ECHR in regard to conditions in immigration detention is more than difficult for some states. Governments try to justify the violations by relying on their inability to cope with the migration crisis. The Strasbourg Court most often responds that it is aware of and does not underestimate the difficulties in managing the increasing influx of foreigners at the European border. Then, the court points out that Article 3 of the ECHR has an absolute character, and thus those problems cannot absolve states of their obligations under that provision.[1911] However, in the case of *Khlaifia and Others v. Italy*, the Grand Chamber mitigated this firm approach and added that the extreme difficulties resulting from the migration crisis cannot, in themselves, justify breaching Article 3 of the ECHR, but they must be taken into account by the court as the general context of a case.[1912]

The EU law incorporates to some extent the minimum standard established by the ECtHR under Articles 3 and 5(1) of the ECHR.[1913] Asylum seekers and returnees can be detained only in specialized facilities, where they should have access to open-air spaces and contact with the UNHCR, legal advisers, family members etc. The health of a detainee must be of primary concern. Minors can be detained only as a measure of last resort and for the shortest appropriate period of time. When deprived of freedom, they shall have the possibility to engage in leisure activities and have access to education. Asylum-

1910 ECtHR, *Mublilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03 (2006), §§50-59. See Dembour (2015), 389-392, pointing out that the fact that the ECtHR used such strong words was unusual and that the court reached 'a tipping point' in this case. See also ECtHR, *Moustahi v. France*, no. 9347/14 (2020), §§66-67. Cf. ECtHR, *Nur and Others v. Ukraine*, no. 77647/11 (2020), §91, where the court found—in regard to the detention in good conditions of the seventeen-year-old girl—that 'the sole fact that the applicant was held with adults can be considered to amount to a violation of Article 3 of the Convention'.

1911 See e.g. ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §223; ECtHR, *Aden Ahmed v. Malta*, no. 55352/12 (2013), §90; ECtHR (GC), *Z.A. and Others v. Russia*, nos. 61411/15 etc. (2019), §§187-188; ECtHR, *G.B. and Others v. Turkey*, no. 4633/15 (2019), §112.

1912 ECtHR (GC), *Khlaifia and Others v. Italy*, no. 16483/12 (2016), §185. See also ECtHR, *S.F. and Others v. Bulgaria*, no. 8138/16 (2017), §§91-92; ECtHR, *J.R. and Others v. Greece*, no. 22696/16 (2018), §§143-147; ECtHR, *H.A. and Others v. Greece*, no. 19951/16 (2019), §174.

1913 See Recital 18 in the preamble and Articles 10-11 of the 2013 Reception Directive, Article 28(4) of the Dublin III Regulation and Recital 2 in the preamble and Articles 16-17 of the Return Directive.

seeking unaccompanied minors should not be accommodated with adults. Specified special needs of families and females also have to be addressed. Human dignity must be respected and protected.

Nevertheless, some provisions of the EU law may be found to be questionable from the perspective of the ECHR. Firstly, the 2013 Reception Directive and the Return Directive provide for a possibility to derogate from some of the above-mentioned rules in specified circumstances.[1914] Secondly, both directives allow, albeit exceptionally, for the deprivation of liberty of asylum seekers and returnees in prisons. Only asylum-seeking unaccompanied minors cannot be detained there. When a Member State must resort to such accommodation, the foreigners shall be kept separate from ordinary prisoners and the detention conditions provided for in the directives shall still apply.[1915]

As regards detention in prisons, only Article 16(1) of the Return Directive has been interpreted by the CJ.[1916] In the case of *Bero and Bouzalmate*, the court explained that, as a rule, returnees should be detained in specialized facilities. It stressed that the second sentence of Article 16(1) of the Return Directive, allowing for deprivation of liberty in prisons, 'lays down a derogation from that principle, which, as such, must be interpreted strictly'.[1917] Thus, it is not acceptable to detain a foreigner in prison only because there is no specialized facility for that purpose in a particular federated state of a Member State. National authorities must 'be able to detain third-country nationals in specialised detention facilities'. In Member States that have a federal structure, like Germany, such facilities should be established in each federated state or, when that is not possible, it should be ensured that returnees are accommodated in a specialized facility in another federated state than the federated state competent to decide on their detention under national law.[1918]

1914 Article 11(6) of the 2013 Reception Directive and Article 18 of the Return Directive. For the critique, see Baldaccini (2010), 131; Smyth (2014), 231; Peers (2016). See also Article 10(4) of the 2013 Reception Directive and, for its critique, Moreno-Lax and Guild (2015), 523.

1915 Articles 10(1) and 11(3) of the 2013 Reception Directive and Article 16(1) of the Return Directive. Those directives do not regulate the size of the personal space that must be made available to detained asylum seekers and other foreigners. However, in the *Dorobantu* case, which concerned detention conditions after the execution of a European arrest warrant, the CJ relied heavily on the ECtHR's requirements in this regard [CJ (GC), case C-128/18 *Dorobantu* (2019), paras 71-77].

1916 However, the court's findings in this regard should be applied to the interpretation of Article 10(1) of the 2013 Reception Directive. See also Moreno-Lax and Guild (2015), 523.

1917 CJ (GC), joined cases C-473/13 and C-514/13 *Bero and Bouzalmate* (2014), para 25. See also CJ, case C-18/19 *WM* (2020), para 31.

1918 CJ (GC), joined cases C-473/13 and C-514/13 *Bero and Bouzalmate* (2014), paras 28-32. See also CJ (GC), case C-474/13 *Pham* (2014), para 16.

In the case of *Pham*, the Vietnamese national consented in writing to being detained pending return proceedings in a prison together with ordinary prisoners, her compatriots. The Luxembourg Court held that the EU law does not provide for any exception from the obligation requiring foreigners to be kept separated from ordinary prisoners. It is 'a guarantee of observance of the rights which have been expressly accorded by the EU legislature to those third-country nationals in the context of the conditions relating to detention in prison accommodation for the purpose of removal'. Detention in a prison together with ordinary prisoners is not consistent with the directive, so the Member States cannot take into account the wishes of a foreigner concerned to that effect.[1919]

While both above-mentioned judgments were welcomed in the literature and did curtail the objectionable practices in the Member States,[1920] the CJ did not explain there how far the separation from ordinary prisoners should go[1921] or what circumstances would justify accommodation in prisons. Only in the *WM* case was the court challenged with the second question. First, the court confirmed the relation between the second sentence of Article 16(1) and Article 18(1) of the Return Directive.[1922] The 'emergency situation' described in the latter provision (i.e. exceptionally large numbers of returnees) can constitute a ground for a derogation from the rule that returnees must be accommodated in specialized facilities. However, it is not the only permissible reason for placing third country nationals in prisons during return proceedings. The court decided that also in other exceptional circumstances, where national authorities cannot comply with the objectives of the Return Directive, a prison accommodation may be resorted to in accordance with the EU law.[1923] The court stressed that a threat to public policy and public security, as in the main proceedings,

> may justify, in exceptional cases, the detention of a third-country national, for the purpose of removal, in prison accommodation, separated from

1919 CJ (GC), case C-474/13 *Pham* (2014), paras 19-23. The distinction between criminal and administrative detention of returnees was even more reinforced in CJ, case C-61/11 PPU *El Dridi* (2011) and CJ (GC), case C-329/11 *Achughbabian* (2011) [see Mancano (2019), 67 fn 19].

1920 See e.g. Sheridan (2015), 64.

1921 See Majcher (2014). AG Pikamäe tried to answer this question in his opinion delivered on 27 February 2020 in case C-18/19 *WM*, EU:C:2020:130, paras 129-135.

1922 The opinions on the relation between Article 16(1) and Article 18(1) of the Return Directive varied, see opinion of AG Bot delivered on 30 April 2014 in joined cases C-473/13 and C-514/13 *Bero and Bouzalmate* and case C-474/13 *Pham*, EU:C:2014:336, para 136; European Commission (2017), 147; Mancano (2019), 72.

1923 CJ, case C-18/19 *WM* (2020), paras 35-36, 39.

> ordinary prisoners, pursuant to the second sentence of Article 16(1) of Directive 2008/115, for the purpose of ensuring the smooth progress of the removal procedure, in accordance with the objectives pursued by that directive.[1924]

The court stipulated that the detention in prison would be justified only when a detainee's 'individual conduct represents a genuine, present and sufficiently serious threat, affecting one of the fundamental interests of society or the internal or external security of the Member State concerned'.[1925]

In neither of the above-mentioned rulings did the Luxembourg Court consider whether the accommodation of asylum seekers and returnees in prisons is coherent with the ECHR and the jurisprudence of the Strasbourg Court.[1926] AG Bot stated that Article 16(1) of the Return Directive transposed the case-law of the ECtHR established under Articles 3, 5 and 8 of the ECHR. He specified the conditions in immigration detention required by the Strasbourg Court and concluded that the ECtHR had 'ruled that prison is not an 'appropriate' or 'suitable' place for the accommodation and detention of third-country nationals awaiting removal'.[1927] The AG relied on the ECtHR's case of *Popov v. France*; however, he omitted that in this case—as in many others—Articles 3 and 5(1)(f) of the ECHR had been considered violated only in respect to the children, not their parents. In regard to adults, the prison-like conditions of detention did not attain the level of severity required for a violation of the prohibition of inhuman and degrading treatment to be found nor did they entail arbitrariness in the deprivation of liberty.[1928] Therefore, the conclusion reached by the AG that the Strasbourg Court considered prisons *per se* as unsuitable accommodation for the purpose of immigration detention could not be unequivocally drawn from the *Popov v. France* case. The question is, however, whether

1924 Ibid., para 41.

1925 Ibid., para 46.

1926 However, AG Pikamäe did conduct such analysis in his opinion delivered on 27 February 2020 in case C-18/19 *WM*, EU:C:2020:130, paras 123-135, 144-146. He focussed on the obligation of national authorities to assess whether prison accommodation would amount to the inhuman and degrading treatment contrary to Article 3 of the ECHR, in particular with respect to the required separation from ordinary prisoners. Cf. CJ (GC), case C-128/18 *Dorobantu* (2019), paras 58-60, 71-77, which concerned the European arrest warrant, where the court relied heavily on the ECtHR's requirements in regard to conditions of detention arising from Article 3 of the ECHR.

1927 Opinion of AG Bot delivered on 30 April 2014 in joined cases C-473/13 and C-514/13 *Bero and Bouzalmate* and case C-474/13 *Pham*, EU:C:2014:336, paras 84, 87-89.

1928 ECtHR, *Popov v. France*, nos. 39472/07 and 39474/07 (2012), §§103, 105, 119-121. See also, critically on this differentiation, Vandenhole and Ryngaert (2013), 75-76, 81-82.

this conclusion was in fact justified. As shown above, the Strasbourg Court is clear that immigration detention of children cannot be effected in prison-like conditions. Thus, it is safe to conclude that the deprivation of liberty of minors (both accompanied and unaccompanied) in prisons would be even more unacceptable from the perspective of the ECHR.[1929] In regard to adults, the answer is not as straightforward. On the one hand, the ECtHR reiterates that 'there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention'[1930] and that it must be taken into account that immigration detention 'is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country'[1931]. The above clearly suggests that asylum seekers deprived of liberty in accordance with Article 5(1)(f) of the ECHR should be treated differently from ordinary prisoners. Thus, depriving asylum seekers of liberty in prisons together with and in the same conditions as convicted persons seems to be in violation of the ECHR. On the other hand, the Strasbourg Court does not disqualify any place of confinement without a thorough analysis of the conditions therein. In a situation when a state must–due to exceptional circumstances as determined by the CJ–resort to a prison accommodation where adult asylum seekers or returnees are treated in accordance with their status, thus not in the same manner as ordinary prisoners, and where conditions do not constitute inhuman or degrading treatment, it is conceivable that the ECtHR would accept such a solution as compatible with the requirements arising from the ECHR.[1932] It seems also to be in accordance with Article 16(1) of the Return Directive (and Article 10(1) of the 2013 Reception Directive that has a similar wording) and the interpretation of this provision delivered by the Luxembourg Court in the cases of *Bero and Bouzalmate*, *Pham* and *WM*.

1929 Meanwhile, only asylum-seeking unaccompanied minors cannot be detained in prisons under the EU law. *A contrario,* accompanied asylum-seeking children and all minors awaiting removal can be deprived of liberty in prisons in accordance with the 2013 Reception Directive and the Return Directive.

1930 ECtHR, *Riad and Idiab v. Belgium*, nos. 29787/03 and 29810/03 (2008), §77.

1931 See e.g. ECtHR, *Amuur v. France*, no. 19776/92 (1996), §43.

1932 See also Peek and Tsourdi (2016), 1424. Cf. Sheridan (2015), 59, 62, claiming that the long-term accommodation of asylum seekers in prisons or police cells is questionable from the standpoint of the respect for human dignity and that in this regard the same rationale as in the case of ECtHR, *Mublilanzila Mayeka and Kaniki Mitunga v. Belgium,* no. 13178/03 (2006) could be applied. In this case, the court stated that detaining the unaccompanied minor with adults in a facility not adapted to her needs had violated Article 5 of the ECHR.

VII. Procedural Safeguards

1. Right to Information

According to Article 5(2) of the ECHR, everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him. The ECtHR applies this provision also to immigration detention.[1933]

The Strasbourg Court reproaches national authorities for not giving foreigners information about the grounds for their detention.[1934] The communication of those reasons must be done with respect to the requirements established by the ECtHR. The information does not have to be provided in writing[1935] but it must be comprehensible[1936]. The ECtHR reiterates that

> paragraph 2 of Article 5 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of paragraph 2 any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4.[1937]

Thus, the procedural safeguards expressed in paragraphs 2 and 4 of Article 5 of the ECHR are closely intertwined.[1938] The information about the reasons on which the deprivation of liberty is based on should allow the legality of the detention in question to be contested.[1939]

There is also a link between the lawfulness requirement and the right to information. The Strasbourg Court noticed that when the deprivation of liberty lacks a basis in the domestic law, and thus is unlawful under paragraph 1, it is impossible to provide foreigners with the information about the legal

1933 See e.g. ECtHR, *Shamayev and Others v. Georgia and Russia*, no. 36378/02 (2005), §414.

1934 See e.g. ECtHR, *Amerkhanov v. Turkey*, no. 16026/12 (2018), §69.

1935 See e.g. ECtHR, *M.A. v. Cyprus*, no. 41872/10 (2013), §229; ECtHR, *M.S. v. Slovakia and Ukraine*, no. 17189/11 (2020), §102.

1936 See e.g. ECtHR, *Nur and Others v. Ukraine*, no. 77647/11 (2020), §§137-138.

1937 ECtHR, *Čonka v. Belgium*, no. 51564/99 (2002), §50. See also ECtHR (GC), *Khlaifia and Others v. Italy*, no. 16483/12 (2016), §115; ECtHR, *M.S. v. Slovakia and Ukraine*, no. 17189/11 (2020), §98.

1938 See e.g. ECtHR, *Rusu v. Austria*, no. 34082/02 (2008), §41; ECtHR (GC), *Khlaifia and Others v. Italy*, no. 16483/12 (2016), §132. See also ECtHR, *Rahimi v. Greece*, no. 8687/08 (2011), §§120-121. For more on paragraph 4, see these Chapter and Title, point 2.

1939 See e.g. ECtHR, *Suso Musa v. Malta*, no. 42337/12 (2013), §§115-116.

reasons for their detention in accordance with paragraph 2.[1940] Moreover, the court stressed that 'the absence of elaborate reasoning for an applicant's deprivation of liberty renders that measure incompatible with the requirement of lawfulness'.[1941]

Foreigners must learn about both the factual and the legal grounds for their detention. The information should be exact as to facts and correct as to laws. Specific factual information regarding the concerned foreigner's deprivation of liberty must be given. Brochures and information sheets that do not refer to the circumstances of the case may be found to be insufficient from the perspective of Article 5(2) of the ECHR.[1942] If the reasons for the deprivation of liberty change or new relevant facts occur, a detainee has a right to this information too.[1943]

Providing information at once in a language an asylum seeker understands may be difficult in practice. The presence of an interpreter during the apprehension in order to translate the reasons for detention is enough for the purposes of Article 5(2) of the ECHR.[1944] However, that is often not the case. The court reiterates that the required information must be conveyed promptly, but 'it need not be related in its entirety by the arresting officer at the very moment of the arrest'.[1945] Some delays are acceptable and the court assesses them on a case-by-case basis. For instance, in the case of *Saadi v. the United Kingdom*, a delay of seventy-six hours in communicating in understandable language the grounds for detention was found unacceptable under the requirements arising from Article 5(2) of the ECHR.[1946]

1940 ECtHR (GC), *Khlaifia and Others v. Italy*, no. 16483/12 (2016), §§117-118. For more on the lawfulness requirement, see this Chapter, Title II.

1941 ECtHR, *Lokpo and Toure v. Hungary*, no. 10816/10 (2011), §24. Cf. ECtHR, *Thimothawes v. Belgium*, no. 39061/11 (2017), §§77-78.

1942 ECtHR, *Rusu v. Austria*, no. 34082/02 (2008), §§37-42. Cf. ECtHR, *J.R. and Others v. Greece*, no. 22696/16 (2018), §§122-124, where the brochure was disqualified because the information about remedies against detention order contained there had not been formulated in simple and comprehensible language. The court also emphasized that the asylum seekers might have known that they were crossing the border illegally, but they could not be aware that the EU-Turkey deal applied to them. Cf. also ECtHR, *Suso Musa v. Malta*, no. 42337/12 (2013), §§115-116; ECtHR, *Nur and Others v. Ukraine*, no. 77647/11 (2020), §135, where the court stated that 'Article 5 § 2 does not require that reference be made to such elaborate details as specific legal provisions authorising detention'.

1943 ECtHR, *M.A. v. Cyprus*, no. 41872/10 (2013), §227.

1944 ECtHR, *Čonka v. Belgium*, no. 51564/99 (2002), §52. See also ECtHR, *A.H. and J.K. v. Cyprus*, nos. 41903/10 and 41911/10 (2015), §224.

1945 ECtHR, *Čonka v. Belgium*, no. 51564/99 (2002), §50. See also ECtHR, *M.S. v. Slovakia and Ukraine*, no. 17189/11 (2020), §98.

1946 ECtHR (GC), *Saadi v. the United Kingdom*, no. 13229/03 (2008), §84. See also ECtHR, *Shamayev and Others v. Georgia and Russia*, no. 36378/02 (2005), §416 (delay of four days) and ECtHR, *Rusu v. Austria*, no. 34082/02 (2008), §43 (ten days).

Pursuant to the 2013 Reception Directive and Return Directive, detention shall be ordered in writing and the decision should state the reasons in fact and in law on which it is based.[1947] Enforcing the detention of asylum seekers or third-country nationals staying illegally on the territory of a Member State without such a decision is precluded under the EU law.[1948] Foreigners detained pending asylum proceedings (including Dublin transferees) must also 'immediately be informed in writing, in a language which they understand or are reasonably supposed to understand, of the reasons for detention and the procedures laid down in national law for challenging the detention order, as well as of the possibility to request free legal assistance and representation'.[1949] The Return Directive does not provide for similar guarantees.

In the case of *Mahdi*, the referring court expressed doubt as to whether Article 15(2) of the Return Directive, requiring decisions on deprivation of liberty to be in writing, is applicable only to the first detention order or also to the extension of detention after the initial period of deprivation of liberty has expired. The CJ found that

> (t)he requirement that a decision be adopted in writing must be understood as necessarily covering all decisions concerning extension of detention, given that (i) detention and extension of detention are similar in nature since both deprive the third-country national concerned of his liberty in order to prepare his return and/or carry out the removal process and (ii) in both cases the person concerned must be in a position to know the reasons for the decision taken concerning him.[1950]

Referring to its case-law on the general principle of effective judicial protection,[1951] the court recalled that it is essential to communicate the reasons for deprivation of liberty in order to guarantee a foreigner's right to defence 'in the best possible conditions' and to facilitate his decision on initiating appeal proceedings against the extension of detention. A full disclosure of the grounds for detention also allows the court to carry out a review of the legality of the decision in question.[1952] The CJ stressed that

1947 Article 9(2) of the 2013 Reception Directive and Article 15(2) of the Return Directive.

1948 CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 259, 274. See also CJ (GC), case C-808/18 *Commission v Hungary* (2020), paras 204-208.

1949 Article 9(4) of the 2013 Reception Directive and Article 28(4) of the Dublin III Regulation.

1950 CJ, case C-146/14 PPU *Mahdi* (2014), para 44.

1951 E.g. CJ, case C-222/86 *Unectef v Heylens* (1987), para 15. For more on this principle, see Chapter 6.

1952 CJ, case C-146/14 PPU *Mahdi* (2014), para 45.

> (a)ny other interpretation of Article 15(2) and (6) of Directive 2008/115 would mean that challenging the legality of a decision extending detention would be more difficult for a third-country national than challenging the legality of an initial detention decision, which would undermine the fundamental right to an effective remedy.[1953]

Accordingly, the court concluded that in the light of Articles 6 and 47 of the EU Charter, 'any decision adopted by a competent authority, on expiry of the maximum period allowed for the initial detention of a third-country national, on the further course to take concerning the detention must be in the form of a written measure that includes the reasons in fact and in law for that decision'.[1954] However, the court narrowed down this safeguard by stipulating that the same obligations are not applicable to the reviews at reasonable intervals of time referred to in the first sentence of Article 15(3) of the Return Directive.[1955]

Hitherto, the CJ has approached the states' obligations arising from Article 9(2) and (4) of the 2013 Reception Directive timidly,[1956] despite the fact that the latter provision may raise some concerns as to its compatibility with Article 5(2) of the ECHR (in particular, it is controversial that the information about the reasons for detention may be delivered in a language which the asylum seeker is 'reasonably supposed to understand').[1957] However, it is already clear from the jurisprudence of the ECtHR and the *Mahdi* case that both courts push states to provide asylum seekers with sufficient information about the factual and legal grounds on which their deprivation of liberty is based. Moreover, the *Mahdi* case shows that the Luxembourg Court–like the Strasbourg Court–sees the right to information about the reasons for detention in the context of its review. Only by knowing why he was detained can the foreigner make an informed decision on initiating review proceedings and defend his rights effectively.[1958]

1953 Ibid., para 46.

1954 Ibid., para 52.

1955 Ibid., para 47.

1956 CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 257, 259; CJ (GC), case C-808/18 *Commission v Hungary* (2020), paras 204-208.

1957 See Velluti (2014), 68; Markiewicz-Stanny (2015), 71-72; Peek and Tsourdi (2016), 1421.

1958 See also Vavuola (2014), claiming that the *Mahdi* ruling contributes to safeguarding the right to effective remedy for third-country nationals.

2. Right to Review

Under Article 5(4) of the ECHR all detainees are entitled to take proceedings by which the lawfulness of their detention shall be decided speedily by a court and their release ordered if the detention is not lawful.[1959] Thus, the ECHR requires that detained asylum seekers have at their disposal an effective and speedy remedy under domestic law by which they can challenge the lawfulness of their deprivation of liberty. The lack of possibility for a detention to be reviewed from the perspective of its lawfulness constitutes a clear violation of Article 5(4) of the ECHR.[1960] Moreover, 'a detainee is entitled to apply to a "court" having jurisdiction to "speedily" decide whether or not their deprivation of liberty has become "unlawful" in the light of new factors which have emerged subsequently to the decision on their initial placement in custody'.[1961]

For a remedy to be in accordance with Article 5(4) of the ECHR, it must be effective,[1962] but it does not have to entail a suspensive effect.[1963] The existence of a remedy has to be 'sufficiently certain, not only in theory but also in practice, failing which it will lack the requisite accessibility and effectiveness'.[1964] A remedy is not effective when it offers no prospect of success.[1965] In regard to the requirement of accessibility, the ECtHR stressed that it 'implies, inter alia, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy'.[1966] The lack of access to free legal aid in the context of detention proceedings, 'particularly where legal representation is required in the domestic context for the purposes of Article 5§4, may raise an issue as to the accessibility of such

1959 Article 5(4) of the ECHR concerns reviewing only the lawfulness of detention. When there is no possibility to challenge under a domestic law the conditions in which the deprivation of liberty is effected, the ECtHR may find a violation of Article 13 of the ECHR, see e.g. ECtHR, *Mahmundi and Others v. Greece*, no. 14902/10 (2012), §76.

1960 See e.g. ECtHR, *S.D. v. Greece*, no. 53541/07 (2009), §§73-77; ECtHR, *L.M. and Others v. Russia*, nos. 40081/14, 40088/14 and 40127/14 (2015), §§141-142; ECtHR, *Moustahi v. France*, no. 9347/14 (2020), §103.

1961 ECtHR, *Abdulkhakov v. Russia*, no. 14743/11 (2012), §208, see also §216.

1962 See e.g. ECtHR, *G.B. and Others v. Turkey*, no. 4633/15 (2019), §§172-173. Article 5(4) of the ECHR is considered a *lex specialis* to Article 13 of the ECHR providing for the right to an effective remedy, see e.g. ECtHR (GC), *A. and Others v. the United Kingdom*, no. 3455/05 (2009), §202. For more on Article 13 of the ECHR, see Chapter 6.

1963 See e.g. ECtHR, *A.M. v. France*, no. 56324/13 (2016), §38.

1964 See e.g. ECtHR, *Abdolkhani and Karimnia v. Turkey*, no. 30471/08 (2009), §139; ECtHR (GC), *Khlaifia and Others v. Italy*, no. 16483/12 (2016), §130.

1965 See e.g. ECtHR, *Suso Musa v. Malta*, no. 42337/12 (2013), §58, ECtHR, *Abdi Mahamud v. Malta*, no. 56796/13 (2016), §109.

1966 See e.g. ECtHR, *Soldatenko v. Ukraine*, no. 2440/07 (2008), §125.

a remedy'.[1967] Moreover, if detainees are not informed about the reasons for their confinement (in violation of Article 5(2) of the ECHR), their right to review is considered to be 'deprived of all substance'.[1968]

The review proceedings available to detainees must be speedy. The Strasbourg Court reiterates that 'since the liberty of the individual is at stake, the State must ensure that the proceedings are conducted as quickly as possible'.[1969] Detention of vulnerable foreigners, in particular minors, requires even greater expedition.[1970] Moreover, the remedy should be considered during the period of detention in question.[1971] The ECtHR applies very strict standards concerning the State's compliance with the speediness requirement.[1972] It is examined on a case-by-case basis, taking into account in particular 'the complexity of the case, any specificities of the domestic procedure and the applicant's behaviour in the course of the proceedings'.[1973] In the case of *D.B. v. Turkey*, the Strasbourg Court reproached national authorities for taking almost five months to consider the applicant's motion to annul the decision refusing his release. The court stressed that the case had not been complex: the detention in question had lacked a sufficient legal basis in domestic law. Despite this, the national court released the foreigner only because his refugee status had been recognized.[1974] In the case of *Muhammad Saqawat v. Belgium*, the court rejected the Government's arguments that the review proceedings lasted a long time due to the multiple levels of jurisdiction offered by Belgium law and the applicant's eagerness to appeal.[1975]

The ECtHR reiterates that long intervals in the context of automatic periodic review may give rise to a violation of Article 5(4) of the ECHR. In regard to immigration detention (both under the first and second limb of Article 5(1)(f)

1967 See e.g. ECtHR, *Suso Musa v. Malta*, no. 42337/12 (2013), §61. See also ECtHR, *Abdolkhani and Karimnia v. Turkey*, no. 30471/08 (2009), §141; ECtHR, *H.A. and Others v. Greece*, no. 19951/16 (2019), §212.

1968 See e.g. ECtHR, *Shamayev and Others v. Georgia and Russia*, no. 36378/02 (2005), §432; ECtHR (GC), *Khlaifia and Others v. Italy*, no. 16483/12 (2016), §§132–133. For more on Article 5(2) of the ECHR, see this Chapter and Title, point 1.

1969 ECtHR (GC), *Khlaifia and Others v. Italy*, no. 16483/12 (2016), §131.

1970 ECtHR, *G.B. and Others v. Turkey*, no. 4633/15 (2019), §§166–167, 186.

1971 See e.g. ECtHR, *Čonka v. Belgium*, no. 51564/99 (2002), §§45, 55; ECtHR, *Abdolkhani and Karimnia v. Turkey*, no. 30471/08 (2009), §139; ECtHR, *A.B. and Others v. France*, no. 11593/12 (2016), §137; ECtHR, *Nur and Others v. Ukraine*, no. 77647/11 (2020), §§145–148.

1972 See e.g. ECtHR, *Suso Musa v. Malta*, no. 42337/12 (2013), §52; ECtHR, *M.A. v. Cyprus*, no. 41872/10 (2013), §162.

1973 ECtHR (GC), *Khlaifia and Others v. Italy*, no. 16483/12 (2016), §131.

1974 ECtHR, *D.B. v. Turkey*, no. 33526/08 (2010), §§53–55. See also ECtHR, *Aden Ahmed v. Malta*, no. 55352/12 (2013), §§120–124; ECtHR, *M.A. v. Cyprus*, no. 41872/10 (2013), §§167–170.

1975 ECtHR, *Muhammad Saqawat v. Belgium*, no. 54962/18 (2020), §§66–67.

of the ECHR) the court stressed that the intervals between reviews should be shorter than in case of other exceptions to the right to liberty, because the factors affecting the lawfulness of immigration detention, such as the progress of the asylum, extradition or deportation proceedings and the authorities' diligence in the conduct of such proceedings, may change over the course of time. However, taking into account the lack of a requirement for the necessity of detention under subparagraph (f), reviews do not have to be as frequent as in case of an arrest or detention under Article 5(1)(c) of the ECHR[1976]. The intervals applied in practice are assessed by the court on a case-by-case basis.[1977]

The reviewing court must determine the detention's 'compliance with the procedural and substantive conditions which are essential for the "lawfulness", in Convention terms'.[1978] The court stresses that the 'lawfulness' in paragraph 4 of Article 5 of the ECHR must be understood as having the same meaning as the same notion mentioned in paragraph 1 of this provision.[1979] However, it points out that

> Article 5 § 4 does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5 § 1 (...). The reviewing "court" must not have merely advisory functions but must have the competence to "decide" the "lawfulness" of the detention and to order release if the detention is unlawful.[1980]

As long as the lawfulness of detention can be examined, various forms of judicial review can be considered acceptable under paragraph 4.[1981] Moreover, Article 5(4) of the ECHR does not require that all arguments given by a detainee

1976 Article 5(1)(c) of the ECHR concerns 'the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so'.

1977 ECtHR, *Aboya Boa Jean v. Malta*, no. 62676/16 (2019), §§76-78.

1978 See e.g. ECtHR (GC), *Khlaifia and Others v. Italy*, no. 16483/12 (2016), §128.

1979 Ibid. Cf. ECtHR, *J.N. v. the United Kingdom*, no. 37289/12 (2016), §87; ECtHR, *Aboya Boa Jean v. Malta*, no. 62676/16 (2019), §80. For the requirement of lawfulness, see this Chapter, Title II.

1980 See e.g. ECtHR (GC), *Khlaifia and Others v. Italy*, no. 16483/12 (2016), §128.

1981 Ibid., §129.

be addressed by a reviewing court,[1982] but it must take into account those facts that are capable of putting in doubt the lawfulness of the deprivation of liberty.[1983]

The lawfulness of detention is also at the centre of the review proceedings guaranteed under the secondary EU law. Pursuant to the 2013 Reception Directive and the Return Directive, when the deprivation of liberty has been ordered by administrative authorities, the returnee concerned has a right to a speedy judicial review of the lawfulness of detention either *ex officio* or on request.[1984] National legislation that does not provide for such a review is precluded under the EU law as being in violation of the secondary law as well as the principle of effective judicial protection guaranteed under Article 47 of the EU Charter.[1985] Moreover, detention shall be reviewed at reasonable intervals of time.[1986] A speedy judicial review is also guaranteed under the 2013 Procedures Directive.[1987]

The scope of review has been interpreted by the CJ only in regard to the extension of detention pending return proceedings.[1988] However, taking into account the resemblance of the respective provisions, the findings of the court must be considered relevant to the interpretation of the 2013 Reception Directive.[1989]

In the cases of *Arslan* and *G. and R.* the Luxembourg Court stressed that the judicial authority deciding on the extension of the detention must conduct an assessment on a case-by-case basis of all factual and legal circumstances.[1990] This approach continued in the case of *Mahdi*, where the court analysed the

1982 In particular, it is not required for a reviewing court to have the power to examine the merits of an expulsion or extradition order [Harris et al. (2018), 356].

1983 ECtHR, *Ermakov v. Russia*, no. 43165/10 (2013), §§264, 267; ECtHR, *G.B. and Others v. Turkey*, no. 4633/15 (2019), §§175-176. See also ECtHR, *A.B. and Others v. France*, no. 11593/12 (2016), §137, where the reviewing court did not consider the alternatives to detention in regard to the accompanied minors.

1984 Article 15(2) of the Return Directive and Article 9(3) of the 2013 Reception Directive.

1985 CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 260-261, 276-277, 290.

1986 Article 15(3) of the Return Directive and Article 9(5) of the 2013 Reception Directive.

1987 Article 26(2) of the 2013 Procedures Directive. See also Article 18(2) of the 2005 Procedures Directive.

1988 The judicial review of the lawfulness of detention under Article 9 of the 2013 Reception Directive had been at the heart of the preliminary request in the case of *D.H.*, but the referring court withdrew its question [see CJ, case C-704/17 *D.H.*, order (2019)]. However, the AG Sharpston delivered on 31 January 2019 the opinion in this case (EU:C:2019:85).

1989 See also Moreno-Lax and Guild (2015), 522.

1990 CJ, case C-534/11 *Arslan* (2013), paras 62-63; CJ, case C-383/13 PPU *G. and R* (2013), paras 44-45.

scope of 'supervision' referred to in the second sentence of Article 15(3) of the Return Directive. The nature of the examination to be conducted by the judicial authority deciding on the extension of the returnee's detention is not specified in this provision. However, it is clear that national courts must take into account the conditions laid down in Article 15(1) and (6) of the Return Directive, just as they should assess the reasonable prospect of removal pursuant to paragraph 4.[1991] Domestic judicial authorities 'must be able to rule on all relevant matters of fact and of law' in this regard and conduct an 'in-depth examination of the matters of fact specific to each individual case'. When this analysis leads to the conclusion that the detention is no longer justified, a national court

> must be able to substitute its own decision for that of the administrative authority or, as the case may be, the judicial authority which ordered the initial detention and to take a decision on whether to order an alternative measure or the release of the third-country national concerned.[1992]

The judicial authority must take into account all the facts and evidence presented to it (both by the administrative authority and by the detainee) and 'any other element that is relevant for its decision should it so deem necessary'. Thus, 'the powers of the judicial authority in the context of an examination can under no circumstances be confined just to the matters adduced by the administrative authority concerned'.[1993]

The *Mahdi* case enhanced the scope of judicial review in the context of the prolongation of immigration detention, in particular in comparison with some national practices that limited courts' powers in this regard.[1994] On the one hand, surprisingly, the Luxembourg Court did not rely on Article 47 of the EU Charter in this regard. Despite that, as Ippolito noticed, the CJ's conclusions are 'seemingly drawn' from the logic of the EU Charter.[1995] On the other hand, unsurprisingly, the CJ did not refer to the ECtHR's case-law regarding Article 5(4) of the ECHR, under which the requirements regarding the scope and intensity of review are modest. In the *Mahdi* ruling, the Luxembourg Court pushes states to go beyond their obligations arising from the ECHR, in particular when it stresses that the judicial authority conducting the review must be able not only to order the detainee's release, but also to apply alternatives to

1991 CJ, case C-146/14 PPU *Mahdi* (2014), paras 56–61.

1992 Ibid., para 62. See also CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), para 293.

1993 CJ, case C-146/14 PPU *Mahdi* (2014), para 62.

1994 Basilien-Gainche (2014). See also Vavuola (2014).

1995 Ippolito (2015), 32.

detention when necessary,[1996] and when it highlights that all the detainee's arguments must be taken into account, as well as any other information that the court considers relevant in the case.[1997]

VIII. Conclusions

In this chapter, the requirements arising from the right to liberty and security as they are determined by the Strasbourg Court in its abundant case-law on immigration detention were examined and juxtaposed with the respective jurisprudence of the Luxembourg Court. The analysis was meant to enable ascertaining whether the right to liberty and security applied in the context of immigration detention is interpreted in a convergent manner by the two courts, providing a clear and indubitable standard that asylum seekers can rely on in domestic proceedings.

The right to liberty and security expressed in Article 6 of the EU Charter is supposed to have the same meaning and scope as the very same right arising from Article 5 of the ECHR. A congruous relation exists between Article 4 of the EU Charter and Article 3 of the ECHR regarding the prohibition of torture or inhuman or degrading treatment or punishment.[1998] Thus, it is not unreasonable to expect that the respective provisions of the ECHR and EU Charter will be–in the context of the detention of asylum seekers as in any other–interpreted coherently. However, it should not be overlooked that, pursuant to Article 52(3) of the EU Charter, the EU law may also provide for more extensive protection than the ECHR. And indeed, the analysis conducted in this chapter leads to a conclusion that either the jurisprudence of the ECtHR and the CJ on immigration detention is coherent or the Luxembourg Court pushes the Member States to provide for more extensive protection in accordance with the EU law than is required under the ECHR.

The two European asylum courts agree that immigration detention must be lawful, i.e. it has to be based in law of a sufficient quality and it cannot be arbitrary.[1999] The ECtHR and CJ coherently state that deprivation of liberty

1996 However, exceptionally, in some cases the ECtHR did reproach national courts for not considering alternatives to detention during review proceedings [see e.g. ECtHR, *A.B. and Others v. France*, no. 11593/12 (2016), §137]. The scarcity of such findings results from the court's approach to the applicability of the requirement of necessity in the context of immigration detention. For more see this Chapter, Title III.

1997 Cf. Mananashvili (2016), 740.

1998 See this Chapter, Title I, point 1.

1999 See this Chapter, Title II.

justified by reasons like the ones provided for in points (a) and (b) of the first subparagraph of Article 8(3) of the 2013 Reception Directive is in compliance with the first limb of Article 5(1)(f) of the ECHR.[2000] They also consistently highlight–in regard to detention pending return proceedings and removal–the requirements of due diligence and a realistic prospect of removal. They state in agreement that deprivation of liberty can continue despite return proceedings having been temporarily stayed, even when this suspension results from an application for international protection.[2001] Moreover, both courts push states to provide asylum seekers with sufficient information about the factual and legal grounds on which their detention was based.[2002]

The courts' approach to immigration detention differs in those cases where the Luxembourg Court decided that more extensive protection is provided under the EU law than pursuant to the ECHR. In the *Al Chodor and Others* case, the CJ found that the detention of Dublin transferees ordered on the basis of the settled case-law confirming a consistent administrative practice must be considered unlawful. Pursuant to the Dublin III Regulation, the reasons to believe that an asylum seeker may abscond must be based on objective criteria defined by law, i.e.–as concluded by the Luxembourg Court–by 'a binding provision of general application'. The CJ relied on the requirements arising from the ECtHR's case-law on the sufficient quality of law concerning detention, but decided to apply a more restrictive interpretation of the concept of 'law' than the Strasbourg Court occasionally did.[2003] Similarly, in the *Mahdi* ruling, the CJ pushed states to go beyond their obligations arising from the ECHR. In particular, it stressed that the judicial authority conducting the review of a pre-removal detention must be able to apply alternative measures and that all the arguments made by a detainee must be taken into account.[2004] In the *FMS and Others* ruling, the Luxembourg Court expressed (indirectly) its agreement with the ECtHR's conclusion that a foreigner's possibility to leave a transit zone at his own will is a factor that affects the qualification of the measures applied to asylum seekers as a detention or not. However, it decided–against the wording of the *Ilias and Ahmed v. Hungary* judgment–that such possibility is real only when a departure would be lawful and would not deprive the concerned foreigners of access to asylum proceedings.[2005]

2000 See this Chapter, Title IV, point 1.

2001 See this Chapter, Title IV, point 3.

2002 See this Chapter, Title VII, point 1.

2003 See this Chapter, Title II.

2004 See this Chapter, Title VII, point 2.

2005 See this Chapter, Title IV, point 2.

The most noteworthy divergency between the jurisprudence of the two courts concerns the principle of proportionality and requirement of necessity.[2006] Under Article 5(1)(f) of the ECHR, the necessity test is not required and the application of the principle of proportionality is limited. That is a rule with some established exceptions. Pursuant to the EU law and the CJ's case-law, it is clear that the detention of asylum seekers–independently of the context (whether it is effected in connection with asylum, Dublin or return proceedings)–is subject to the principle of proportionality and the requirement of necessity. That is a rule with no exceptions. The standard applied by the Luxembourg Court is therefore clearly more protective than the one established by the ECtHR. The approach of the Strasbourg Court in this regard is rightly criticized, in particular in relation to the first limb of subparagraph (f). The respective jurisprudence of the ECtHR has evolved over the years; in particular, it now requires that for some vulnerable persons, their detention must be necessary. However, the progress is too slow and insufficient. There is a long way to go before the standards of the two European asylum courts unify in this regard, if they ever will.

The analysis conducted in this chapter also proved that there is the possibility of more inconsistency between the courts' approach to the detention of asylum seekers and returnees. Firstly, some provisions of the secondary EU law are questionable from the perspective of the requirements arising from Article 5 of the ECHR, but they have not been interpreted by the CJ yet.[2007] Secondly, the answers given by the Luxembourg Court in its judgments concerning immigration detention are sometimes incomprehensive and insufficient.[2008] References to the Strasbourg Court's jurisprudence, which could clarify the CJ's view on the matter, are not as frequent as one would expect taking into account the close relation between Article 6 of the EU Charter and Article 5 of the ECHR.[2009] In consequence, there is a risk that the secondary EU law examined by the Luxembourg Court may be interpreted in a manner that conflicts with the requirements arising from the ECHR. Thirdly, the jurisprudence of the Strasbourg Court on immigration detention is to a large extent so casuistic that it may be difficult to rely on it, both by the CJ and national authorities. Therefore, the unclear and too meagre reasoning in the rulings of the Luxembourg Court and the casuistic case-law of the ECtHR creates the opportunity for inconsistency between the courts' jurisprudence.

2006 See this Chapter, Title III.

2007 See e.g. Articles 9(4) and 11(6) of the 2013 Reception Directive.

2008 See this Chapter, Title IV, point 3.1, with regard to the *Mahdi* case; Title IV, point 3, with regard to the *Kadzoev* case; Title VI, with regard to cases *Bero and Bouzalmate* and *Pham*.

2009 In fact, the references to Article 6 of the EU Charter are also scarce.

It seems that the CJ ruling that aroused the greatest doubts in regard to its coherence with the ECtHR's jurisprudence was the *J.N.* case.[2010] In this case, the Luxembourg Court concluded that detention of asylum seekers under point (e) the first subparagraph of Article 8(3) of the 2013 Reception Directive (allowing for a deprivation of liberty for national security or public order reasons) is compatible with the requirements arising from Article 5(1)(f) of the ECHR. Meanwhile, the ECtHR excludes the possibility of detaining a person solely for public order or national security reasons under subparagraph (f). However, the Strasbourg Court allows for immigration detention when the security considerations exist but at the same time the proceedings concerning the foreigner's expulsion or extradition are in progress. The Luxembourg Court decided that the proceedings regarding *J.N.*'s return had been ongoing, even though he had applied for asylum and in those circumstances, pursuant to the national law, the return decision had lapsed. This artful manoeuvre enabled a reconciliation of the standards between the CJ and ECtHR. Nevertheless, the problem with the *J.N.* judgment lies less in what the court said and more in what it decided not to address. The answer given by the court did not refer to the facts of the case. Therefore, some doubts concerning the detention of asylum seekers for security reasons still persist, in particular in a situation when return proceedings were not concluded or even initiated before the asylum proceedings. It has been noticed that in this regard, point (e) of the first subparagraph of Article 8(3) of the 2013 Reception Directive may be interpreted inconsistently with the jurisprudence of the Strasbourg Court. The CJ did not address this problem in the *J.N.* case.

Importantly, while the standards on immigration detention arising from the ECtHR's and CJ's jurisprudence diverge to some extent, they all can be satisfied on a national level. The more protective rules arising from the CJ's case-law on the concept of 'law', the applicability of the necessity requirement and principle of proportionality, as well as the scope of the right to review,[2011] are not in contradiction with the ECHR. In fact, when under a domestic law–in accordance with the EU law and the respective jurisprudence of the Luxembourg Court–a higher standard is provided for as regards immigration detention, the Strasbourg Court applies it under the lawfulness requirement as well.[2012]

Moreover, when the CJ's jurisprudence on immigration detention is incomprehensive or insufficient or does not address the crux of the problem,

2010 See this Chapter, Title IV, point 4.

2011 See this Chapter, Title II, III and VII, point 2.

2012 See this Chapter, Title II.

the ECHR and ECtHR's jurisprudence may sometimes dispel the doubts that have arisen. For instance, while in the case of *J.N.* the CJ decided not to address the issue of whether a detention of an asylum seeker for security reasons is permissible when the return order has not yet been issued, the analysis of the Strasbourg Court's case-law proves that such deprivation of liberty may be compatible with Article 5(1)(f) of the ECHR as long as it is ordered to prevent an unauthorised entry into the country.[2013] In the case of *Kadzoev,* the CJ did not consider a possible contradiction between the eighteen-month time-limit for a pre-removal deprivation of liberty and the states' obligations arising from the ECHR, in particular the requirement that the duration of immigration detention must be reasonable. However, the ECtHR's jurisprudence clearly shows that the length of deprivation of liberty must be reasonable irrespective of the existence or absence of time-limits under a domestic law.[2014]

Taking that into account, it must be concluded that even though the jurisprudence of the two European asylum courts on immigration detention is not convergent in its entirety, it is surely complementary. The standards established by the ECtHR and the CJ taken together may sufficiently protect asylum seekers and returnees against arbitrary, unjustified or protracted detention in unacceptable conditions without adequate procedural safeguards. However, the practice shows that states are not willing to comply with those standards, in particular in the face of large influxes of foreigners.[2015]

The UNHCR's postulate of 1986 that detention of asylum seekers and refugees 'should normally be avoided' is far from being realized.[2016] In 2014 the UNHCR boldly adopted a global strategy to support governments to end detention of asylum seekers and refugees. It established three main goals: ending detention of children, ensuring that alternatives to detention are available in law and practice, and guaranteeing that conditions of detention, where the detention is necessary and unavoidable, meet international standards.[2017] The practice of states that is reflected in the applications and preliminary references submitted to the ECtHR and the CJ respectively bluntly shows that there is still a long way to go before those goals can be achieved.

2013 See this Chapter, Title IV, point 4.

2014 See this Chapter, Title V.

2015 See also Wilsher (2011), 170, stating that 'state practice has remained largely immune to human right bodies' criticism'.

2016 For more postulates of the UNHCR, see this Chapter, Title I, point 1. See also Wilsher (2011), 132, noticing that there has been 'a long, and largely fruitless, battle between the UNHCR and Western governments over detention issues'.

2017 UNHCR (2014), 7.

Chapter 6
Remedies

I. Introduction

For asylum seekers, having access to effective remedies[2018] is of great importance. A decision that refuses entry to presumptive refugees by disregarding the principle of non-refoulement or that wrongfully rejects an application for international protection may lead to the asylum seeker's removal to a country where he fears persecution. A decision on an expulsion, extradition or transfer issued without a proper examination of the risk of treatment contrary to Article 3 of the ECHR and Article 4 of the EU Charter may put a returnee in a danger: he may be tortured or suffer an inhuman or degrading treatment or punishment after the return. The consequences of faulty decisions issued in asylum-related proceedings may be tremendous, if not life-threatening. As rightly stated by Hofmann and Löhr, the '(n)on-refoulement is only guaranteed if the person affected can appeal against unlawful decisions'.[2019] The domestic authorities are obviously not infallible[2020] and asylum seekers need a path to prove them wrong. Taking into account the rights that are at stake, it is not sufficient that asylum seekers have access to any remedy–it has to be an effective one.

In practice, some form of appeal procedure is provided in most of the European states as regards asylum, expulsion, extradition or transfer decisions. However, domestic appeal proceedings that asylum seekers are involved with are often flawed.[2021] To start with, the remedies are hardly accessible to asylum seekers, due to, *inter alia,* truncated time-limits for lodging an appeal[2022]

2018 Notion of 'remedies' is understood in this chapter in its procedural sense, i.e. as 'the processes by which arguable claims of human rights violations are heard and decided' [see Shelton (2005), 7], in particular by appeal or reviewing courts and administrative bodies.

2019 Hofmann and Löhr (2011), 1105.

2020 Ibid., referring to multiple accounts of successful appeals in refugee status determination procedures. See also UNHCR (2010), 88; EASO (2019), 63. See also Staffans (2010), 280, pointing out that due to the nature of asylum proceedings the frequency of appeals is high.

2021 See e.g. UNHCR (2010), 83-92.

2022 See e.g. ECRE (2016) 'Admissibility…', 22-23; ICommJ and ECRE (2018), 6-7; UNHCR (2018), Annex 2; ECRE (2020), 21. For more see Reneman (2013); EASO (2018) 'Asylum Procedures…', 151-154.

or the limited availability of legal aid[2023]. Even when a foreigner manages to submit an appeal, he may be removed before it is considered on the merits by a competent authority, because not all remedies entail a suspensive effect.[2024] The appeal bodies that are entrusted with the competence to deal with asylum seekers' matters sometimes lack sufficient independence and impartiality as well as expertise and experience.[2025] The scrutiny that they carry out may be restricted, by law or practice, only to points of law or to examination *ex tunc*.[2026] In some instances, the respective authorities reviewing a decision are not allowed or willing to admit new evidence or gather information *proprio motu*.[2027] In fact, on appeal, there is a tendency to scrutinize as little as possible.[2028] Such approach results, *inter alia,* from the standpoint that a first-instance authority is best suited to assess the evidence and applicant's credibility.[2029] Moreover, appeal asylum-related proceedings tend to be unduly lengthy,[2030] which leaves asylum seekers in a state of uncertainty about their legal position for an unnecessarily long time. Furthermore, procedural rules regarding remedies in asylum-related proceedings differ—sometimes significantly—between states, even amongst the Member States of the EU. In consequence, the scope of protection that an asylum seeker enjoys in this regard depends heavily on the law and practice of the state that issued a first-instance decision on a refugee status determination or return.

The above-mentioned problems that asylum seekers struggle with in practice in the context of asylum-related appeal proceedings prove bluntly that cogent and coherent guidance is needed in this regard from the Strasbourg and Luxemburg Courts. In this chapter, the case-law of the two European asylum courts concerning the right to an effective remedy is scrutinized and juxtaposed (Title II-V). This examination is preceded by introductory remarks concerning the applicable legal framework (1) and by a detailed determination of the scope of the analysis conducted in this chapter (2).

2023 See e.g. ECRE/ELENA (2017), 4-9; ECRE (2020), 21.

2024 In particular in the admissibility and accelerated procedures, see e.g. ECRE (2016) 'Admissibility…', 23-24; ECRE (2017) 'Accelerated…', 12; ICommJ and ECRE (2018), 7-8; UNHCR (2018), Annex 2; EASO (2019), 163. See also ECRE (2020), 21, with regard to Dublin proceedings.

2025 See e.g. ICommJ and ECRE (2018), 4.

2026 See e.g. ECRE (2017) 'Accelerated…', 12; EASO (2018) 'Asylum Procedures…', 147.

2027 See e.g. EASO (2018) 'Evidence and Credibility…', 28-29.

2028 Spijkerboer (2009), 49.

2029 Reneman (2014) *EU Asylum Procedures (…)*, 256, 259.

2030 ECRE (2016) 'Length…', 9-10. See also FRA (2010), 33.

1. Legal Framework

The 1951 Refugee Convention does not specifically regulate procedural issues. The particularities of how refugees are to be identified were left to the discretion of the states. However, the general obligation to examine applications for asylum and, thus, to establish some procedure in this regard can be drawn from the text of the Convention.[2031]

International refugee law does not expressly provide for a right to an effective remedy for asylum seekers and refugees. Moreover, there is no agreement as to whether such a right may be inferred from the 1951 Refugee Convention, in particular from Articles 16[2032] and 33[2033]. Notwithstanding, when a refugee who is lawfully in the territory of a state is to be expelled, Article 32 para 2 does demand the right to appeal. However, this provision was not intended to give refugees the right to a full and *ex nunc* judicial review.[2034] Moreover, the right to a remedy in expulsion proceedings under the 1951 Refugee Convention can be excluded due to compelling reasons of national security.[2035]

The indispensability of remedies in asylum-related proceedings was promptly noticed by international and regional organizations. As early as in 1977, the UNHCR recommended that a right to appeal against a refusal of recognition as a refugee should be secured under national law. That remedy should entail a suspensive effect.[2036] In 1981, those conclusions were shared

2031 See e.g. Boeles (1996), 297-299; Legomsky (2003), 654; Battjes (2006), 467; Goodwin-Gil and McAdam (2007), 530, 538; Vedsted-Hansen (2014), 439-441; Cantor (2015), 81; Cherubini (2015), 62-63. See also UNHCR, 'Handbook…', para 189. Cf. Hathaway (2005), 184-185.

2032 See e.g. Boeles (1996), 302-303; Elberling (2011), 944; Boeles et al. (2014), 277; Morgades-Gil (2017) 'The Right…', 258; Moreno-Lax (2017) *Accessing Asylum…*, 402. Cf. UNHCR, 'Handbook…' para 12 (ii), stating that Article 16 has 'no influence on the process of determination of refugee status'. See also Moffatt (2019), 419-420.

2033 Battjes (2006), 323, emphasized that Article 33 did not require appeal proceedings. However, he also claimed that when a remedy is made available in a state, the procedure 'must give full effect' to the principle of non-refoulement. Most importantly, a right to remain in a state during appeal proceedings should be guaranteed then. Cf. Fischer-Lescano, Löhr and Tohidipur (2009), 285.

2034 Davy (2011), 1317-1318. See also Grahl-Madsen (1997), 133; Hathaway (2005), 671-672.

2035 The wording of the provision 'advocates for a very strict interpretation' [Davy (2011), 1320].

2036 I.e. 'if the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing stem' and 'he should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending' [UNHCR, Executive Committee (1977) 'Determination…', para. e (vi, vii)]. Moreover, even when an asylum application is considered

by the CoE Committee of Ministers.[2037] Several years later, the latter body specified that a rejected asylum seeker who is facing an expulsion to a country where there is a risk that he would be subjected to treatment contrary to Article 3 of the ECHR should have access to an effective remedy.[2038] This recommendation was based on the developing case-law of the ECtHR concerning Article 13 in conjunction with Article 3 of the ECHR.

Asylum seekers, like any other person, have a right to an effective remedy guaranteed under the ECHR. Pursuant to Article 13, '(e)veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'. An arguable claim as regards other human rights enshrined in the Convention or protocols hitherto is thus required to activate the protection under Article 13.[2039] This obligation causes in particular that under the ECHR the right to an effective remedy is not guaranteed against any removal decision.[2040] An asylum seeker has to convincingly claim that a decision prompting his removal would expose him to a real risk of suffering treatment contrary to that treaty. Accordingly, asylum-seeking applicants most often invoke Article 13 of the ECHR in conjunction with Article 3.[2041] Occasionally, a breach of Article 2 of the ECHR or of Article 4 of the Protocol no. 4 is also referred to in this context.[2042]

Importantly, Article 3 of the ECHR (its procedural limb[2043]) also imposes some requirements on national asylum-related proceedings.[2044] In cases regarding the principle of non-refoulement, those requisites often overlap with

'manifestly unfounded' or 'clearly abusive', the applicant should have a right to challenge this decision before he is forcibly removed [UNHCR, Executive Committee (1983), para. e (iii)].

2037 Committee of Ministers of the CoE (1981), point 5.

2038 Committee of Ministers of the CoE (1998).

2039 Cf. Moreno-Lax (2017) *Accessing Asylum…*, 420, claiming that with the Grand Chamber's judgment in the case of *Tarakhel v. Switzerland,* no. 29217/12 (2014), 'the arguability threshold would seem to have disappeared'.

2040 De Weck (2017), 277.

2041 Costello and Hancox (2016), 433, claiming that 'the 'arguability' threshold in Article 3 cases will be met in most asylum cases (…)'. See also Clayton (2014), 196.

2042 See e.g. ECtHR (GC), *De Souza Ribeiro v. France*, no. 22689/07 (2012), §82; ECtHR, *Čonka v. Belgium*, no. 51564/99 (2002), §§81-85; ECtHR (GC), *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15 (2020), §§240-244; ECtHR, *D. and Others v. Romania*, no. 75953/16 (2020), §§129-130.

2043 See e.g. ECtHR, *Slimani v. France,* no. 57671/00 (2004), §§29-32.

2044 See e.g. ECtHR, *Jabari v. Turkey*, no. 40035/98 (2000), §40; ECtHR, *Khaydarov v. Russia*, no. 21055/09 (2010), §§112-115; ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §§163-164.

the ones arising from Article 13 of the ECHR.[2045] In consequence, the court does not always find it necessary to consider the violation of both provisions and decides only on the breach of Article 3.[2046] Conversely, sometimes it decides that the complaints regarding the remedies should be analysed only in relation to Article 13.[2047] Moreover, regrettably, in some cases the court clearly implied that the procedural limb of Article 3 of the ECHR had been violated in regard to appeal proceedings, but subsequently argued that there was no breach of the right to an effective remedy.[2048]

Effective remedies are also guaranteed under EU law.[2049] Pursuant to Article 47(1) of the EU Charter, '(e)veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article'. In fact, the right to effective judicial protection was considered a general principle of EU law by the CJ long before the adoption of the EU Charter,[2050] and Article 47 only 'constitutes a reaffirmation' of this principle.[2051] The Luxembourg Court reiterates that

> in the absence of EU rules on the matter, it is for the national legal order of each Member State to establish procedural rules for actions intended to safeguard the rights of individuals, in accordance with the principle of procedural autonomy, on condition, however, that those rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness).[2052]

2045 De Weck (2017), 295, even claimed that Article 3 of the ECHR 'contains an implicit right to an effective remedy against refoulement decisions.' See also, in general, Barkhuysen and van Emmerik (2018), 1048.

2046 See e.g. ECtHR, *Klein v. Russia*, no. 24268/08 (2010), §65; ECtHR, *Charahili v. Turkey*, no. 46605/07 (2010), §§79-80; ECtHR, *Khaydarov v. Russia*, no. 21055/09 (2010), §156; ECtHR, *Abdulkhakov v. Russia*, no. 14743/11 (2012), §158; ECtHR, *M.D. and M.A. v. Belgium*, no. 58689/12 (2016), §70; ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §179; ECtHR, *M.S. v. Slovakia and Ukraine*, no. 17189/11 (2020), §131.

2047 See e.g. ECtHR, *Hilal v. the United Kingdom*, no. 45276/99 (2001), §69.

2048 See e.g. ECtHR (GC), *Tarakhel v. Switzerland*, no. 29217/12 (2014), §§120-132. For the critique of this part of the judgment, see Costello and Mouzourakis (2014), 409.

2049 See also Article 19(1) of the TEU: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

2050 See e.g. CJ, case C-222/84 *Johnston* (1986), paras 18-19.

2051 CJ, case C-403/16 *El Hassani* (2017), para 38. See also CJ, case C-661/17 *M.A. and Others* (2019), para 77.

2052 CJ, case C-403/16 *El Hassani* (2017), para 26. See also CJ, case C-651/19 *JP* (2020), para 34.

Article 47(1) of the EU Charter is also undoubtedly based on Article 13 of the ECHR. However, it is not a right which corresponds to a right guaranteed by the ECHR within the meaning of Article 52(3) of the EU Charter. The right to an effective remedy enshrined in Article 47 is not dependent on the existence of 'an arguable complaint'; it is applicable to all cases that are within the scope of EU law, including asylum cases.[2053]

The ECHR and the EU Charter provide for other procedural guarantees, also. Firstly, in Article 1 of the Protocol no. 7 'procedural safeguards relating to expulsion of aliens' are determined. However, this provision is applicable only to 'an alien lawfully resident in the territory of a State', so usually not to asylum seekers.[2054] Secondly, under Article 6 of the ECHR the right to a fair trial is safeguarded. Nevertheless, the ECtHR–in line with the case-law of the ECommHR[2055]–refuses to apply it in relation to asylum cases, as 'decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 §1'.[2056] Nonetheless, the protection offered by Article 13 of the ECHR has been extended by the ECtHR over time so that nowadays it includes some aspects of the right to a fair trial.[2057] Moreover, the latter right is also secured under Article 47(2) of the EU Charter.

2053 'Explanations Relating to the Charter of Fundamental Rights' (2007), 29, 33-34; CJ (GC), case C-562/13 *Abdida* (2014), para 51. See also opinion of AG Cruz Villalón in case C-69/10 *Samba Diouf,* delivered on 1 March 2011, EU:C:2011:102, paras 38-39, claiming that the right to effective judicial protection under Article 47 of the EU Charter 'acquired a separate identity and substance under that article which are not the mere sum of the provisions of Articles 6 and 13 of the ECHR'. Cf. CJ, case C-348/16 *Sacko* (2017), para 39.

2054 See e.g. Lambert (2005), 45-46; Szklanna (2010), 195; Vedsted-Hansen (2014), 448; Cantor (2015), 91; Moreno-Lax (2017) *Accessing Asylum…,* 418. See also ECtHR, *Sultani v. France*, no. 45223/05 (2007), §§87-88; ECtHR, *A.M. and Others v. Sweden*, no. 38813/08, dec. (2009), concerning rejected asylum seekers.

2055 See Szklanna (2010), 179; Reid (2019), 824. See e.g. ECommHR, *Bozano v. France,* no. 9990/82, dec. (1984).

2056 ECtHR (GC), *Maaouia v. France*, no. 39652/98 (2000), §40. See also ECtHR (GC), *Mamatkulov and Askarov v. Turkey,* nos. 46827/99 and 46951/99 (2005), §82; ECtHR, *Tatar v. Switzerland*, no. 65692/12 (2015), §61; ECtHR, *A.L. v. the United Kingdom*, no. 32207/16, dec. (2018), §48. See also ECtHR, *Panjeheighalehei v. Denmark*, no. 11230/07, dec. (2009), where the court found that Article 6 was also not applicable to a case concerning the action for damages against the Refugee Board arising from the refusal of granting refugee status to the applicant. Cf. Cantor (2015), 90, stating that refugee status determination procedures 'fall outside the restrictive scope of the *Maaouia* ratio and remain subject to Article 6(1) because they are not a decision about entry, stay, or even expulsion, but instead concern the determination of an international civil and political status'. See also, for the critique of the *Maaouia* judgment, Sitaropoulos (2007), 102-105; Dembour (2015), 426 (referring to 'the poisonous authority' of this judgment); Moffatt (2019), 427.

2057 See e.g. Morgades-Gil (2017) 'The Right…', 259.

This provision clearly corresponds to Article 6(1) of the ECHR, although it is not limited to civil and criminal proceedings.[2058] Thus, it is recognized that by the means of Article 47(2) of the EU Charter the requirements arising from Article 6 of the ECHR as defined in the respective case-law of the ECtHR are applicable to asylum-related proceedings conducted in the Member States of the EU.[2059]

The right to an effective remedy is strengthened by specific provisions of the secondary asylum law, notably by Article 46 of the 2013 Procedures Directive,[2060] Article 27 of the Dublin III Regulation[2061] and Article 13 of the Return Directive. All those acts explicitly refer to the obligation of the Member States to provide for an effective remedy in the respective asylum-related proceedings, but the scope of this right differs between asylum, Dublin and return procedures. Moreover, a lot of discretion is still left to the Member States in this regard, hampering a real harmonization of the EU law.[2062] Thus, in practice and law, the procedural safeguards as regards remedies differ not only between asylum-related proceedings, but also between the Member States.

There is 'much room for insecurity about the real level of procedural guarantees that is required'[2063] under the secondary asylum law. The EU Charter and the ECHR should provide guidance in this regard, at least in relation to the right to an effective remedy, but it cannot be overlooked that the respective provisions are formulated in a very broad and vague manner. Article 13 of the ECHR was even considered one of the most obscure provisions of the Convention.[2064] In those circumstances it is not surprising that national courts

2058 Thus, its meaning is the same, but the scope is wider, see 'Explanations Relating to the Charter of Fundamental Rights' (2007), 30, 34.

2059 See e.g. Battjes (2006), 326; Peers (2012), 467; Reneman (2014) *EU Asylum Procedures (...)*, 85-86; Baldinger (2015), 384; Moreno-Lax (2017) *Accessing Asylum...*, 429; Lock and Martin (2019), 2215-2216.

2060 The right to an effective remedy was also guaranteed under the 2005 Procedures Directive (Article 39).

2061 The right to an effective remedy was not guaranteed under the Dublin II Regulation. See Article 19(2) of this Regulation, stating that a transfer decision *may* be subject to an appeal or a review.

2062 Asylum seekers' procedural rights proved to be particularly difficult to agree on during the negotiations of the secondary asylum law and in many instances the European Commission had to water down procedural safeguards to reach an agreement between the Member States [see e.g. as regards asylum proceedings: Costello (2007), 158; Brouwer (2008), 289; Costello and Mouzourakis (2017), 276; as regards return proceedings: Mananashvili (2016), 723; see also Ippolito and Velluti (2011), 31].

2063 Boeles et al. (2014), 411.

2064 See partially dissenting opinion of judges Matscher and Pinheiro Farinha in ECtHR (Plenary), *Malone v. the United Kingdom*, no. 8691/79 (1984), claiming that 'Article 13 (art. 13) constitutes one of the most obscure clauses in the Convention and that its application raises extremely difficult and complicated problems of interpretation'.

and tribunals often refer preliminary questions regarding remedies in asylum-related proceedings to the CJ and asylum seekers constantly complain before the ECtHR that their right to an effective remedy has been violated.[2065]

2. Scope of Analysis

In this chapter, the right to an effective remedy enshrined in Article 13 (in particular in conjunction with Article 3) of the ECHR and Article 47(1) of the EU Charter, is put in focus. Accordingly, the analysis below does not encompass Article 1 of the Protocol no. 7, as this provision is usually not applicable to asylum seekers. Moreover, due to the above-mentioned constant and clear approach of the Strasbourg Court as to the applicability of Article 6 of the ECHR to asylum cases,[2066] the right to a fair trial enshrined in the ECHR and the EU Charter is examined only incidentally in this chapter.

In general, the case-law of the ECtHR and the CJ concerning Article 13 of the ECHR and Article 47(1) of the EU Charter, respectively, is abundant. As regards remedies in asylum-related proceedings, the jurisprudence of the Strasbourg Court has been particularly well established, under both Article 13[2067] and the procedural limb of Article 3 of the ECHR. Within the CJ's asylum case-law, Article 47 is the provision of the EU Charter that is most often referred to by national courts and by the Luxembourg Court itself.[2068] The latter court is increasingly giving preliminary rulings that concern remedies available in asylum, Dublin and return proceedings.

The jurisprudence of the Strasbourg Court regarding asylum seekers' right to an effective remedy serves as the starting point for the analysis conducted in this chapter. The ECtHR reiterates that the scope of the states' obligations under Article 13 of the ECHR is dependent on the nature of an applicant's complaint.[2069] In the refoulement context, the Strasbourg Court maintains that Article 13 requires, first, an independent and rigorous scrutiny

2065 For more see Chapter 1, Title V, point 1.2.

2066 For more see these Chapter and Title, point 1.

2067 Cf. Dembour (2015), 426-427, emphasizing that the ECtHR only occasionally finds breaches of Article 13 of the ECHR in return cases and its case-law in this regard 'remains weak'.

2068 For more see Chapter 1, Title V, point 1.2. Cf. Thym (2019), 192, claiming that the CJ 'often treads carefully when pronouncing itself on procedural aspects' and, in consequence, a 'comparatively little 'demand' among domestic courts in the form of preliminary references on procedural issues' was found. See also Costello and Hancox (2016), 385.

2069 See e.g. ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §288; ECtHR (GC), *De Souza Ribeiro v. France*, no. 22689/07 (2012), §78; ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), §197; ECtHR, *S.K. v. Russia*, no. 52722/15 (2017), §74.

of a claim that there exist substantial grounds for fearing a real risk of suffering a treatment contrary to Article 3 of the ECHR, and, second, an automatic suspensive effect.[2070] More recently, the ECtHR added that the right to an effective remedy entails also 'a reasonable promptness' of appeal proceedings (or a 'particularly prompt response').[2071]

In this chapter, the three requirements arising from the right to an effective remedy as they are established in the Strasbourg Court's asylum case-law are examined and juxtaposed with the respective jurisprudence of the CJ. The analysis starts with the newest criterion, 'a prompt response' (Title II), and continues with the more developed requirements of 'an independent and rigorous scrutiny' (Title III) and 'a suspensive effect' (Title IV). The aim of this chapter is to determine whether the right to an effective remedy in asylum-related proceedings is interpreted in a convergent manner by the two courts, providing a clear and indubitable standard that asylum seekers can rely on (Title V).

II. Prompt Response

Pursuant to Article 6(1) of the ECHR, everyone is entitled to a fair and public hearing within a reasonable time. This guarantee applies until the final conclusion of the proceedings, i.e. also during the appeal procedure.[2072] However, as mentioned before, the ECtHR refuses to apply this provision in relation to asylum cases because they 'do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him' as specified in Article 6.[2073] That does not mean, though, that unduly lengthy asylum-related proceedings are acceptable under the ECHR. The Strasbourg Court approaches this problem in its case-law developed under Articles 3 and 13 of the Convention.[2074]

2070 See e.g. ECtHR, *Jabari v. Turkey*, no. 40035/98 (2000), §50; ECtHR, *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05 (2007), §58; ECtHR, *Abdolkhani and Karimnia v. Turkey*, no. 30471/08 (2009), §108; ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), §198; ECtHR, *A.M. v. the Netherlands*, no. 29094/09 (2016), §62.

2071 See e.g. ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §293; ECtHR, *Mohammed v. Austria*, no. 2283/12 (2013), §§71-72; ECtHR, *M.A. v. Cyprus*, no. 41872/10 (2013), §133; ECtHR, *S.K. v. Russia*, no. 52722/15 (2017), §74-75; ECtHR, *Kebe and Others v. Ukraine*, no. 12552/12 (2017), §101.

2072 See e.g. Harris et al. (2018), 440.

2073 ECtHR (GC), *Maaouia v. France*, no. 39652/98 (2000), §40. See also this Chapter, Title I, point 1.

2074 See also, in the context of the investigations into alleged killings or ill-treatment, ECtHR, *Aksoy v. Turkey*, no. 21987/93 (1996), §98, where the court stated that the requirement of promptness 'is implicit in the notion of an "effective remedy" under Article 13'.

In the refoulement context, the ECtHR emphasizes that the right to an effective remedy entails–in addition to the well-established requirements of independent and rigorous scrutiny as well as a suspensive effect–'a reasonable promptness' or a 'particularly prompt response'.[2075] The court highlights that 'particular attention should be paid to the speediness of the remedial action itself, since it is not inconceivable that the adequate nature of the remedy can be undermined by its excessive duration'.[2076]

The Greek cases are the most illustrative in this regard. In the case of *M.S.S. v. Belgium and Greece*, the Strasbourg Court found that the remedy against the negative asylum decision could not be considered effective for the purposes of Article 13 of the ECHR, *inter alia* because the appeal proceedings before the Supreme Administrative Court had lasted on average five and a half years. Also, the procedure concerning the suspension of the expulsion order was found to be excessively long (up to 4 years).[2077] The court emphasized that it could not agree with the Greek Government

> that the length of the proceedings before the Supreme Administrative Court is irrelevant for the purposes of Article 13. The Court has already stressed the importance of swift action in cases concerning ill-treatment by State agents (...). In addition, it considers that such swift action is all the more necessary where, as in the present case, the person concerned has lodged a complaint under Article 3 in the event of his deportation, has no procedural guarantee that the merits of his complaint will be given serious consideration at first instance, statistically has virtually no chance of being offered any form of protection and lives in a state of precariousness that the Court has found to be contrary to Article 3.[2078]

The ECtHR clarified later that the excessive delays in examining requests and appeals are particularly unreasonable when the respective proceedings concern a stay of a removal. A request for interim protection is intended to be considered speedily. Meanwhile, in the case of *Ahmade v. Greece* those proceedings

2075 See e.g. ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §293; ECtHR (GC), *De Souza Ribeiro v. France*, no. 22689/07 (2012), §82; ECtHR, *S.K. v. Russia*, no. 52722/15 (2017), §74-75; ECtHR, *Kebe and Others v. Ukraine*, no. 12552/12 (2017), §101; ECtHR, *Allanazarova v. Russia*, no. 46721/15 (2017), §96.

2076 See e.g. ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §292; ECtHR (GC), *De Souza Ribeiro v. France*, no. 22689/07 (2012), §81. See also concurring opinion of judge Pinto de Albuquerque in ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), where the features of refugee-status determination procedure that are indispensable were indicated, including the 'full and speedy judicial review of both the factual and legal grounds of the first-instance decision'.

2077 ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §§190, 320.

2078 Ibid., §320.

took almost two years.[2079] Moreover, the ECtHR specified that when interim measures were indicated under Rule 39, national courts should act with a particular diligence and rule on the merits rapidly.[2080]

The Strasbourg Court highlights the need for speedy appeal proceedings, but it also stresses that this promptness should not be achieved by sacrificing the thoroughness of a review.[2081] Already in the case of *Chahal v. the United Kingdom*, the ECtHR stated that in cases that involve 'considerations of an extremely serious and weighty nature', like asylum cases, 'it is neither in the interests of the individual applicant nor in the general public interest in the administration of justice that such decisions be taken hastily, without due regard to all the relevant issues and evidence'.[2082] As a rule, independent and rigorous scrutiny is required in appeal proceedings concerning claims under Article 3 of the ECHR,[2083] and it cannot be precluded only in order to ensure promptness.

The CJ did not examine in detail the excessive length of the appeal proceedings in Greece in the case of *N.S. and M.E.*, which followed the ECtHR's *M.S.S. v. Belgium and Greece* judgment. However, it did emphasize there that the asylum seeker's situation should not be worsened by infringing his fundamental rights 'by using a procedure for determining the Member State responsible which takes an unreasonable length of time'.[2084] This brief, but essential, statement should be understood as applying to both first-instance and appeal proceedings concerning a Dublin transfer. Similarly, in the case of *MA and Others*, the Luxembourg Court stated that

> (i)n the interest of unaccompanied minors, it is important, (...) not to prolong unnecessarily the procedure for determining the Member State responsible, and to ensure that unaccompanied minors have prompt access to the procedures for determining refugee status.[2085]

2079 ECtHR, *Ahmade v. Greece*, no. 50520/09 (2012), §§115-116,

2080 ECtHR, *A.C. and Others v. Spain*, nos. 6528/11 etc. (2014), §103. For more on interim measures, see Chapter 3, Title III, point 1.1.

2081 Cf. ECtHR, *Mohammed v. Austria*, no. 2283/12 (2013), §§79-81, where the court allowed for a limited scrutiny in subsequent asylum proceedings provided that the first asylum procedure had guaranteed a substantive examination and the circumstances of a case did not change. See also ECtHR, *Sultani v. France*, no. 45223/05 (2007), §65; ECtHR, *I.K. v. Austria*, no. 2964/12 (2013), §§72-75.

2082 ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §117. This statement was made (and criticized) in the context of the requirement of due diligence arising from Article 5(1)(f) of the ECHR, for more see Chapter 5, Title IV, point 3. See also ECtHR, *I.M. v. France*, no. 9152/09 (2012), §148; ECtHR, *K.G. v. Belgium*, no. 52548/15 (2018), §87; and PACE (2005), paras 8.1.1 and 8.8.

2083 For more see this Chapter, Title III.

2084 CJ (GC), joined cases C-411/10 and C-493/10 *N.S.* and *M.E.* (2011), para 108.

2085 CJ, case C-648/11 *MA and Others* (2013), para 61.

Moreover, in the *Shiri* case, the CJ clarified that Article 27(1) of the Dublin III Regulation, read in the light of Recital 19 thereof and Article 47 of the EU Charter, is to be interpreted as meaning that an applicant for international protection must have an effective and rapid remedy made available to him.[2086] The court emphasized that a national court or tribunal has to make a decision on interim protection within a reasonable period of time.[2087]

The Luxemburg Court also gave some guidance on the expected length of appeal proceedings conducted under the 2013 Procedures Directive. Pursuant to Article 46(10), laying down time-limits for a court or tribunal is left to the discretion of the states.[2088] In practice, it happens that asylum appeal procedures are either protracted[2089] or so short that a thorough consideration of a remedy is undermined or even precluded.

The CJ reiterates that asylum proceedings must be prompt. In the case of *Alheto,* it noticed that in order to ensure an effective remedy in accordance with Article 47 of the EU Charter, national authorities are required to adopt a new asylum decision 'within a short period of time' following the annulment, by the court hearing the appeal, of the initial decision taken on an asylum application.[2090] In the case of *H.N.,* the referring court asked the CJ whether under EU law it was permissible to provide for two separate proceedings: one concerning a refugee status and the second as regards a subsidiary protection, the initiation of which is dependent on a rejection in the first one. The Luxembourg Court allowed for such national legislation, although it stipulated that the respective national procedural rule should not 'give rise to a situation in which the application for subsidiary protection is considered only after an unreasonable length of time'. It emphasized the importance of guaranteeing that 'the entire procedure for considering an application for international protection does not exceed a reasonable period of time'.[2091] It is conceivable that this requirement applies to both first- and second-instance proceedings.

The promptness of a review should not be achieved at the expense of rigorous scrutiny and procedural safeguards. In the case of *Sacko* the CJ held that even though Recital 20 in the preamble to the 2013 Procedures Directive allows the Member States to accelerate proceedings in certain circumstances,

2086 CJ (GC), case C-201/16 *Shiri* (2017), para 46.

2087 Ibid., para 28.

2088 So as under the preceding 2005 Procedures Directive [Article 39(4)].

2089 Appeal asylum procedures are reported to last even up to two years, see ECRE (2016) 'Length…', 9-10. See also FRA (2010), 33.

2090 CJ (GC), case C-585/16 *Alheto* (2018), para 149.

2091 CJ, case C-604/12 *H.N.* (2014), paras 56-57.

that does not mean that the essential procedural requirements can 'be dispensed with on grounds of speed'. When a court or tribunal considering the appeal finds it necessary to hear an asylum seeker in order to carry out the full and *ex nunc* examination, it should be competent to do so. The Luxembourg Court emphasized that the provision that enables the acceleration of proceedings 'does not authorise the elimination of procedures which are essential in order to guarantee the applicant's right to effective judicial protection'.[2092] Furthermore, in the case of *Ghezelbash*, the CJ recalled—drawing on the case of *Petrosian and Others*—that 'the EU legislature did not intend that the judicial protection enjoyed by asylum seekers should be sacrificed to the requirement of expedition in processing asylum applications'.[2093]

The Luxembourg Court discussed the relation between the expected promptness of asylum proceedings and the requirement of an *ex nunc* examination arising from Article 46(3) of the 2013 Procedures Directive[2094] in the cases of *P.G.* and *L.H.* Under the Hungarian law, a remedy in asylum proceedings had to be considered within 60 (regular procedure) or 8 (accelerated procedure) days. The referring court asked whether such a regulation was in compliance with the directive, Article 47 of the EU Charter and Articles 6 and 13 of the ECHR, but the CJ decided to analyse the domestic law in question only from the perspective of the EU law. The Luxembourg Court stressed that it is well-established that an *ex nunc* and individual examination is required when a remedy against a decision on international protection is being considered. Moreover, asylum seekers have multiple procedural rights during appeal proceedings.[2095] When those substantial and procedural safeguards cannot be complied with within a time-limit established under a domestic law, this time-limit should not be applied (it should be considered instructive, not binding), but a court or tribunal is still required to decide on the matter as quickly as possible.[2096] Under the principle of effectiveness, the court concluded that the national legislation establishing the time-limit of 60 days enabled—in general—procedural guarantees to be provided to asylum seekers and a reviewing court or tribunal to conduct the *ex nunc* assessment, but the 8-day time-limit might be inadequate in this regard. Thus, Article 46(3) of the 2013 Procedures Directive and Article 47 of the EU Charter preclude national legislation

2092 CJ, case C-348/16 *Sacko* (2017), paras 45, 49.

2093 CJ (GC), case C-63/15 *Ghezelbash* (2016), para 57, referring to CJ, case C-19/08 *Petrosian and Others* (2009), para 48. See also CJ, case C-348/16 *Sacko* (2017), para 45.

2094 For more see this Chapter, Title III, point 3.

2095 CJ, case C-406/18 *PG* (2020), paras 28-31; CJ, case C-564/18 *LH* (2020), paras 65-71.

2096 CJ, case C-406/18 *PG* (2020), paras 34-37; CJ, case C-564/18 *LH* (2020), paras 75-76.

that establishes such a short time-limit for the examination of a remedy against a decision that an asylum application is inadmissible.[2097]

Overall, the Luxembourg Court approached the speediness of asylum-related proceedings predominantly *en passant* and it did not rely on the jurisprudence of the Strasbourg Court in this regard. Despite this, it may be concluded that the requirement of 'a reasonable promptness' established by the ECtHR under Article 13 of the ECHR is not questioned in the CJ's jurisprudence. In fact, the Luxembourg Court seems to increasingly highlight the need for reasonably speedy asylum-related proceedings (both first-instance and appeal ones).

The CJ's emphasis on promptness of asylum and Dublin procedure sits in conformity with the more established jurisprudence of both courts under Article 6(1) of the ECHR and Article 47(2) of the EU Charter[2098] emphasizing that the length of national proceedings has to be reasonable. As noticed by the CJ,

> it is clear from the case-law of both the Court of Justice and the European Court of Human Rights that the reasonableness of the length of proceedings is to be determined in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities (...).[2099]

Thus, the length of asylum-related proceedings is to be examined by both courts on a case-by-case basis. Due to the casuistic approach adopted by both courts in this regard and their general agreement as to the principle that a 'reasonable promptness' of a review is expected from domestic authorities, this requirement is not analysed in more detail in this chapter, leaving space for more contentious issues regarding the right to an effective remedy in asylum-related proceedings, including the requirement of independent and rigorous scrutiny.

2097 CJ, case C-564/18 *LH* (2020), paras 73, 77; CJ, case C-406/18 *PG* (2020), paras 32, 37. Cf. CJ, case C-69/10 *Samba Diouf* (2011), para 65, where the CJ excused the procedural differences between the accelerated procedure and the ordinary procedure. It emphasized that limited procedural guarantees in accelerated proceedings were 'intended to ensure that unfounded or inadmissible applications for asylum are processed more quickly, in order that applications submitted by persons who have good grounds for benefiting from refugee status may be processed more efficiently'.

2098 Both provisions concern a right to a public hearing within a reasonable time.

2099 CJ, case C-270/99 P *Z* (2001), para 24.

III. Independent and Rigorous Scrutiny

The ECtHR reiterates that when a person alleges that his removal would expose him to a real risk of suffering treatment contrary to Article 3 of the ECHR, ensuring the effectiveness of a remedy for the purposes of Article 13 requires independent and rigorous scrutiny of those claims.[2100] The notion of 'independent scrutiny' was first introduced in this context in the case of *Chahal v. the United Kingdom*.[2101] Four years later, in the case of *Jabari v. Turkey*, the Strasbourg Court specified that the examination demanded for the purposes of Article 13 of the ECHR has to be not only independent but also rigorous.[2102] Nowadays, those two adjectives are adduced in one breath by the court when it discusses the scrutiny that is expected from national authorities in asylum-related appeal proceedings.

It is explicit under the ECtHR's case-law that the court requires more rigorous examination by national authorities of the applicant's claims in the refoulement context than in other cases.[2103] That approach results from the absolute character of Articles 2 and 3 of the ECHR and the irreversibility of a harm that might occur when a risk of ill-treatment materializes. The Strasbourg Court, in particular,

> must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations.[2104]

2100 See e.g. ECtHR, *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05 (2007), §58; ECtHR, *K.R.S. v. the United Kingdom*, no. 32733/08, dec. (2008); ECtHR, *Abdolkhani and Karimnia v. Turkey*, no. 30471/08 (2009), §108; ECtHR, *Diallo v. the Czech Republic*, no. 20493/0 (2011), §74; ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §293; ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), §198; ECtHR, *M.A. v. Cyprus*, no. 41872/10 (2013), §133; ECtHR, *A.M. v. the Netherlands*, no. 29094/09 (2016), §62; ECtHR, *S.K. v. Russia*, no. 52722/15 (2017), §74; ECtHR, *Kebe and Others v. Ukraine*, no. 12552/12 (2017), §101.

2101 ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §151. See also Baldinger (2015), 244-245.

2102 ECtHR, *Jabari v. Turkey*, no. 40035/98 (2000), §50. See also Spijkerboer (2009), 63, and Baldinger (2015), 245.

2103 See e.g. Baldinger (2015), 241; Moreno-Lax (2017) *Accessing Asylum…*, 420-421; Reid (2019), 1081. However, 'the "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant' [ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §289].

2104 ECtHR, *NA. v. the United Kingdom*, no. 25904/07 (2008), §119. See also ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §150. For the ECtHR's sources of information, see Chapter 3, Title IV, point 1.

Accordingly, domestic authorities are regularly condemned for not conducting any assessment of risks invoked by asylum seekers.[2105] For instance, in the case of *Abdolkhani and Karimnia v. Turkey* the court was 'struck by the fact that both the administrative and judicial authorities remained totally passive regarding the applicants' serious allegations of a risk of ill-treatment if returned to Iraq or Iran'.[2106] Moreover, the court may assess that the examination conducted by national authorities was deficient on an appeal level and decide that Article 13 of the ECHR has been violated on this basis.[2107] However, the standard in this regard is not easily recognizable.[2108]

While the court describes the demanded scrutiny as 'rigorous', 'careful', 'close', 'thorough', 'adequate and detailed',[2109] none of those formulations sufficiently clarifies what the expected scope of the assessment is and how intense the examination of claims of a risk of ill-treatment should be. Due to the vagueness of the 'independent and rigorous scrutiny' requirement, its precise impact on domestic proceedings is considered uncertain.[2110] Moreover, the court decides on a case-by-case basis, taking into account specific personal and general circumstances concerning a particular asylum seeker. The casuistic approach of the ECtHR in this regard occasionally results in incoherent case-law, where the same national remedy was declared enough for the purposes of Article 13 of the ECHR in one case and not sufficient in another.[2111]

2105 See e.g. ECtHR, *Diallo v. the Czech Republic*, no. 20493/0 (2011), §§77, 79, 81, 85; ECtHR, *Auad v. Bulgaria*, no. 46390/10 (2011), §121; ECtHR, *Singh and Others v. Belgium*, no. 33210/11 (2012), §§100-105; ECtHR, *Tershiyev v. Azerbaijan*, no. 10226/13 (2014), §§72-73; ECtHR, *S.K. v. Russia*, no. 52722/15 (2017), §§82-84, 96-98; ECtHR, *O.D. v. Bulgaria*, no. 34016/18 (2019), §63. See also ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §137, highlighting that 'a postfactum finding that the asylum seeker did not run a risk in his or her country of origin (…) cannot serve to absolve the State retrospectively of the procedural duty' under Article 3 of the ECHR.

2106 ECtHR, *Abdolkhani and Karimnia v. Turkey*, no. 30471/08 (2009), §113.

2107 See e.g. ECtHR, *Klein v. Russia*, no. 24268/08 (2010), §56; ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §389; ECtHR, *Abdulkhakov v. Russia*, no. 14743/11 (2012), §148. See also, in regard to Article 3 of the ECHR, ECtHR, *Nizomkhon Dzhurayev v. Russia*, no. 31890/11 (2013), §§115-121; ECtHR, *Savran v. Denmark*, no. 57467/15 (2019), §§51-67; ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §§156-160.

2108 See also Battjes (2006), 321; Spijkerboer (2009), 68; Reneman (2014) *EU Asylum Procedures (…)*, 271; Baldinger (2015), 245.

2109 See e.g. ECtHR, *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05 (2007), §58; ECtHR, *Yakubov v. Russia*, no. 7265/10 (2011), §102; ECtHR, *Diallo v. the Czech Republic*, no. 20493/0 (2011), §§74, 75, 77; ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), §205; ECtHR, *A.M. v. Switzerland*, no. 37466/13, dec. (2015), §29; ECtHR (GC), *Paposhvili v. Belgium*, no. 41738/10 (2016), §187; ECtHR, *S.K. v. Russia*, no. 52722/15 (2017), §§96, 98; ECtHR, *Amerkhanov v. Turkey*, no. 16026/12 (2018), §57.

2110 Vedsted-Hansen (2014), 447.

2111 De Weck (2017), 297, referring to the cases: ECtHR, *Yoh-Ekale Mwanje v. Belgium*, no. 10486/10 (2011) and ECtHR, *Quraishi v. Belgium*, no. 6130/08, dec. (2009). See also

Similarly, the Luxembourg Court was criticized for not voicing an explicit standard in regard to judicial scrutiny.[2112] In fact, until recently, the scope and intensity of review was rarely analysed by the CJ, either in general[2113] or in regard to asylum-related proceedings. The 2005 Procedures Directive, the Return Directive and the Dublin II Regulation remained silent about the scrutiny required in appeal asylum, return and Dublin proceedings. Thus, in its early asylum jurisprudence (regarding the 2004 Qualification Directive), the Luxembourg Court approached the problem warily. The court determined that the examination that national authorities have to carry out in asylum proceedings relates to the question of

> whether or not the established circumstances constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subjected to acts of persecution. That assessment of the extent of the risk must, in all cases, be carried out *with vigilance and care,* since what are at issue are issues relating to the integrity of the person and to individual liberties, issues which relate to the fundamental values of the Union.[2114]

Moreover, as regards the exclusion clauses, 'a full investigation into all the circumstances of each individual case' must be conducted.[2115]

In regard to accelerated procedures, the Luxembourg Court emphasized that determining authorities should be able to 'carry out a fair and comprehensive examination of those applications and to ensure that the applicants are not exposed to any dangers in their country of origin'.[2116] Moreover, in the case of *Samba Diouf* the court recalled, drawing on Article 23(2) of the 2005 Procedures Directive, that an adequate and complete examination of asylum

ECtHR, *I.M. v. France*, no. 9152/09 (2012), §§136-160; ECtHR, *M.E. v. France*, no. 50094/10, (2013), §§65-70; ECtHR, *K.K. v. France*, no. 18913/11 (2013), §§66-71.

2112 The inconsistencies in its case-law are noticed and disapproved of, see e.g. Baldinger (2015), 392.

2113 Hofmann (2014), 1227; Reneman (2014) *EU Asylum Procedures (…)*, 257.

2114 CJ (GC), joined cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla* (2010), paras 89-90 (emphasis added). See also CJ (GC), joined cases C-71/11 and C-99/11 *Y and Z* (2012), para 77; CJ, joined cases C-199/12, C-200/12 and C-201/12 *X, Y and Z* (2013), para 73; and opinion of AG Sharpston in joined cases C-148/13, C-149/13 and C-150/13 *A, B and C,* delivered on 17 July 2014, EU:C:2014:2111, para 47, where both the ECtHR's requirement of rigorous scrutiny and the CJ's demand for 'vigilance and care' were accommodated. See also CJ, case C-277/11 *M.M.* (2012), para 88, where a careful and impartial examination was called for.

2115 CJ (GC), joined cases C-57/09 and C-101/09 *B and D* (2010), para 93. See also CJ, case C-373/13 *T.* (2015), paras 84, 89, 99; CJ (GC), case C-573/14 *Lounani* (2017), para 72; CJ, case C-369/17 *Ahmed* (2018), paras 48-50.

2116 CJ, case C-175/11 *H.I.D. and B.A.* (2013), para 75.

applications was required and that the legality of a decision adopted in an accelerated procedure should be 'the subject of a thorough review by the national court, within the framework of an action against the decision rejecting the application'.[2117]

It cannot be overlooked that the above-mentioned notions of 'vigilance and care' and a 'full investigation', as well as a 'fair and comprehensive', 'adequate and complete' and 'thorough' examination are as elusive as the ECtHR's requirement of 'independent and rigorous scrutiny', especially since the Luxembourg Court did not elaborate on that matter in its early asylum jurisprudence (except in the case of *Samba Diouf*[2118]). However, more recently, the CJ has started to give more specific guidance in regard to the scope and intensity of review in asylum, Dublin and return proceedings. It was to some extent encouraged by the adoption of the recast instruments of the secondary asylum law. On the one hand, Article 46(3) of the 2013 Procedures Directive specifies that 'a full and *ex nunc* examination of both facts and points of law including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU, at least in appeals procedures before a court or tribunal of first instance' is required. That provision is considered to incorporate the ECtHR's (e.g. the case of *Salah Sheekh v. the Netherlands*) and CJ's (the case of *Samba Diouf*) standards regarding the scrutiny required in asylum proceedings.[2119] Additionally, Recital 34 in the preamble to the directive states that 'procedures for examining international protection needs should be such as to enable the competent authorities to conduct a rigorous examination of applications for international protection'. On the other hand, the Dublin III Regulation does not provide for as direct and clear a requirement as for a scrutiny, although it demands judicial effective remedies in fact and law against transfer decisions that 'cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred'.[2120] Thus, the formulations provided for in the 2013 Procedures Directive and the Dublin III Regulation must have given the Luxembourg Court the needed impulse to determine in more

2117 CJ, case C-69/10 *Samba Diouf* (2011), paras 30, 44, 56. See also CJ, case C-348/16 *Sacko* (2017), para 44, in regard to the 2013 Procedures Directive. Cf. CJ, case C-651/19 *JP* (2020), paras 59-60, with regard to a limited scope of review in subsequent asylum proceedings.

2118 CJ, case C-69/10 *Samba Diouf* (2011), para 61. See also Morano-Foadi (2015), 134, pointing out that the standard established in the *Samba Diouf* case in this regard is more rigorous than the one requiring only 'vigilance and care'.

2119 See e.g. Boeles et al. (2014), 284-285; Reneman (2014) *EU Asylum Procedures (...)*, 250; Baldinger (2015), 410; Costello and Hancox (2016), 431.

2120 Article 27(1) of the Dublin III Regulation and Recital 19 in the preamble hitherto.

detail–albeit still not indubitably, as shown below–the scope and intensity of the scrutiny required in asylum-related proceedings in the EU.

Under neither court's case-law a clear picture of the required scrutiny in appeal proceedings involving asylum seekers has not appeared yet. In this subchapter, some of the doubts that are raised in this regard are given a closer look. It is determined whether pursuant to the ECtHR's and CJ's jurisprudence: judicial remedies are demanded in asylum-related proceedings (1), the examination of appeal authorities can be limited to the points of law (2) or can be restricted to the *ex tunc* assessment (3).

1. Judicial or Non-Judicial Remedies

The requirement of 'independent scrutiny' may suggest that the ECtHR demands judicial remedies in asylum-related proceedings. The Strasbourg Court is of the opinion that judicial remedies 'indeed furnish strong guarantees of independence'.[2121] Nevertheless, the ECtHR also clearly allows for remedies of a non-judicial nature under Article 13 of the ECHR. As early as in the case of *Chahal v. the United Kingdom*, it made clear that the requirement of independent scrutiny applicable in the refoulement context does not necessarily demand remedies of a judicial nature.[2122]

Neither judicial nor non-judicial remedies are accepted blindly as being in conformity with Article 13 of the ECHR. With regard to judicial review proceedings, the Strasbourg Court reiterates that they

> constitute, in principle, an effective remedy within the meaning of Article 13 of the Convention in relation to complaints in the context of expulsion and extradition, provided that the courts can effectively review the legality of executive discretion on substantive and procedural grounds and quash decisions as appropriate.[2123]

Thus, the powers that a court or tribunal was given in asylum-related appeal proceedings must be examined in order to assess whether an asylum seeker has access to an effective remedy in accordance with the ECHR.[2124] Similarly,

2121 ECtHR (GC), *Z and Others v. the United Kingdom*, no. 29392/95 (2001), §110.

2122 ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §152.

2123 ECtHR, *Abdulazhon Isakov v. Russia*, no. 14049/08 (2010), §137. See also ECtHR (GC), *Slivenko and Others v. Latvia*, no. 48321/99, dec. (2002), §99; ECtHR, *Baysakov and Others v. Ukraine*, no. 54131/08 (2010), §75; ECtHR, *A v. the Netherlands*, no. 4900/06(2010), §158; ECtHR, *Tershiyev v. Azerbaijan*, no. 10226/13 (2014), §71; ECtHR, *S.K. v. Russia*, no. 52722/15 (2017), §72.

2124 Reneman (2014) *EU Asylum Procedures (…)*, 268, claimed that 'the ECtHR concluded for the first time that that the standard of judicial review applied by a national court

the powers of a non-judicial authority as well as the procedural guarantees which it affords are relevant in determining whether the remedy before it is effective.[2125]

Scrutinizing the powers of judicial and non-judicial bodies, the Strasbourg Court reiterates in general that a reviewing authority should be able to deal with the substance of an arguable complaint under the ECHR as well as to grant appropriate relief. The Contracting States are afforded some discretion as to the manner in which they conform to their obligations in this regard.[2126]

In cases concerning a removal that allegedly entails a risk of treatment contrary to Article 3 of the ECHR, appeal bodies must be entitled in particular to consider and address an appellee's complaint based on this provision. In the case of *Chahal v. the United Kingdom*, the ECtHR found that 'neither the advisory panel nor the courts could review the decision of the Home Secretary to deport Mr Chahal to India with reference solely to the question of risk, leaving aside national security considerations'.[2127] In consequence, those remedies could not be considered effective under Article 13 of the ECHR.

The competence to grant 'appropriate relief' is also required. When the principle of non-refoulement is invoked by the applicants, the ECtHR most often assesses whether a national reviewing authority was entitled to quash a decision that was in violation of Article 3 of the ECHR. The ruling of an appeal authority must be binding.[2128] In the case of *T.I. v. the United Kingdom* concerning the transfer of the Sri Lankan asylum seeker to Germany under the Dublin Convention, the Strasbourg Court assessed the review proceedings before the English courts as regards complaints raised under Article 3 of the ECHR. It emphasized that

> English courts could effectively control the legality of executive discretion on substantive and procedural grounds and quash decisions as appropriate. It was also accepted that a court in the exercise of its powers of

did not comply with the requirements of close and rigorous scrutiny' in ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011).

2125 See e.g. ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §152; ECtHR, *Čonka v. Belgium*, no. 51564/99 (2002), §75; ECtHR, *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05 (2007), §53; ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §289; ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), §197; ECtHR (GC), *De Souza Ribeiro v. France*, no. 22689/07 (2012), §79; ECtHR (GC), *Khlaifia and Others v. Italy*, no. 16483/12 (2016), §268; ECtHR, *S.K. v. Russia*, no. 52722/15 (2017), §71; ECtHR, *S.A. v. the Netherlands*, no. 49773/15 (2020), §76.

2126 See e.g. ECtHR, *Jabari v. Turkey*, no. 40035/98 (2000), §48; ECtHR, *Abdolkhani and Karimnia v. Turkey*, no. 30471/08 (2009), §107; ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §291; ECtHR, *S.K. v. Russia*, no. 52722/15 (2017), §70; ECtHR, *Kebe and Others v. Ukraine*, no. 12552/12 (2017), §100.

2127 ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §153.

2128 Ibid., §154. See also Harris et al. (2018), 752.

> judicial review would have power to quash a decision to expel or deport an individual to a country where it was established that there was a serious risk of inhuman or degrading treatment on the ground that in all the circumstances of the case the decision was one that no reasonable Secretary of State could take.[2129]

In consequence, the judicial review proceedings in the United Kingdom concerning any removals (expulsions, extraditions and Dublin transfers) were considered an effective remedy under Article 13 of the ECHR.[2130]

Diverse procedural safeguards afforded to asylum seekers before and during appeal proceedings are also taken into account by the ECtHR. The court examines *inter alia* time-limits to lodge an appeal; whether the applicants were served with a removal order with sufficient justification and had access to adequate information about the procedure in question; whether legal representation or legal aid was available and some form of adversarial proceedings existed.[2131] Moreover, the Strasbourg Court can verify the independence of a body in question,[2132] also in regard to asylum-related appeal proceedings.[2133] A reviewing authority should be 'sufficiently independent' from a body of first-instance.[2134]

While non-judicial remedies are in general allowed under Article 13 of the ECHR, provided that sufficient independence, powers and procedural safeguards can be ensured, Article 47(1) of the EU Charter requires appeal or review proceedings to be conducted before a tribunal.[2135] This guarantee is currently enforced by the secondary EU law. Under Article 46(1) of the 2013

2129 ECtHR, *T.I. v. the United Kingdom,* no. 43844/98, dec. (2000).

2130 Ibid. See also ECtHR (Plenary), *Soering v. the United Kingdom,* no. 14038/88 (1989), §§121-122; ECtHR, *Vilvarajah and Others v. the United Kingdom,* nos. 13163/87 etc. (1991), §§123-126; ECtHR, *D. v. the United Kingdom,* no. 30240/96 (1997), §§70-71; ECtHR, *Hilal v. the United Kingdom,* no. 45276/99 (2001), §§77-78. For a more detailed analysis, see Spijkerboer (2009), 66-68. See also these Chapter and Title, point 3.

2131 See e.g. ECtHR (GC), *Chahal v. the United Kingdom,* no. 22414/93 (1996), §154; ECtHR, *Al-Nashif v. Bulgaria,* no. 50963/99 (2002), §137; ECtHR, *Abdolkhani and Karimnia v. Turkey,* no. 30471/08 (2009), §§114-117; ECtHR (GC), *M.S.S. v. Belgium and Greece,* no. 30696/09 (2011), §§316-319; ECtHR, *I.M. v. France,* no. 9152/09 (2012), §§150-152.

2132 See e.g. ECtHR, *Silver and Others v. the United Kingdom,* nos. 5947/72 etc. (1983), §116; ECtHR, *Leander v. Sweden,* no. 9248/81 (1987), §§81; ECtHR, *Khan v. the United Kingdom,* no. 35394/97 (2000), §§44-47; ECtHR, *Othman (Abu Qatada) v. the United Kingdom,* no. 8139/09 (2012), §220, where the court conducted such examination.

2133 For the court's competence in this regard, see e.g. ECtHR (GC), *De Souza Ribeiro v. France,* no. 22689/07 (2012), §79; ECtHR, *S.K. v. Russia,* no. 52722/15 (2017), §71.

2134 ECtHR, *Silver and Others v. the United Kingdom,* nos. 5947/72 etc. (1983), §116.

2135 Remedies before a court were also required under the general principle of effective judicial protection [see CJ, case C-222/86 *Unectef v Heylens* (1987), para 14].

Procedures Directive and Article 27(1) of the Dublin III Regulation, asylum seekers, as a rule, must have access to an effective judicial remedy in asylum[2136] and Dublin[2137] proceedings.

Only Article 13(1) of the Return Directive directly allows for legislation whereby appeals are considered before a non-judicial body (precisely, an 'administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence'). However, in the case of *Gnandi*, the Luxembourg Court clarified that judicial remedies are required in return proceedings as well. It stated

> in respect of a return decision and a possible removal decision, the protection inherent in the right to an effective remedy and in the principle of non-refoulement must be guaranteed by affording the applicant for international protection the right to an effective remedy enabling automatic suspensory effect, *before at least one judicial body.*[2138]

The court pointed out that as regards 'the remedies against decisions related to return, as set out in Article 13 of Directive 2008/115, (...) the characteristics of such remedies must be determined in a manner that is consistent with Article 47 of the Charter'.[2139] This interpretation was upheld in the case of *FMS and Others,* where the Grand Chamber added that the first-instance appeal may be considered by non-judicial authorities, but subsequently a returnee must be guaranteed access to a court.[2140] Thus, pursuant to Article 47(1) of the EU Charter and the secondary asylum law, asylum seekers must have access to a remedy of judicial nature in all asylum-related proceedings.

2136 See also CJ, case C-180/17 *X and Y* (2018), para 30. The right to an effective remedy before a court or tribunal was also guaranteed under Article 39(1) of the 2005 Procedures Directive [see CJ, case C-69/ 10 *Samba Diouf* (2011), para 69]. Recital 27 in the preamble to the 2005 Procedures Directive specified that a notion of 'a court or tribunal' should be understood 'within the meaning of Article 234 of the Treaty' [see also CJ, case C-175/11 *H.I.D. and B.A.* (2013), para 81].

2137 Cf. Article 19(2) of the Dublin II Regulation, stating that a transfer decision *may* be subject to an appeal or a review. Baldinger claimed that this formulation was applied in order to enable offering to asylum seekers non-judicial remedies [Baldinger (2015), 414].

2138 CJ (GC), case C-181/16 *Gnandi* (2018), para 58 (emphasis added). See also CJ, case C-175/17 *X* (2018), para 33; CJ, case C-180/17 *X and Y* (2018), para 29.

2139 CJ (GC), case C-181/16 *Gnandi* (2018), para 52. See also CJ (GC), case C-562/13 *Abdida* (2014), para 45.

2140 CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 126–130. See also European Commission (2017), 134, where it is stated that under the Return Directive 'the reviewing body can also be an administrative authority provided that this authority is composed of members who are impartial and who enjoy safeguards of independence and that national provisions provide for the possibility to have the decision reviewed by a judicial authority'. See also CJ, case C-403/16 *El Hassani* (2017), para 42, in regard to judicial remedies in visa proceedings.

Like the Strasbourg Court, the CJ does not unreservedly accept all judicial remedies. Such remedies should be available before a court or tribunal within the meaning of Article 267 of the TFEU,[2141] i.e. the appeal body must be established by law, independent and permanent, its jurisdiction has to be compulsory, it must apply rules of law and a procedure before it should be *inter partes*.[2142] In the case of *H.I.D. and B.A.*, the Luxembourg Court examined some of those factors in regard to the Refugee Appeals Tribunal in Ireland. The parties to the main proceedings contested its independence as well as the lack of compulsory jurisdiction and adversarial proceedings.

As regards the compulsory jurisdiction, the CJ found that the Refugee Appeals Tribunal was at that time the competent body established by law to examine and rule on appeals brought against first-instance asylum decisions. When the Tribunal decided to uphold the appeal, the Minister was obliged to grant refugee status. The Luxembourg Court did not consider it problematic that decisions that were not favourable for asylum seekers (upholding first-instance negative decisions) were not binding on the national authorities.[2143]

Concerning the requirement of *inter partes* procedure, the CJ noted that it is not absolute. A body that made a first-instance asylum decision is not necessarily then required to participate as a party to the appeal proceedings to defend its rulings. However, the first-instance asylum authority was obliged to provide all the documents that it relied on to the Refugee Appeals Tribunal and the latter had to consider them fully. Moreover, the Tribunal could hold a hearing where a first-instance body and asylum seekers were able to present their cases. The Luxembourg Court concluded that 'the Refugee Appeals Tribunal has a broad discretion, since it takes cognisance of both questions of fact and questions of law and rules on the evidence submitted to it, in relation to which it enjoys a discretion'.[2144]

The issue of the Tribunal's independence was examined especially closely by the CJ. The court explained that 'the concept of independence, which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision'. In order for the authorities to be considered independent, they should be 'protected against external intervention or pressure liable to

2141 In order to safeguard the preliminary references procedure [see Brouwer (2007), 81]. See also Recital 27 in the preamble to the 2005 Procedures Directive and, by way of analogy, CJ (GC), case C-506/04 *Wilson* (2006), paras 47-48.

2142 CJ, case C-175/11 *H.I.D. and B.A.* (2013), para 83. See also CJ, case C-54/96 *Dorsch Consult* (1997), para 23; CJ (GC), case C-506/04 *Wilson* (2006), para 48.

2143 CJ, case C-175/11 *H.I.D. and B.A.* (2013), paras 86-87.

2144 Ibid., paras 88-93.

jeopardise the independent judgment of its members as regards proceedings before them'.[2145] The Irish law specified that the Refugee Appeals Tribunal was independent and that its decisions upholding appeals were binding on the Minister. The Luxembourg Court decided that the rules governing the appointment of members of the Tribunal did not affect its independence as they did 'not differ substantially from the practice in many other Member States'. However, it found problematic that the ordinary members of the Tribunal could be removed by the Minister and the reasons for such removal were not specified by law. Despite this, the CJ concluded that the criterion of independence was satisfied by the Irish asylum system and that it must therefore be regarded as respecting the right to an effective remedy. The court resorted to the wording of Recital 27 in the preamble to the 2005 Procedures Directive stating that the effectiveness of the remedy depends on the administrative and judicial system of each Member State seen as a whole. The decision of the Refugee Appeals Tribunal could have been appealed to higher courts. The Luxembourg Court decided that it was enough to protect the Tribunal 'against potential temptations to give in to external intervention or pressure liable to jeopardise the independence of its members'.[2146]

The requirement of independence has been also scrutinized in the case of *FMS and Others*. In this case the Hungarian authorities rejected the asylum applications as inadmissible and ordered the foreigners' return to a third country, Serbia. Subsequently, the country of destination was changed to the asylum seekers' countries of origin. The foreigners could lodge objections in this regard to the asylum authority, but no further remedy was provided for in the law. The Luxembourg Court emphasized that the asylum authority could not be considered independent because it was subject to the ministry of police, thus the executive power. The change of a destination country constitutes a new return decision and foreigners must have access to judicial remedy against that decision.[2147]

The powers of judicial appeal bodies in asylum proceedings were further examined by the CJ in the cases of *Alheto* and *Torubarov*. In both judgments the Luxembourg Court emphasized that a decision of a court or tribunal issued after conducting the full and *ex nunc* assessment of the international protection needs of an applicant (that is required pursuant to Article 46(3) of the 2013 Procedures Directive) must necessarily be binding on a first-instance

2145 Ibid., paras 95–96. See also CJ (GC), case C-506/04 *Wilson* (2006), paras 49–51.

2146 CJ, case C-175/11 *H.I.D. and B.A.* (2013), paras 98–105. For a critique of this reasoning, see Costello and Hancox (2016), 430.

2147 CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 132–137.

administrative or quasi-judicial body.[2148] A court or tribunal can decide on a case by itself[2149] or refer it back to a determining authority[2150]. However, in the latter case, the right to an effective remedy enshrined in the EU Charter as well as the 2013 Procedures Directive requires that

> each Member State bound by that directive must order its national law in such a way that, following annulment of the initial decision and in the event of the file being referred back to the quasi-judicial or administrative body (...), a new decision (...) complies with the assessment contained in the judgment annulling the initial decision.[2151]

When a first-instance authority refuses to comply with a judicial decision made on appeal and a legal system does not provide for any remedy to force the compliance, as in the circumstances of the *Torubarov* case,[2152] a court or tribunal must act. The Luxembourg Court emphasized that

> in order to guarantee that an applicant for international protection has an effective judicial remedy within the meaning of Article 47 of the Charter, and in accordance with the principle of sincere cooperation enshrined in Article 4(3) TEU, a national court or tribunal seised of an appeal is required to vary a decision of the administrative or quasi-judicial body, (...) that does not comply with its previous judgment and to substitute its own decision on the application by the person concerned for international protection by disapplying, if necessary, the national law that prohibits it from proceeding in that way.[2153]

2148 CJ (GC), case C-585/16 *Alheto* (2018), paras 147-149; CJ (GC), case C-556/17 *Torubarov* (2019), paras 58, 65-66; CJ, case C-406/18 *PG* (2020), paras 20, 23.

2149 Article 46(3) of the 2013 Procedures Directive enables that 'the application for international protection may be considered in an exhaustive manner without it being necessary to refer the case back to the determining authority' [CJ (GC), case C-556/17 *Torubarov* (2019), para 53].

2150 CJ (GC), case C-585/16 *Alheto* (2018), para 146; CJ (GC), case C-556/17 *Torubarov* (2019), para 54. See also CJ, case C-54/96 *Dorsch Consult* (1997), para 37.

2151 CJ (GC), case C-585/16 *Alheto* (2018), para 148; CJ (GC), case C-556/17 *Torubarov* (2019), para 59. See also CJ, case C-406/18 *PG* (2020), paras 19-20.

2152 The applicant was refused international protection by the Hungarian determining authority. He appealed but the judgment favourable for him was disrespected. He appealed again. The court found he should be granted international protection, but the determining authority refused it for a third time. In the third appeal proceedings, the court initiated the preliminary ruling procedure. Hungarian law excluded varying the asylum decision by the court itself and did not provide for any remedy to force the compliance of the determining authority with the judgment.

2153 CJ (GC), case C-556/17 *Torubarov* (2019), para 74.

Thus, if a court or tribunal decides on appeal that an asylum seeker should be granted international protection, but a determining authority rules otherwise without a reasonable justification, the judicial body is not only entitled but required to vary the first-instance asylum decision and substitute its own decision in this regard, even when the national procedural rules do not confer such a competence.[2154] This obligation arises from Article 46(3) of the 2013 Procedures Directive read in conjunction with Article 47 of the EU Charter. The courts' and tribunals' powers to quash first-instance decisions that infringe rights and freedoms guaranteed by EU law have to be real. Meanwhile, 'the right to an effective remedy would be illusory if a Member State's legal system were to allow a final, binding judicial decision to remain inoperative to the detriment of one party'.[2155]

Under Article 47 of the EU Charter and the secondary asylum law, the CJ pressures the Member States to provide for a high standard of effective judicial protection in their respective legislations relating to asylum seekers. On first sight, this standard, at least in respect to the access to judicial remedies, is more extensive under EU law than under the ECHR. Despite the fact that Article 47(1) of the EU Charter is undoubtedly based on Article 13 of the ECHR,[2156] it does not allow a national law to provide for only non-judicial remedies.[2157] However, the respective standards before the Strasbourg and Luxembourg Courts are in fact becoming closer.[2158] Even though the ECtHR reiterates that remedies demanded under Article 13 of the ECHR must not be of judicial nature, the requirements that are established in regard to non-judicial remedies, notably the sufficient independence, powers and procedural safeguards, are very demanding. In fact, taking into account the importance

2154 Ibid., paras 77-78. See also CJ, case C-406/18 *PG* (2020), paras 22-23.

2155 CJ (GC), case C-556/17 *Torubarov* (2019), para 57. The CJ has drawn on the case of *Toma* where it relied on the ECtHR's standards established under Article 6 of the ECHR [CJ, case C-205/15 *Toma* (2016), para 43]. It shows that by the means of Article 47 of the EU Charter the requirements arising from Article 6 of the ECHR as defined in the respective case-law of the ECtHR are applicable to asylum-related proceedings conducted in the Member States (see also this Chapter, Title I, point 1).

2156 'Explanations Relating to the Charter of Fundamental Rights' (2007), 29. See also CJ (GC), case C-562/13 *Abdida* (2014), para 51.

2157 Moreover, asylum seekers are entitled to judicial remedies under the EU Charter and secondary asylum law also when their claims are not 'arguable' within the meaning of Article 13 of the ECHR.

2158 See also Moreno-Lax (2017) *Accessing Asylum…,* 439, concluding that 'the "national authority" to which Article 13 ECHR refers to has to be understood within the EU context as a reference to a judicial body', because Article 47 of the EU Charter secures access to a court.

of Article 3 of the ECHR, it is hard to imagine that the Strasbourg Court would accept a national system in which asylum seekers could make an appeal only to administrative bodies in asylum, Dublin and return proceedings.[2159]

2. Facts or Law

The view that both facts and points of law should be examined by national appeal authorities pursuant to Article 13 of the ECHR seems to prevail in the literature.[2160] In asylum cases, this interpretation is inferred from the fact that an independent and rigorous scrutiny of the substance of a claim is required and 'it is hard to imagine that "rigorous scrutiny" can be provided by an authority which is only competent to rule on points of law'.[2161] The ECtHR stressed in general that 'a procedure which, by reason of the limited scope of review, does not afford the possibility of dealing with the substance of an arguable complaint under the Convention cannot satisfy the requirements of Article 13'.[2162] Moreover, it is emphasized that the scope of scrutiny on a national level should be at least as wide as the one applied by the Strasbourg Court itself.[2163] The court's examination of a risk of ill-treatment contrary to Article 3 of the ECHR–to use its own words–'must necessarily be a rigorous one'.[2164] The

2159 See also Cantor (2015), 93, who, drawing on the case of *Vilvarajah and Others v. the United Kingdom*, stated that in regard to remedies in asylum proceedings '(…) the Court implicitly appears to require this remedy to take the form of a competent judicial authority (…)'. See also Sitaropoulos (2007), 114; Nowicki (2014), 94; and concurring opinion of judge Pinto de Albuquerque in ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), where he indicated the features of a refugee-status determination procedure that are indispensable, including a 'full and speedy *judicial* review of both the factual and legal grounds of the first-instance decision' (emphasis added).

2160 Some authors contend that the obligation to examine both facts and points of law in asylum cases may be established, by way of analogy, under the ECtHR's case-law concerning Article 6(1) of the ECHR. See e.g. Baldinger (2015), 277-278, claiming that: 'Taking into account that the requirements of Article 13 reinforce those of Article 6, it may be argued that the requirement of an independent and rigorous scrutiny (Article 13) reinforces the requirement of full jurisdiction on points of fact and points of law (Article 6)'. See also Reneman (2014) *EU Asylum Procedures (…)*, 252-253; Moffatt (2019), 421-422, 427.

2161 Reneman (2014) *EU Asylum Procedures (…)*, 254. See also Battjes (2006), 321, and concurring opinion of judge Pinto de Albuquerque in ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), where the features of refugee-status determination procedure that are indispensable were indicated, including a 'full and speedy judicial review of both the factual and legal grounds of the first-instance decision'.

2162 ECtHR, *Stamose v. Bulgaria*, no. 29713/05 (2012), §51.

2163 Battjes (2006), 322; Spijkerboer (2009), 64, 68; Reneman (2014) *EU Asylum Procedures (…)*, 267-268.

2164 ECtHR, *Vilvarajah and Others v. the United Kingdom*, nos. 13163/87 etc. (1991), §108.

court needs to scrutinize in particular 'all the facts of the case'.[2165] It regularly analyses both factual and legal circumstances of asylum cases it adjudicates on. The court also determines some facts itself (e.g. as regards the situation in the applicant's country of origin).[2166]

The analysis of the ECtHR's asylum case-law confirms that the examination of both facts and law is required in asylum-related appeal proceedings. In the case of *Jabari v. Turkey,* the judicial proceedings before the Ankara Administrative Court were not accepted as an effective remedy because this court had scrutinized only whether the applicant's removal had been fully in line with the domestic law requirements and had not addressed the substance of the complaint, i.e. the risk of ill-treatment in Iran.[2167] In the case of *Diallo v. the Czech Republic* the court decided that a constitutional appeal was not an effective remedy because the 'Constitutional Court would not have reviewed the merits of the applicants' arguable claims under Article 3 of the Convention but would have dealt only with the question of conformity of the particular provision of the Aliens Act with the Constitution'.[2168] In the case of *Ilias and Ahmed v. Hungary,* both the Hungarian first-instance administrative authorities and the national court deciding on the appeal were reproached for not examining sufficiently thoroughly the factual information on the situation of asylum seekers in Serbia, which was considered by Hungarian authorities a safe third country for the applicants.[2169]

In contrast, in the case of *Vilvarajah and Others v. the United Kingdom* the ECtHR accepted the judicial review proceedings of the asylum decisions as being in conformity with Article 13 of the ECHR even though the English courts could only rule on points of law.[2170] Two judges dissented and stated that 'a national system which it is claimed provides an effective remedy for a breach of the Convention and which excludes the competence to make a decision on the merits cannot meet the requirements of Article 13'.[2171] Despite this, the ECtHR's approach to judicial remedies in the United Kingdom as established in the *Vilvarajah* case prevailed for many years.[2172] However, it seems that

2165 ECtHR, *NA. v. the United Kingdom*, no. 25904/07 (2008), §113.

2166 For more on the information obtained *proprio motu* by the ECtHR, see Chapter 3, Title IV, point 1.3.

2167 ECtHR, *Jabari v. Turkey*, no. 40035/98 (2000), §§49-50.

2168 ECtHR, *Diallo v. the Czech Republic*, no. 20493/0 (2011), §83.

2169 ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §§158-160.

2170 ECtHR, *Vilvarajah and Others v. the United Kingdom*, nos. 13163/87 etc. (1991), §126.

2171 Partly dissenting opinion of judge Walsh joined by judge Russo in ECtHR, *Vilvarajah and Others v. the United Kingdom*, nos. 13163/87 etc. (1991), §3.

2172 See e.g. ECtHR, *T.I. v. the United Kingdom,* no. 43844/98, dec. (2000). See also Clayton (2014), 198; Moffatt (2019), 422-424, 427-428.

this case-law results from the particularities of the English judicial system as it was at the time and is deeply rooted in the conviction that the limited powers of the courts 'do provide an effective degree of control over the decisions of the administrative authorities in asylum cases', as they are exercisable 'by the highest tribunals in the land'.[2173]

While the respective jurisprudence of the Strasbourg Court may be considered not fully decisive, the standard as regards the examination of facts and laws during asylum-related appeal proceedings is slightly more consistent before the CJ.[2174] However, the specific acts of the secondary asylum law approach the issue diversely.

The Return Directive does not provide for any guidelines in regard to the scope of review, and the Luxembourg Court has not specifically adjudicated on this issue yet. However, it did emphasize that as regards the remedies in return proceedings 'the characteristics of such remedies must be determined in a manner that is consistent with Article 47 of the Charter'.[2175] Meanwhile, under the CJ's jurisprudence, it is clear that 'for a "tribunal" to be able to determine a dispute concerning rights and obligations arising under EU law in accordance with Article 47 of the Charter, it must have power to consider all the questions of fact and law that are relevant to the case before it'.[2176] Thus, it should not be doubted that the review in return proceedings must involve the examination of both facts and points of law. This conclusion is supported, by way of analogy, by the court's case-law regarding the Directive 64/221/EEC, which applied to expulsions of EU citizens and their family members.[2177] Article 9 of that Directive allowed for a legislation where during appeal proceedings regarding an expulsion order issued for reasons of public policy, public security or public health, only points of law could be examined. However, in such circumstances, the additional safeguard of an opinion from a competent authority was required. The Luxembourg Court explained that

> where the right of appeal is restricted to the legality of the decision, the purpose of the intervention of the competent authority (…) is to enable

2173 ECtHR, *Vilvarajah and Others v. the United Kingdom*, nos. 13163/87 etc. (1991), §126.

2174 See also Moffatt (2019), 422, 424, where she stated that the ECtHR 'has not clearly articulated a right to merits review' under Article 13 of the ECHR, but that right is expressly stipulated in the EU law.

2175 CJ (GC), case C-181/16 *Gnandi* (2018), para 52. See also CJ (GC), case C-562/13 *Abdida* (2014), para 45.

2176 CJ (GC), case C-199/11 *Otis and Others* (2012), para 49.

2177 Council Directive 64/221/EEC on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, 25 February 1964, OJ 56/850, in force until 29 April 2006.

> an exhaustive examination of all the facts and circumstances, (...) to be carried out before the decision is finally taken.[2178]

The assessment of both facts and points of law by a competent authority issuing an opinion was demanded in order to 'mitigate the effect of deficiencies in the remedies'.[2179] It is therefore justified to claim that the CJ considered remedies in expulsion proceedings that were limited to only points of law to be 'deficient', thus, insufficient.[2180]

Under the 2005 Procedures Directive, the scope of review in asylum appeal proceedings was not determined.[2181] Despite that, in the case of *Samba Diouf,* the Luxembourg Court invoked the need to examine both facts and laws in asylum appeal proceedings. The ruling concerned the lack of a separate remedy against a decision to examine an asylum application under an accelerated procedure. The CJ decided it is allowed under EU law provided that a national court is able to review the reasons that led to applying accelerated procedure in the action which may be brought against the final decision rejecting the asylum application.[2182] In the circumstances of the case, that reasons were the same as those which led to denying international protection. Thus, the lack of possibility of reviewing the reasons for applying accelerated procedure 'would render review of the legality of the decision impossible, as regards both the facts and the law'.[2183] The CJ drew on the *Wilson* case where judicial remedies available to the party to the main proceedings were rejected as incompliant with the EU law because 'the appeal before the supreme court of that Member State permits judicial review of the law only and not the facts'.[2184]

2178 CJ, joined cases C-65/95 and C-111/95 *Shingara and Radiom* (1997), para 34, with references to the earlier case-law. See also CJ, case C-136/03 *Dörr* (2005), para 55.

2179 CJ, joined cases C-65/95 and C-111/95 *Shingara and Radiom* (1997), para 35. See also CJ, case C-98/79 *Pecastaing* (1980), para 20, and CJ, case C-459/99 *MRAX* (2002), para 101.

2180 Baldinger (2015), 403.

2181 See also Staffans (2010), 281. Some Member States provided under the 2005 Procedures Directive for a review limited only to questions of law [UNHCR (2010), 89]. However, the initial proposal of the directive did mention the examination of both facts and points of law [see Baldinger (2015), 414-415].

2182 CJ, case C-69/10 *Samba Diouf* (2011), paras 55-61. See also CJ, case C-348/16 *Sacko* (2017), para 36, in regard to the 2013 Procedures Directive.

2183 CJ, case C-69/10 *Samba Diouf* (2011), para 57. See also CJ, case C-175/11 *H.I.D. and B.A.* (2013), para 93, where the remedy before the Irish Refugee Appeals Tribunal was considered effective *inter alia* due to the fact that this body had a broad discretion, since it took 'cognisance of both questions of fact and questions of law (...)'.

2184 CJ (GC), case C-506/04 *Wilson* (2006), paras 60-62.

Article 46(3) of the 2013 Procedures Directive clearly requires 'a full and *ex nunc* examination of both facts and points of law'.[2185] In the case of *Alheto* the Luxembourg Court specified that

> the Member States are required, by virtue of Article 46(3) of Directive 2013/32, to order their national law in such a way that the processing of the appeals referred to includes an examination, by the court or tribunal, of all the facts and points of law necessary in order to make an up-to-date assessment of the case at hand.[2186]

Such an examination is needed to ensure that 'the application for international protection may be considered in an exhaustive manner without it being necessary to refer the case back to the determining authority'.[2187] The court pointed out that it serves both the thoroughness and rapidity of asylum proceedings that are the aims of the 2013 Procedures Directive.

In the *Sacko* ruling, the CJ held that even when an asylum application was considered manifestly unfounded, in the appeal proceedings a court or tribunal should hear an asylum seeker when it finds it necessary, in particular when 'the information gathered during the personal interview conducted in the procedure at first instance is insufficient'.[2188] The domestic appeal bodies are then obliged under Article 46(3) of the 2013 Procedures Directive not only to take into account both facts and law, but also to gather some information itself when it is needed to ensure a 'full and *ex nunc* examination'.[2189]

In the case of *Fathi*, the Luxembourg Court was challenged with a question regarding the scope of scrutiny required pursuant to Article 46(3) of the 2013 Procedures Directive in relation to the Dublin III Regulation. In this case, the application for international protection was rejected on the merits by the Bulgarian determining authority. The domestic court considering his appeal wondered whether the requirement of 'a full and *ex nunc* examination

2185 However, the provision states as well that this obligation applies 'at least in appeals procedures before a court or tribunal of first instance'. It is then conceivable that–in compliance with Article 46(3) of the 2013 Procedures Directive–appeal procedures of higher instance can be limited to an examination of points of law. For more on further appeal proceedings, see this Chapter, Title IV, point 3.

2186 CJ (GC), case C-585/16 *Alheto* (2018), para 110.

2187 CJ (GC), case C-556/17 *Torubarov* (2019), para 53. See also CJ (GC), case C-585/16 *Alheto* (2018), para 112.

2188 CJ, case C-348/16 *Sacko* (2017), paras 48–49.

2189 See also CJ (GC), case C-585/16 *Alheto* (2018), para 121, where the court pointed out that for the examination to be rigorous domestic courts must invite, 'where appropriate, the determining authority to produce any documentation or factual evidence which may be relevant'. See also CJ, case C-564/18 *LH* (2020), para 69.

of both facts and points of law' entailed that it must of its own motion examine whether the criteria and mechanisms for determining the Member State responsible for examining that application, as provided for by the Dublin III Regulation, were correctly applied by the determining authority. The CJ clearly explained that when an asylum application was dismissed as being unfounded, no such obligation can be inferred from either the 2013 Procedures Directive or the Dublin III Regulation.[2190]

While the Dublin II Regulation remained silent about the scope of scrutiny in appeal proceedings, its successor secures 'the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision'.[2191] Furthermore, Recital 19 in the preamble specifies that 'an effective remedy against such decisions should cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred'. Despite that, the scope of judicial review in Dublin proceedings continues to be in doubt. The Luxembourg Court has repeatedly answered preliminary questions about which facts and legal provisions an asylum seeker can rely on in his appeal against a transfer decision. The court most often replied in a favourable manner for asylum seekers, guaranteeing a broad scope of scrutiny in Dublin proceedings.[2192]

Nevertheless, in the case of *Abdullahi*, responding to the doubts resulting from the *N.S. and M.E.* ruling[2193], the Luxembourg Court opted for a limited scope of judicial review under the Dublin II Regulation.[2194] It decided that

> in circumstances where a Member State has agreed to take charge of an applicant for asylum on the basis of the criterion laid down in Article 10(1) of that regulation–namely, as the Member State of the first entry of the applicant for asylum into the European Union–*the only way* in which the applicant for asylum can call into question the choice of that criterion is *by pleading systemic deficiencies in the asylum procedure and in the conditions*

2190 CJ, case C-56/17 *Fathi* (2018), paras 60-72.

2191 Article 27(1) of the Dublin III Regulation.

2192 An asylum seeker is entitled to plead the incorrect application of the criteria for determining responsibility laid down in the regulation, e.g. the criterion set out in Article 12 [see CJ (GC), case C-63/15 *Ghezelbash* (2016), para 61] as well as in Article 13(1) [CJ (GC), case C-490/16 *A.S.* (2017), para 35]. He can also rely on the expiry of periods laid down in Article 21(1) [CJ (GC), case C-670/16 *Mengesteab* (2017), para 62] and Article 29(1) and (2) of that regulation [CJ (GC), case C-201/16 *Shiri* (2017), para 46; CJ (GC), case C-163/17 *Jawo* (2019), paras 66-69] as well as on the rule set out in the second subparagraph of Article 19(2) of the Dublin III Regulation [CJ (GC), case C-155/15 *Karim* (2016), para 27]. Cf. CJ (GC), joined cases C-582/17 and C-583/17 *H. and R.* (2019), para 84.

2193 CJ (GC), joined cases C-411/10 and C-493/10 *N.S.* and *M.E.* (2011), para 94. See also CJ (GC), case C-4/11 *Puid* (2013), para 36.

2194 Cf. Chlebny (2016), 147-149.

> *for the reception* of applicants for asylum in that Member State, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.[2195]

The judgment was widely criticized as being incompliant with the ECtHR's and CJ's standards,[2196] including those arising from Article 13 of the ECHR and Article 47 of the EU Charter.[2197]

The ECtHR addressed the CJ's controversial interpretation of the scope of a remedy in Dublin proceedings—although not expressly[2198]—in the case of *Tarakhel v. Switzerland*.[2199] The Strasbourg Court noted that the presumption that a state participating in the 'Dublin system' would respect the fundamental rights laid down by the ECHR can be rebutted. In Dublin cases, even though they involve the Contracting States of the ECHR, 'carrying out a thorough and individualised examination of the situation of the person concerned' and 'suspending enforcement of the removal order should the risk of inhuman or degrading treatment be established' are required as in any other non-refoulement case.[2200] The examination should not be limited to 'systemic deficiencies' in national asylum proceedings in a receiving country.[2201]

2195 CJ (GC), case C-394/12 *Abdullahi* (2013), para 62 (emphasis added).

2196 See e.g. Peers (2015) 'The Dublin III Regulation', 373; Hruschka and Maiani (2016), 1571.

2197 E.g. Hennessy (2013); Costello and Mouzourakis (2014), 404-405; Taylor (2014) 'Tarakhel…'; Peers (2014) 'Tarakhel…'; Ippolito (2015), 26; Peers (2015) 'The Dublin III Regulation', 353, 372-373, 382; Maiani (2016) 'The Dublin III Regulation…', 128, 137; Morgades-Gil (2017) 'The Right…', 275, 278. Cf. Lübbe (2015), 136, 139.

2198 The ECtHR referred directly only to the *N.S. and M.E.* ruling [ECtHR (GC), *Tarakhel v. Switzerland*, no. 29217/12 (2014), §103]. For more on both cases, see Chapter 4, Title II, point 5.

2199 However, the ECtHR seemed to accept the 'systemic deficiencies' criterion in a number of decisions concerning Dublin transfers to Italy preceding the *Tarakhel* judgment. For more see Chapter 4, Title II, point 5.

2200 ECtHR (GC), *Tarakhel v. Switzerland*, no. 29217/12 (2014), §104. Cf. §§123-132, where the scrutiny of the Swiss authorities was considered in compliance with Article 13 of the ECHR. However, this finding conflicted with the conclusions reached in regard to Article 3 of the ECHR, where the Swiss authorities were reproached for not obtaining assurances from their Italian counterparts. See also Costello and Mouzourakis (2014), 409.

2201 See e.g. Costello and Mouzourakis (2014), 408; Peers (2014) 'Tarakhel…'; Taylor (2014) 'Tarakhel…'; Vicini (2015), 63-64; Maiani (2016) 'The Dublin III Regulation…', 137-138; Vedsted-Hansen (2016) 'Reception Conditions…', 349-350; Hruschka and Maiani (2016), 1499; de Weck (2017), 181; Morgades-Gil (2017) 'The Right…', 275-276; Baumgärtel (2019),64. See also opinion of AG Tanchev in case C-578/16 PPU *C.K. and Others*, delivered on 9 February 2017, EU:C:2017:108, paras 46-47, referring to the *Tarakhel* judgment and stating: 'whereas the Court Justice requires, in order to prohibit the transfer of an applicant to the Member State responsible, 'systemic' flaws in that Member State, the ECtHR merely seeks flaws which affect the applicant's individual situation'.

After the *Tarakhel* judgment, the CJ had to decide whether and how to bring its own case-law in line with the ECtHR's standards.[2202] The preliminary references concerning the scope of judicial review under Article 27(1) of the Dublin III Regulation offered the court a convenient solution. In the case of *Ghezelbash*, the CJ departed to some extent from the *Abdullahi* reasoning by stating that it is no longer justified under the new regulation. It emphasized that the Dublin III Regulation differs significantly from its predecessor as it introduced some procedural rights for asylum seekers and enhanced others.[2203] Transferees are now more involved in the Dublin proceedings than under the Dublin II Regulation, *inter alia* due to the introduction of a right to an effective remedy.[2204] The restrictive interpretation of the scope of a remedy guaranteed under Article 27(1) of the Dublin III Regulation is unjustified *inter alia* because 'the drafting of that provision makes no reference to any limitation of the arguments that may be raised by the asylum seeker when availing himself of that remedy'.[2205] Thus, systemic deficiencies in a national asylum system are not the only grounds for questioning the state's responsibility under the Dublin III Regulation.[2206] An asylum seeker is also entitled to plead the incorrect application of the criteria for determining responsibility[2207] as well as of other rules provided for in the Dublin III Regulation[2208].

The CJ's interpretation of the scope of a remedy in Dublin proceedings given in the case of *Ghezelbash* could still be in tension with the ECtHR's case-law. The Luxembourg Court's views expressed in this ruling are internally contradictory in regard to the facts that are to be examined in Dublin appeal proceedings. It first stated that there is no link between Article 27(1) and Article 3(2) of the Dublin III Regulation,[2209] but afterwards established one as regards Recital 19. It is specified there that an effective remedy against transfer decisions 'should cover both the examination of the application of this

2202 Cf. Lenaerts (2017), 831-832, 839, claiming that the CJ's case of *N.S. and M.E.* (that prompted the doubts that were answered in the *Abdullahi* ruling) and the ECtHR's case of *Tarakhel v. Switzerland* are not comparable as they answer different questions, so the two courts' case-law cannot be in fact considered incoherent as claimed by many authors.

2203 CJ (GC), case C-63/15 *Ghezelbash* (2016), paras 34, 45-50, 52

2204 Ibid., para 51. See also CJ (GC), case C-670/16 *Mengesteab* (2017), para 45.

2205 CJ (GC), case C-63/15 *Ghezelbash* (2016), paras 36. See also CJ (GC), case C-670/16 *Mengesteab* (2017), para 57.

2206 CJ (GC), case C-155/15 *Karim* (2016), para 22. See also Xanthopoulou (2018), 496-497.

2207 CJ (GC), case C-63/15 *Ghezelbash* (2016), para 61. See also CJ (GC), case C-490/16 *A.S.* (2017), para 35.

2208 CJ (GC), case C-155/15 *Karim* (2016), para 27; CJ (GC), case C-670/16 *Mengesteab* (2017), para 62; CJ (GC), case C-201/16 *Shiri* (2017), para 46.

2209 CJ (GC), case C-63/15 *Ghezelbash* (2016), para 37.

Regulation and of the legal and factual situation in the Member State to which the applicant is transferred'. The court concluded that this formulation 'refers only to the review of the situation prevailing in the Member State to which the applicant is to be transferred and is designed to check that it is not impossible to proceed with the transfer of the applicant for the reasons set out in Article 3(2) of the regulation'.[2210] Meanwhile, the latter provision merely concerns 'systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment'. The court's reasoning in the *Ghezelbash* case may suggest, in line with the *Abdullahi* judgment, that in regard to facts, an asylum seeker can rely in his appeal only on a risk of ill-treatment that results from systemic deficiencies in a national asylum system.[2211] Such an interpretation was difficult to accommodate with the ECtHR's reasoning in the *Tarakhel* case.

In the case of *C.K. and Others,* the Luxembourg Court finally dispelled doubts concerning the scope of examination during appeal Dublin proceedings. The case concerned the Dublin transfer to Croatia of a family of three, including a mother who suffered severe psychiatric disorders after giving birth. There were no reports of systemic deficiencies in the health care provided for asylum seekers in the receiving state. However, the court emphasized that

> it cannot be ruled out that the transfer of an asylum seeker whose state of health is particularly serious may, in itself, result, for the person concerned, in a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter, irrespective of the quality of the reception and the care available in the Member State responsible for examining his application.[2212]

When an asylum seeker presents evidence before an appeal body 'capable of showing the particular seriousness of his state of health and the significant and irreversible consequences to which his transfer might lead', the authorities have to take that evidence into account,[2213] even when there are no systemic

2210 Ibid., para 40.

2211 See also opinion of AG Tanchev in case C-578/16 PPU *C.K. and Others,* delivered on 9 February 2017, EU:C:2017:108, para 55, claiming that it cannot be concluded from the *Ghezelbash* judgment 'that the existence of systemic flaws in the Member State responsible is not the only situation in which that Member State avoids its responsibility and in which the applicant cannot be transferred to that State'. Cf. Maiani (2016) 'The Reform…', 40, claiming that in the case of *Ghazelbash* the CJ overruled the *Abdullahi* judgment.

2212 CJ, case C-578/16 PPU *C.K. and Others* (2017), para 73. For more see Chapter 4, Title II, point 5.

2213 Ibid., para 75. See also CJ (GC), case C-163/17 *Jawo* (2019), para 90; CJ (GC), joined cases C-297/17, C-318/17, C-319/17 and C-438/17 *Ibrahim and Others* (2019), para 88.

deficiencies in the national asylum system in the receiving Member State. Thus, an asylum seeker can rely in his appeal on a risk of inhuman or degrading treatment that does not result from systemic flaws in a national asylum system, and domestic authorities have to take into consideration all the risks of treatment contrary to Article 4 of the EU Charter (and Article 3 of the ECHR) that the applicant may be subject to.[2214] It should be concluded then, that in the case of *C.K. and Others,* the CJ decided to put its case-law much more in line with the jurisprudence of the ECtHR, in particular with the case of *Tarakhel v. Switzerland*.[2215]

Interestingly, in most of the cases concerning the scope of judicial review in Dublin proceedings the Luxembourg Court shied away from referring to Article 47 of the EU Charter, Article 13 of the ECHR or the ECtHR's jurisprudence.[2216] In the cases of *Shiri, Hasan* and *Jawo,*[2217] the court only incidentally mentions and does not analyse, Article 47 of the EU Charter.[2218] The court's omission in this regard seems intentional. Even when the right to an effective remedy arising from the EU Charter and ECHR was mentioned in the AGs' opinions,[2219] or even when it has been made decisive in their

2214 CJ, case C-578/16 PPU *C.K. and Others* (2017), paras 65, 67, 68. See also Lenaerts (2017), 834; Crescenzi (2018), 48; Xanthopoulou (2018), 497. Cf. Imamović and Muir (2017), 726.

2215 This conclusion may be supported by the fact that the controversial interpretation of Recital 19 in the preamble to the Dublin III Regulation as provided for in the *Ghezelbash* ruling did not reoccur in the further judgments. For the conclusion that the *C.K. and Others* ruling brings the CJ's jurisprudence closer to the ECtHR's standards, see also Rizcallah (2017); Marin (2017), 146; Lenaerts (2017), 833-834; Callewaert (2018), 1703-1704; Favilli (2018), 90; Sadowski (2019), 49. See also Lenaerts (2018), 34, emphasizing that both the ECtHR and the CJ 'strive to achieve convergence, as the rulings (…) of the CJEU in (…) *C.K.* demonstrate'. Cf. Imamović and Muir (2017), 727.

2216 See CJ (GC), case C-394/12 *Abdullahi* (2013); CJ (GC), case C-4/11 *Puid* (2013); CJ (GC), case C-63/15 *Ghezelbash* (2016); CJ (GC), case C-155/15 *Karim* (2016); CJ (GC), case C-670/16 *Mengesteab* (2017); CJ (GC), case C-490/16 *A.S.* (2017); CJ (GC), joined cases C-582/17 and C-583/17 *H. and R.* (2019). In the *C.K. and Others* ruling, the court referred to the jurisprudence of the Strasbourg Court, but not the one regarding the right to an effective remedy [CJ, case C-578/16 PPU *C.K. and Others* (2017), paras 68, 78-79].

2217 CJ (GC), case C-201/16 *Shiri* (2017), paras 44, 46; CJ, case C-360/16 *Hasan* (2018), paras 31, 40; CJ (GC), case C-163/17 *Jawo* (2019), para 68.

2218 Thym claimed that the reference in the *Shiri* ruling had been superfluous and should not be overestimated [Thym (2018), 565-566].

2219 See opinion of AG Sharpston in case C-201/16 *Shiri,* delivered on 20 July 2017, EU:C:2017:579, para 37, where she emphasized that 'the rights to good administration and to an effective remedy (Articles 41 and 47 of the Charter) provide standards which are particularly relevant to the correct interpretation of Article 27(1) of the Dublin III Regulation'. See also her opinion in case C-670/16 *Mengesteab,* delivered on 20 June 2017, EU:C:2017:480, para 104, where she claimed that the words 'the right to an effective remedy' in Article 27(1) of the Dublin III Regulation 'must be construed by reference to Articles 41 and 47 of the Charter, as the Court has done in *Ghezelbash* and *Karim*'.

analysis,[2220] the CJ remained silent in this regard. Den Heijer rightly notices that this may result from a reluctance to jeopardize the reasoning in the *Abdullahi* case.[2221] In the case of *C.K. and Others,* the court emphasized that the interpretation presented in this ruling is not invalidated by the one provided in the case of *Abdullahi,* as the judgments concerned different legal acts and factual circumstances.[2222] Irrespectively of the reasons for the cautious choice of the argumentation in the recent Dublin cases, the message of the CJ is clear: the scope of scrutiny has altered since the *Abdullahi* judgment, because the EU law has changed. *Ipso facto,* it may change again with the adoption of a new secondary asylum law. The scope of judicial review in Dublin proceedings as defined in the recent judgments of the Luxembourg Court is thus not settled for good.[2223]

3. *Ex Nunc* or *Ex Tunc*

The ECtHR reckons that it is obliged to conduct 'a full and *ex nunc* examination'[2224] of an alleged risk of treatment contrary to Article 3 of the ECHR.[2225] When a foreigner has not yet been removed, the material point in time is that of the court's consideration of the case. When an expulsion, extradition or Dublin transfer has been enforced, the Strasbourg Court takes into account 'facts which were known or ought to have been known to the Contracting State' at the time of the removal. Nevertheless, the court can also take into account information that came to light subsequent to the expulsion, extradition or Dublin transfer.[2226]

2220 See opinion of AG Sharpston in case C-63/15 *Ghezelbash,* delivered on 17 March 2016, EU:C:2016:186, paras 82-84, 91, where she pointed out that: 'The effectiveness of judicial review guaranteed by Article 47 of the Charter requires an assessment of the lawfulness of the grounds which were the basis of the transfer decision and whether it was taken on a sufficiently solid factual basis'.

2221 Den Heijer (2017), 866.

2222 CJ, case C-578/16 PPU *C.K. and Others* (2017), para 94.

2223 For this conclusion, see also den Heijer (2017), 866.

2224 See e.g. ECtHR, *Salah Sheekh v. the Netherlands,* no. 1948/04 (2007), §136. See also ECtHR, *S.H.H. v. the United Kingdom,* no. 60367/10 (2013), §72; ECtHR, *Tershiyev v. Azerbaijan,* no. 10226/13 (2014), §50; ECtHR, *S.A. v. the Netherlands,* no. 49773/15 (2020), §61.

2225 Dembour (2015), 220, pointed out that such approach has been accepted since 1991, see ECtHR (Plenary), *Cruz Varas and Others v. Sweden,* no. 15576/89 and ECtHR, *Vilvarajah and Others v. the United Kingdom,* nos. 13163/87 etc. In ECtHR (GC), *J.K. and Others v. Sweden,* no. 59166/12 (2016), §83, the court stressed that 'the principle of *ex nunc* evaluation of the circumstances has been established in a number of cases.'

2226 ECtHR, *Vilvarajah and Others v. the United Kingdom,* nos. 13163/87 etc. (1991), §107. See also ECtHR, *Salah Sheekh v. the Netherlands,* no. 1948/04 (2007), §136. See also Chapter 3, Title IV, point 1.3.

The ECtHR justifies the need for the *ex nunc* examination usually by referring to the possibility of a change in the situation in the receiving country. It reiterates that

> (e)ven though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light after the final decision taken by the domestic authorities.[2227]

The court may also examine altered conditions concerning the asylum seeker himself or new statements and evidence presented or considered for the first time before the Strasbourg Court.[2228] It is aware that it may be extremely difficult for an asylum seeker to promptly present adequate proof, particularly when it has to be brought from a country of origin[2229] or when a national law establishes strict time-limits for bringing in new evidence[2230].

The standard that the Strasbourg Court has established in regard to itself in cases concerning the principle of non-refoulement should be applied to national asylum-related appeal proceedings for four reasons. Firstly, the scope of scrutiny on the domestic level should be at least as wide as that before the Strasbourg Court.[2231] Otherwise, an asylum seeker would have to apply to the ECtHR in order to have new facts and evidence examined at all. That situation conflicts with the principle of subsidiarity[2232] and is unacceptable

2227 ECtHR, *Salah Sheekh v. the Netherlands,* no. 1948/04 (2007), §136. See also ECtHR (GC), *Chahal v. the United Kingdom,* no. 22414/93 (1996), §§86, 97; ECtHR (GC), *Mamatkulov and Askarov v. Turkey,* nos. 46827/99 and 46951/99 (2005), §69; ECtHR, *S.H.H. v. the United Kingdom,* no. 60367/10 (2013), §72; ECtHR, *Tershiyev v. Azerbaijan,* no. 10226/13 (2014), §50.

2228 See e.g. ECtHR, *Hilal v. the United Kingdom,* no. 45276/99 (2001), §49, 63; ECtHR, *Said v. the Netherlands,* no. 2345/02 (2005), §50; ECtHR, *J.H. v. the United Kingdom,* no. 48839/09 (2011), §59; ECtHR (GC), *F.G. v. Sweden,* no. 43611/11 (2016), §157; ECtHR, *X. v. Germany,* no. 54646/17, dec. (2017), §32; ECtHR, *Savran v. Denmark,* no. 57467/15 (2019), §53. However, see e.g. ECtHR, *Gebremedhin [Gaberamadhien] v. France,* no. 25389/05 (2007), §55, where the court implicitly adopted the *ex tunc* reasoning [Dembour (2015), 430], when it rejected the Government's argument that the complaint under Article 3 of the ECHR was no longer arguable, because the applicant was granted refugee status during the proceedings before the Strasbourg Court.

2229 See e.g. ECtHR, *J.K. and Others v. Sweden,* no. 59166/12 (2016), §97. However, the benefit of doubt given to asylum seekers is not unconditional, see e.g. ECtHR, *S.H.H. v. the United Kingdom,* no. 60367/10 (2013), §71. See also Chapter 3, Title IV, point 1.1.

2230 See e.g. Myjer (2013), 431-432.

2231 Battjes (2006), 322; Spijkerboer (2009), 64, 68; Reneman (2014) *EU Asylum Procedures (...)*, 267-268.

2232 See also Spijkerboer (2009), 57.

from the perspective of the rising backlog of cases in the court. Secondly, it is hard to imagine that the scrutiny would be considered 'rigorous', as required pursuant to Article 13 of the ECHR, when the appeal body cannot take into account new elements that are important for the case determination.

Thirdly, under the procedural limb of Article 3 of the ECHR the Strasbourg Court explicitly stated that an *ex nunc* examination is required in asylum-related proceedings. In the case of *F.G. v. Sweden,* the Iranian asylum seeker told the domestic asylum bodies from the outset that he had converted to Christianity after arriving in Sweden, but he did not at first wish to ask for protection on this ground. In the appeal he changed his mind. Despite this, the reviewing court did not carry out an assessment of the risk that the asylum seeker might encounter due to his conversion upon returning to Iran. In fact, none of the authorities examined this risk thoroughly. In conclusion the ECtHR found that 'there would be a violation of Articles 2 and 3 of the Convention if the applicant were to be returned to Iran without an *ex nunc* assessment by the Swedish authorities of the consequences of his conversion'.[2233] Moreover, the Strasbourg Court demanded the *ex nunc* examination also in the context of subsequent asylum proceedings. In the case of *M.D. and M.A. v. Belgium,* it reproached national authorities—both first- and second-instance—for not carrying out any analysis of the evidence provided by the applicants in the fourth asylum procedure. The court expressly stated that the examination carried out by the domestic authorities in that case cannot be considered the careful and rigorous scrutiny that is expected in cases pertaining to the principle of non-refoulement.[2234]

Lastly, it seems that the *ex nunc* examination is required also pursuant to Article 13 of the ECHR. In the case of *M.R.A. and Others v. the Netherlands,* the court found that the right to an effective remedy was not violated, *inter alia* because the asylum seeker could 'submit whatever he found relevant for the outcome' of the appeal asylum proceedings.[2235] In the *Yoh-Ekale Mwanje v. Belgium* case, the applicant complained that the authorities had refused her a leave to remain without conducting a proper assessment of her medical condition (she was HIV-positive), thus without the rigorous scrutiny of an alleged

2233 ECtHR (GC), *F.G. v. Sweden,* no. 43611/11 (2016), §158. See also ECtHR, *S.F. and Others v. Sweden*, no. 52077/10 (2012), §§68-71; ECtHR, *A.A. v. Switzerland,* no. 32218/17 (2019), §58; ECtHR, *M.S. v. Slovakia and Ukraine*, no. 17189/11 (2020), §127.

2234 ECtHR, *M.D. and M.A. v. Belgium,* no. 58689/12 (2016), §64. Cf. ECtHR, *A.S.N. and Others v. the Netherlands*, nos. 68377/17 and 530/18 (2020), §§123-125 with joint partly dissenting opinion of judges Lemmens, Vehabović and Schukking.

2235 ECtHR, *M.R.A. and Others v. the Netherlands,* no. 46856/07 (2016), §115. See also ECtHR, *S.A. v. the Netherlands,* no. 49773/15 (2020), §77.

risk of treatment contrary to Article 3 of the ECHR in Cameroon. The ECtHR reproached the Belgian authorities not only for not conducting the specific medical examination during the first-instance proceedings, but also for not taking into account the results of such examination in the appeal proceedings. Thus, the court was compelled to find that the scrutiny in this case had not been close and rigorous enough for the purposes of Article 13 taken in conjunction with Article 3 of the ECHR.[2236] In the case of *M.S.S. v. Belgium and Greece*, the Strasbourg Court found the practice of the appeal body that considered requests for an interim measure not consistent with the requirements of an effective remedy under Article 13 of the ECHR. The examination it carried out was limited to verifying whether an asylum seeker had produced concrete proof of the irreparable harm that might result from a transfer, and in fact even this evidence was not always taken into account.[2237]

The *Singh and Others v. Belgium* case is particularly illustrative. In it, the Strasbourg Court criticized the national asylum authorities for a premature dismissal of evidence—both in first- and second-instance proceedings. The applicants were refused international protection on the grounds that they had not provided enough proof. New evidence was acquired during the appeal proceedings, i.e. the statements from the UNHCR in New Delhi supporting the applicants' claims. Despite this, the appeal body upheld the first-instance decision. It stated that the applicants had been unable to prove their Afghan nationality and the veracity of the protection granted to them by the UNHCR. It assessed that the documents presented by the applicants would have been easy to forge, so it refused to give them any weight. Meanwhile, the ECtHR found that that proof was capable of dispelling the doubts expressed by the first-instance body. Importantly, if the appeal authority was uncertain of that, it could conduct a proper investigation (e.g. contact the UNHCR officials to check the documents' authenticity). It did not, so the applicants were deprived of an effective remedy.[2238]

It is thus plausible that, pursuant to Articles 3 and 13 of the ECHR, an *ex nunc* examination is required from domestic authorities in asylum, Dublin and return proceedings. Meanwhile, there is no absolute requirement for the *ex nunc* assessment in appeal proceedings arising from the right to an effective remedy enshrined in the EU Charter. Pursuant to the principle of effectiveness, the national procedural rules should not render the exercise of the rights

2236 ECtHR, *Yoh-Ekale Mwanje v. Belgium*, no. 10486/10 (2011), §§106-107.

2237 ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §389.

2238 ECtHR, *Singh and Others v. Belgium*, no. 33210/11 (2012), §§100-104. See also, similarly, ECtHR, *R.C. v. Sweden*, no. 41827/07 (2010), §53, and ECtHR, *Abdulkhakov v. Russia*, no. 14743/11 (2012), §148. Cf. ECtHR, *A.A. v. Switzerland*, no. 58802/12 (2014), §§62-63.

conferred by the EU law virtually impossible or excessively difficult. The Luxembourg Court is of the opinion that the legislation according to which new facts and evidence cannot be considered by an appeal body does not necessarily contradict this principle, in particular when those new elements can be taken into account in a fresh procedure.[2239] Hence, under Article 47 of the EU Charter an *ex tunc* examination seems to be allowed in some circumstances.

The Return Directive also does not expressly demand an *ex nunc* assessment in appeal or review proceedings. However, the Luxembourg Court did confirm–albeit indirectly–that such an examination is required. In the *Gnandi* case, the referring court asked whether it is acceptable to adopt a return decision before an appeal procedure regarding an application for international protection is concluded. The CJ found it permissible under the EU law provided that particular safeguards are afforded to asylum seekers,[2240] i.e. *inter alia*

> Member States are required to allow the person concerned to rely on any change in circumstances that occurred after the adoption of the return decision and that may have a significant bearing on the assessment of his situation under Directive 2008/115, and in particular under Article 5 thereof.[2241]

Thus, domestic authorities should respect the principle of non-refoulement, as well as take into account changes in circumstances especially relating to the best interests of a child and the family life and state of health of a third-country national concerned. Importantly, the Luxembourg Court reached this conclusion after generally stating that the characteristics of remedies in return proceedings 'must be determined in a manner that is consistent with Article 47 of the Charter'.[2242]

The *Gnandi* reasoning is corroborated, by way of analogy, by the CJ's case-law regarding expulsions of EU citizens on the grounds of public policy, public security and public health. Reneman rightly argued that those cases have two important things in common with the asylum ones: both types of cases require an examination of whether there is a present threat at the time of a removal, and in both fundamental rights are at stake.[2243] In the joined cases of *Orfanopoulos and Olivieri*, regarding the expulsions of a Greek and an Italian national who had been considered a threat to the public policy, the

2239 See e.g. CJ, case C-120/97 *Upjohn* (1999), paras 38-42.

2240 Including the suspension of a return decision for the duration of appeal asylum proceedings. For more see this Chapter, Title IV, point 2.3(a).

2241 CJ (GC), case C-181/16 *Gnandi* (2018), para 64.

2242 Ibid., para 52. See also CJ (GC), case C-562/13 *Abdida* (2014), para 45.

2243 Reneman (2014) *EU Asylum Procedures (...)*, 287. See also Baldinger (2015), 408.

Luxembourg Court found that the national practice, whereby domestic courts could not take into account, in reviewing the lawfulness of the expulsion, facts that had occurred after the final decision, had to be precluded. The court noticed that new circumstances might arise between the date of an expulsion decision and that of its review. Those novel elements may 'point to the cessation or the substantial diminution of the threat which the conduct of the person ordered to be expelled constitutes to the requirements of public policy'. Due to that possibility, they should be taken into consideration by a court during the review. Those findings were based on the assertion that the procedural rules in the Member States 'must not be such as to render virtually impossible or excessively difficult the exercise of rights conferred by Community law',[2244] thus on the principle of effectiveness.

Like the Return Directive, the Dublin III Regulation and its predecessor do not explicitly require an *ex nunc* assessment in appeal Dublin proceedings. Nevertheless, in the case of *Shiri,* the CJ found that the national legislation that bestows on an asylum seeker the right to 'plead circumstances subsequent to the adoption of the decision to transfer him, in an action brought against that decision, meets that obligation to provide for an effective and rapid remedy'.[2245] The case concerned an asylum seeker from Iran who received a decision ordering his transfer from Austria to Bulgaria. He appealed and during the review proceedings invoked Article 29(1) and (2) of the Dublin III Regulation claiming that Austria became responsible for examining his asylum application when the six-month period for a transfer provided for in those provisions expired. The Luxembourg Court stated that an asylum seeker can rely in his appeal on the expiry of this period in those circumstances.[2246] Similarly, in the *Hasan* case, the Luxembourg Court accepted the *ex nunc* examination in Dublin proceedings as compatible with the EU Charter as well as the Dublin III Regulation.[2247] It did not find problematic that the legislation in question allowed not only facts that were true after the adoption of a transfer decision but also ones that became true after the enforcement of a transfer to be taken into account.[2248]

Admittedly, the rulings in the cases of *Shiri* and *Hasan* only confirm that an *ex nunc* examination in Dublin appeal proceedings is compatible with the

2244 CJ, joined cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* (2004), paras 78-82. See also CJ, case C-467/02 *Cetinkaya* (2005), para 47.

2245 CJ (GC), case C-201/16 *Shiri* (2017), para 45. See also CJ, case C-360/16 *Hasan* (2018), para 32.

2246 CJ (GC), case C-201/16 *Shiri* (2017), para 46.

2247 CJ, case C-360/16 *Hasan* (2018), para 40.

2248 The asylum seeker was transferred to Italy during the Dublin appeal proceedings in Germany, see CJ, case C-360/16 *Hasan* (2018), para 33.

right to an effective remedy, leaving aside the question of whether an *ex tunc* assessment would be acceptable in those circumstances. However, in the case of *C.K. and Others*, the Luxembourg Court explicitly stated that

> where an asylum seeker provides, particularly in the context of an effective remedy guaranteed to him by Article 27 of the Dublin III Regulation, objective evidence, such as medical certificates concerning his person, capable of showing the particular seriousness of his state of health and the significant and irreversible consequences to which his transfer might lead, the authorities of the Member State concerned, *including its courts, cannot ignore that evidence.* They are, on the contrary, under an obligation to assess the risk that such consequences could occur when they decide to transfer the person concerned or, in the case of a court, the legality of a decision to transfer, since the execution of that decision may lead to inhuman or degrading treatment of that person.[2249]

Thus, the CJ made clear that it demands an *ex nunc* examination in Dublin proceedings, including the appeal procedure.[2250] In the following case of *Jawo*, the court clarified that the judicial authority considering a remedy against a transfer decision must take into account, while considering the risk of ill-treatment in a state responsible, 'information that is objective, reliable, specific and *properly updated*'.[2251]

While the 2005 Procedures Directive remained silent in regard to the required point of time for international protection needs to be determined,[2252] its successor clearly demands an *ex nunc* examination in asylum appeal proceedings. In the case of *Alheto*, the CJ explained that states are obliged to 'make

2249 CJ, case C-578/16 PPU *C.K. and Others* (2017), para 75 (emphasis added).

2250 See also Hruschka and Maiani (2016), 1567, claiming that the requirement of the *ex nunc* examination in Dublin proceedings may be inferred from Article 46(3) of the 2013 Procedures Directive. Cf. CJ (GC), case C-63/15 *Ghezelbash* (2016), para 58, where the court noticed the limitations to a scrutiny in Dublin proceedings that arise from the Dublin III Regulation, in particular under Article 22(4) and (5).

2251 CJ (GC), case C-163/17 *Jawo* (2019), para 90. See also CJ (GC), joined cases C-297/17, C-318/17, C-319/17 and C-438/17 *Ibrahim and Others* (2019), para 88; CJ, case C-517/17 *Addis* (2020), para 52.

2252 See, however, CJ, case C-175/11 *H.I.D. and B.A.* (2013), para 93, where the remedy in asylum proceedings before the Irish Refugee Appeals Tribunal was considered effective *inter alia* due to the fact that this body had a broad discretion, since it took cognizance of both questions of fact and questions of law and ruled on the evidence submitted to it, in relation to which it enjoyed discretion. See also CJ (GC), case C-353/16 *MP* (2018), para 57 (emphasis added), where the CJ stated that it was for 'the national court to ascertain, in the light of all *current* and relevant information, in particular reports by international organisations and non-governmental human rights organisations' whether the foreigner is eligible for subsidiary protection.

an up-to-date assessment of the case at hand' and that Article 46(3) of the 2013 Procedures Directive, read in conjunction with Article 47 of the EU Charter,

> must be interpreted as meaning that a court or tribunal of a Member State seised at first instance of an appeal against a decision relating to an application for international protection must examine both facts and points of law, (...) which the body that took that decision took into account or could have taken into account, and those which arose after the adoption of that decision.[2253]

In the *Fathi* ruling, the court specified that 'the expression *"ex nunc"* emphasises the court or tribunal's obligation to make an assessment that takes into account, should the need arise, new evidence which has come to light after the adoption of the decision under appeal'.[2254]

In the case of *Sacko*, the CJ confirmed that the requirements established under Article 46(3) of the 2013 Procedures Directive are applicable to an appeal procedure concerning a decision rejecting a manifestly unfounded application for international protection. When a court or tribunal considering an appeal finds it necessary to hear an asylum seeker (because 'the information gathered during the personal interview conducted in the procedure at first instance is insufficient'), it cannot be prevented from doing so, as it has an obligation to carry out a 'full and *ex nunc* examination'.[2255] Moreover, in the *LH* case, the court noted that the requirement of the *ex nunc* assessment also applies to appeal proceedings concerning admissibility.[2256] It concluded that 8 days for such an examination, the maximum duration of appeal proceedings permissible under the domestic law in question, may be an inadequate time-limit precluded under Article 47 of the EU Charter.[2257]

Article 46(3) of the 2013 Procedures Directive was considered by Costello and Hancox 'a fairly straightforward incorporation' of the ECtHR's standards.[2258] The Luxembourg Court's recent rulings seem to confirm this finding, albeit with one exception. In the case of *Ahmedbekova*, the CJ retracted

2253 CJ (GC), case C-585/16 ***Alheto*** (2018), paras 110 and 118. See also CJ, case C-56/17 ***Fathi*** (2018), para 63; CJ (GC), case C-556/17 ***Torubarov*** (2019), para 53.

2254 CJ, case C-56/17 ***Fathi*** (2018), para 64.

2255 CJ, case C-348/16 ***Sacko*** (2017), paras 48-49. See also CJ (GC), case C-585/16 ***Alheto*** (2018), paras 114, 124; CJ, case C-517/17 ***Addis*** (2020), para 62.

2256 CJ, case C-564/18 ***LH*** (2020), paras 66-69. See also CJ (GC), case C-585/16 ***Alheto*** (2018), para 115.

2257 CJ, case C-564/18 ***LH*** (2020), paras 73-77. For more on the relation between the *ex nunc* assessment and the promptness of appeal proceedings, see this Chapter, Title II.

2258 Costello and Hancox (2016), 431, referring to ECtHR, *Salah Sheekh v. the Netherlands*, no. 1948/04 (2007). See also Reneman et al. (2018), 15.

from its previous firm stance on the requirement of an *ex nunc* examination in appeal asylum proceedings.[2259] It decided that when new grounds for applying for asylum or evidence were presented for the first time during an appeal procedure and they related to events or threats which allegedly had taken place before the determining authority adopted a decision rejecting an asylum application, a court considering an appeal is not always required to fully examine those grounds or evidence. The Luxembourg Court specified that such examination is not demanded when a national court

> finds that those grounds or evidence were relied on in a late stage of the appeal proceedings or are not presented in a sufficiently specific manner to be duly considered or, in respect of evidence, it finds that that evidence is not significant or insufficiently distinct from evidence which the determining authority was already able to take into account.[2260]

The CJ relied in its reasoning on the assumption that the assessment of the determining authority is a 'vital stage of the common procedures'. It should not be circumvented, in particular by allowing an applicant to rely before a reviewing court on new grounds for asylum that could have already been raised and examined by the determining authority. An applicant for international protection is obliged to cooperate with a determining authority. When he does not, he should face the procedural consequences. Importantly, in the *Ahmedbekova* case, the Luxembourg Court did not disallow the *ex nunc* assessment in the above-mentioned circumstances; it left the decision in this regard to the national court. Nevertheless, when a domestic judicial authority chooses to examine new grounds or evidence during appeal proceedings, it is required to involve the determining authority in their assessment.[2261] Reading between the lines, it may be concluded that, in the *Ahmedbekova* case, the CJ clearly took into account the states' apprehension that allowing asylum seekers to rely on new grounds for asylum and evidence during the appeal stage of asylum proceedings may lead to abuses. Asylum seekers may intentionally abstain from providing the determining authority with all the information that they have at the time in order to prolong the asylum proceedings and postpone the removal.[2262] Arguably, the CJ's ruling was intended to counteract such practices.

2259 Relying on the Article 40(1) of the 2013 Procedures Directive. See also CJ, case C-651/19 *JP* (2020), paras 59-60, with regard to the limited scope of review in subsequent asylum proceedings.

2260 CJ, case C-652/16 *Ahmedbekova* (2018), para 103.

2261 Ibid., paras 96-100.

2262 Reneman (2018), 72; Reneman et al. (2018), 27.

The retraction from the rule of an *ex nunc* assessment in appeal asylum proceedings established in the *Ahmedbekova* case may be found to be in tension with the ECtHR's case-law, in particular with the above-mentioned case of *F.G. v. Sweden*.[2263] In that case, the applicant did decide to rely on new grounds for asylum (religious conversion) in his appeal of the decision rejecting his application for international protection. The Strasbourg Court reproached the Swedish asylum authorities for not conducting an *ex nunc* assessment in this regard. It emphasized that '*regardless of the applicant's conduct,* the competent national authorities have an obligation to assess, of their own motion, all the information brought to their attention before taking a decision on his removal'.[2264] Moreover, in the case of *Chahal v. the United Kingdom,* the court emphasized that 'the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct' and that 'the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration'.[2265] Admittedly, in regard to new proofs, in the case of *J.K. and Others v. Sweden,* the ECtHR stated that asylum seekers 'must submit, as soon as possible, all evidence relating to their individual circumstances that is needed to substantiate their application for international protection'.[2266] However, 'the rules concerning the burden of proof should not render ineffective the applicants' rights protected under Article 3 of the Convention'.[2267] Meanwhile, the national court's refusal to consider in detail new grounds for asylum or evidence in appeal asylum proceedings, encouraged by the interpretation of Article 46(3) of the 2013 Procedures Directive provided for in the *Ahmedbekova* ruling, may cause some

2263 ECtHR (GC), *F.G. v. Sweden,* no. 43611/11 (2016), §158. See also, in this regard, Reneman et al. (2018), 16, 29.

2264 ECtHR (GC), *F.G. v. Sweden,* no. 43611/11 (2016), §156 (emphasis added). Cf. ECtHR, *A.S.N. and Others v. the Netherlands,* nos. 68377/17 and 530/18 (2020), §§123-125, where the court accepted that the national authorities had disregarded some individual circumstances invoked by the applicants in asylum proceedings because those circumstances had not disclosed an issue under Article 3 of the ECHR (did not attain a sufficient level of severity). Judges Lemmens, Vehabović and Schukking in joint partly dissenting opinion opposed to such finding and stressed that–to satisfy the rigorous scrutiny requirement– account must be taken of all the information brought to the authorities' attention.

2265 ECtHR (GC), *Chahal v. the United Kingdom,* no. 22414/93 (1996), §§79-80.

2266 ECtHR, *J.K. and Others v. Sweden,* no. 59166/12 (2016), §96. See also ECtHR (GC), *N.D. and N.T. v. Spain,* nos. 8675/15 and 8697/15 (2020), §220, where the applicants added new information only during the hearing before the Grand Chamber. The court noticed that 'the doubts as to the credibility of this allegation' may arise 'from the fact that it was made at a very late stage of the procedure'. See, similarly, ECtHR, *R.H. v. Sweden,* no. 4601/14 (2015), §72.

2267 ECtHR, *J.K. and Others v. Sweden,* no. 59166/12 (2016), §97. See also ECtHR, *M.A. v. Belgium,* no. 19656/18 (2020), §95.

asylum seekers' claims under Article 3 of the ECHR to not be examined at all or to be assessed insufficiently by domestic authorities, violating the right to an effective remedy in conjunction with the principle of non-refoulement.[2268]

Hence, the findings provided for in the *Ahmedbekova* ruling should be understood very narrowly and applied cautiously. It must be remembered that the CJ stated in this judgment that an *ex nunc* examination is required in asylum appeal proceedings.[2269] Limitations in this regard are possible, but only in restricted circumstances: when new grounds for asylum or evidence pertain to facts that existed before the issuance of a decision rejecting an asylum application, when they are submitted 'in a late stage of the appeal proceedings' (thus, not in the appeal itself nor at the beginning of the appeal procedure) or when they are insufficient for their exhaustive assessment to be conducted. New proof can be analysed without the required rigour also when it is insignificant or in fact brings nothing new to a case.[2270] Importantly, to assess whether new grounds or evidence are insufficient or insignificant, a domestic court has to conduct their examination; it cannot reject them in advance. In that sense, the requirement of the *ex nunc* assessment is still applicable.

It is then plausible to conclude that under both the ECtHR's case-law regarding Articles 3 and 13 of the ECHR and the CJ's jurisprudence regarding the secondary EU law and Article 47 of the EU Charter, *ex nunc* examination is the standard that is required of domestic appeal authorities in asylum, Dublin and return proceedings. Despite such convergence of views, in none of the preliminary rulings where the matter of the *ex nunc* assessment was considered was the respective case-law of the Strasbourg Court mentioned. The ECtHR's standpoint might have been considered by the Luxembourg Court not sufficiently certain and consistent to be directly referred to.

IV. Suspensive Effect

Neither the ECHR nor the EU Charter requires that all remedies must entail a suspensive effect. However, it is now well established–under Article 13 of the ECHR–that if a person's removal could expose him to a real risk of suffering treatment contrary to, in particular, Article 3 of the ECHR, the remedy that

2268 See also opinion of AG Mengozzi delivered on 28 June 2018 in case C-652/16 *Ahmedbekova,* para 75 fn 54, where he directly referred to–contrary to the CJ–the ECtHR's case-law.

2269 CJ, case C-652/16 *Ahmedbekova* (2018), paras 92, 98, 103.

2270 Ibid., para 103.

is offered to him has to have a suspensive effect. In general, that approach is followed by the CJ. Both courts came a long way before they fully accepted the need for an automatic suspensive effect in asylum-related appeal proceedings. However, the exact scope of this requirement may still raise doubts (1). Moreover, the European asylum courts differ to some extent as to when they apply this general rule to specific procedures (2) and further appeals (3).

1. Automatic Suspensive Effect

Under the ECtHR's case-law, it is well established that when an applicant alleges that his removal would expose him to a real risk of suffering treatment incompatible with Article 3 of the ECHR, ensuring the effectiveness of a remedy for the purposes of Article 13 of the Convention requires that the person concerned should have access to a remedy with automatic suspensive effect.[2271] The suspensive effect is considered automatic only when it is imposed by law.[2272] Thus, it is insufficient that in practice (but not in law) removals are not executed until the appeal proceedings are concluded.[2273] The court often reiterates that the requirements of Article 13 of the ECHR take the form of a guarantee and not of a mere statement of intent or a practical arrangement.[2274] An effective remedy must be then available both in law and in practice.[2275]

While the Strasbourg Court incessantly repeats that a remedy in non-refoulement cases should have automatic suspensive effect, it does not determine in a lucid manner how automatic this effect in fact should be: whether it must be attached to the remedy itself or if the possibility to request the sus-

2271 See e.g. ECtHR, *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05 (2007), §66; ECtHR, *NA. v. the United Kingdom*, no. 25904/07 (2008), §90; ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §§290-293; ECtHR, *Al Hanchi v. Bosnia and Herzegovina*, no. 48205/09 (2011), §32; ECtHR, *Mohammed v. Austria*, no. 2283/12 (2013), §72; ECtHR, *A.C. and Others v. Spain*, nos. 6528/11 etc. (2014), §94.

2272 Spijkerboer (2009), 72. Cf. Reneman (2014) 'The Right to Remain (...)', 55, claiming that automatic suspensive effect can be imposed, besides by law, by 'other clear and binding rules'.

2273 See e.g. ECtHR, *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05 (2007), §66; ECtHR, *M.A. v. Cyprus*, no. 41872/10 (2013), §§136-137; ECtHR, *A.M. v. the Netherlands*, no. 29094/09 (2016), §63; ECtHR, *S.K. v. Russia*, no. 52722/15 (2017), §75.

2274 See e.g. ECtHR, *K.R.S. v. the United Kingdom*, no. 32733/08, dec. (2008); ECtHR, *M.A. v. Cyprus*, no. 41872/10 (2013), §137; ECtHR, *A.M. v. the Netherlands*, no. 29094/09 (2016), §63; ECtHR, *S.K. v. Russia*, no. 52722/15 (2017), §74.

2275 See e.g. ECtHR, *Abdolkhani and Karimnia v. Turkey*, no. 30471/08 (2009), §115; ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §290; ECtHR (GC), *De Souza Ribeiro v. France*, no. 22689/07 (2012), §80; ECtHR, *Kebe and Others v. Ukraine*, no. 12552/12 (2017), §100. Cf. ECtHR, *Vilvarajah and Others v. the United Kingdom*, nos. 13163/87 etc. (1991), §§125-127, where the practice of non-removal during the judicial review was considered sufficient.

pension of a removal pending the outcome of appeal proceedings suffices. In the *Čonka v. Belgium* case, the court highlighted the risks of a system where a suspension of a removal has to be requested, i.e.:

> it is not possible to exclude the risk that in a system where stays of execution must be applied for and are discretionary they may be refused wrongly, in particular if it was subsequently to transpire that the court ruling on the merits has nonetheless to quash a deportation order for failure to comply with the Convention, for instance, if the applicant would be subjected to ill-treatment in the country of destination or be part of a collective expulsion. In such cases, the remedy exercised by the applicant would not be sufficiently effective for the purposes of Article 13.[2276]

Accordingly, a non-suspensive application for the stay of a removal submitted within an extremely urgent procedure before the Conseil d'État was found incompatible with the requirements of Article 13 of the ECHR due to the fact that the Belgian authorities were not legally bound to await the Conseil's decision, not even for a minimum reasonable period, before executing an expulsion order.[2277] Even though the ECtHR did not expressly state in this case that Article 13 of ECHR requires an automatic suspensive effect,[2278] the judgment was considered to be a significant step forward in comparison with the previous case-law,[2279] where the court had stated that a national law should provide for 'the possibility of suspending the implementation of the measure impugned'.[2280] Some authors even claimed that the *Čonka* case entailed that the stay of a removal for the duration of appeal proceedings should not be conditional on a request being lodged and that a suspensive effect must necessarily be attached to a remedy itself.[2281]

However, the *Čonka* judgment did not bring about the needed definiteness in this regard. The Strasbourg Court still occasionally refers to the possibility of suspending a removal (instead of to the automatic suspensive effect),

2276 ECtHR, *Čonka v. Belgium*, no. 51564/99 (2002), §82. See also ECtHR, *A.C. and Others v. Spain*, nos. 6528/11 etc. (2014), §94.

2277 ECtHR, *Čonka v. Belgium*, no. 51564/99 (2002), §§81-83.

2278 In fact, only five years later, in ECtHR, *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05 (2007), §§66-67, the court expressly determined that a remedy in non-refoulement cases should have an 'automatic suspensive effect'.

2279 Skordas (2004), 321; Byrne (2005), 79-80. See also Vedsted-Hansen (2014), 447-448; Moreno-Lax (2017) *Accessing Asylum...*, 428.

2280 ECtHR, *Jabari v. Turkey*, no. 40035/98 (2000), §50. See also ECtHR, *Bahaddar v. the Netherlands*, no. 25894/94 (1998), §§47-48.

2281 See e.g. Skordas (2004), 319-321; Byrne (2005), 80; Moreno-Lax (2017) *Accessing Asylum...*, 428.

arguably when it fits better to the circumstances of the case.[2282] Moreover, in some cases following the *Čonka* case, it concluded that providing in law for the possibility to request the stay of a removal for the duration of appeal proceedings was enough for the purposes of Article 13 of the ECHR.[2283] Furthermore, the fact that the court in its judgments first recalls the 'automatic suspensive effect' requirement, and then takes into account whether a suspension of removal could have been requested or ordered *proprio motu* by a competent authority, also shows that a suspensive effect does not necessarily have to be attached to a remedy itself to be found in compliance with the right to an effective remedy.[2284]

Thus, it seems that for the purposes of Article 13 of the ECHR, either a suspensive effect attached to a remedy or one that must be requested may be considered sufficient.[2285] However, importantly, the 'possibility of suspending the enforcement of measures whose effects are potentially irreversible' must be 'effective'.[2286] Again though, the court is not very clear as to in what circumstances a request for the suspension of a removal is to be considered effective enough, in particular whether it must be suspensive of itself or if a non-suspensive application is sufficient.

Reneman claimed that under the ECtHR's jurisprudence the automatic suspensive effect should be attached either to a remedy itself or to a request for the suspension of a removal pending the outcome of the appeal proceedings.[2287] She pointed out that a system wherein the suspension of a removal for the duration of appeal proceedings has to be applied for, but such a request

2282 See e.g. ECtHR, *Quraishi v. Belgium*, no. 6130/08, dec. (2009), §2; ECtHR, *Xb v. France and Greece*, no. 44989/08, dec. (2010); ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), §198; ECtHR (GC), *Tarakhel v. Switzerland*, no. 29217/12 (2014), §126; ECtHR, *A.M. v. Switzerland*, no. 37466/13, dec. (2015), §27.

2283 See e.g. ECtHR, *Salah Sheekh v. the Netherlands*, no. 1948/04 (2007), §154; ECtHR, *Quraishi v. Belgium*, no. 6130/08, dec. (2009), §2; ECtHR, *Agalar v. Norway*, no. 55120/09, dec. (2011).

2284 See e.g. ECtHR, *Abdolkhani and Karimnia v. Turkey*, no. 30471/08 (2009), §§108, 116; ECtHR, *M.A. v. Cyprus*, no. 41872/10 (2013), §§133, 135, 140; ECtHR, *A.M. v. the Netherlands*, no. 29094/09 (2016), §§62, 67. See also ECtHR, *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05 (2007), §§64-67. See also Reneman (2014) *EU Asylum Procedures (…)*, 140.

2285 Cf. ECRE (2014), 53, stating that a system in which interim protection must be requested and a request is of itself suspensive '(…) is increasingly considered by the ECHR as problematic as it may not provide sufficient guarantees to ensure compliance with the principle of non-refoulement'.

2286 ECtHR, *Abdulazhon Isakov v. Russia*, no. 14049/08 (2010), §136.

2287 Reneman (2014) *EU Asylum Procedures (…)*, 140. See also Battjes (2006), 327; Peers and Rogers (2006), 408; Boeles (2008), 112-113; Spijkerboer (2009), 72; Boeles et al. (2014), 425; de Weck (2017), 279. See also UNHCR (2010), 88. See e.g. ECtHR, *M.A. v. Cyprus*, no. 41872/10 (2013), §§135, 140; ECtHR, *A.M. v. the Netherlands*, no. 29094/09 (2016), §67.

is suspensive in itself, can be considered enough for the purposes of Article 13 of the ECHR only when additional procedural guarantees are made available. Those are: sufficient time to lodge a request, available legal and linguistic assistance, a not too complex procedure regarding interim protection, not too high a burden of proof and a close and rigorous scrutiny of the risk of refoulement when the decision on a request is made.[2288] Moreover, a request for interim protection should be considered swiftly.[2289]

However, the jurisprudence of the Strasbourg Court is not unequivocal in this regard. On the one hand, in some cases states were reproached for providing for only a non-suspensive application for a suspension of expulsion or extradition.[2290] In the case of *Baysakov and Others v. Ukraine*, concerning the extradition of the refugees to Kazakhstan, the Strasbourg Court concluded that the remedy seeking the annulment of the decision ordering the extradition did not have automatic suspensive effect because a specific staying order by a court (issued at a foreigner's request or *proprio motu*) was required and the court's decision in this regard was discretionary. Thus, even when a foreigner was in a position to challenge the extradition decision, he could be removed before a court had an opportunity to review it. Consequently, the Strasbourg Court found a violation of Article 13 of the ECHR.[2291] On the other hand, depending on the very circumstances of a case, non-suspensive requests were also—albeit rarely—considered to be in compliance with Article 13 of the ECHR. The ECtHR took into account in particular whether a removal was in fact enforced before the competent authority examined a request for a suspension. In the circumstances of the case of *Xb v. France and Greece*, the request for interim protection during the appeal Dublin proceedings had been non-suspensive. However, the court emphasized that it had been granted, so the applicant had access to an effective appeal.[2292]

Thus, under the ECtHR's jurisprudence, it has to be concluded that a suspensive effect should preferably be attached to a remedy itself,[2293] as then

2288 Reneman (2014) 'The Right to Remain (...)', 55-56. See also Reneman (2014) *EU Asylum Procedures (...)*, 143; ECRE (2014), 54-55.

2289 ECtHR, *Ahmade v. Greece*, no. 50520/09 (2012), §§115-116. See also ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §§190, 320.

2290 See e.g. ECtHR, *Jabari v. Turkey*, no. 40035/98 (2000), §§19, 20, 50; ECtHR, *Čonka v. Belgium*, no. 51564/99 (2002), §§81-83; ECtHR, *Al Hanchi v. Bosnia and Herzegovina*, no. 48205/09 (2011), §33; ECtHR, *M.A. v. Cyprus*, no. 41872/10 (2013), §§135, 140; ECtHR, *A.M. v. the Netherlands*, no. 29094/09 (2016), §67.

2291 ECtHR, *Baysakov and Others v. Ukraine*, no. 54131/08 (2010), §§75-78.

2292 ECtHR, *Xb v. France and Greece*, no. 44989/08, dec. (2010).

2293 See e.g. as regards return proceedings, Committee of Ministers of CoE (1998); as regards asylum proceedings, ECRE (2014), 54.

it indubitably satisfies the requirements arising from the right to an effective remedy. Moreover, in some circumstances the possibility of lodging a request for a stay of a removal pending the outcome of appeal proceedings may be considered sufficient for the purposes of Article 13 of the ECHR. Such a request should be suspensive rather than non-suspensive. However, the standard in this regard is uncertain as the ECtHR has occasionally not found Article 13 of the ECHR to be violated even though the applicants had access only to a non-suspensive request for a stay of a removal.[2294]

Even though some doubts may still be expressed in regard to how automatic the suspensive effect should be in order to be in compliance with the right to an effective remedy, it is clear that the ECtHR has decided over time that a higher scope of protection in this regard is needed. Its jurisprudence has evolved from the early case-law in which the matter of a suspensive effect was not addressed at all, through 'the possibility of suspending the implementation of the measure impugned', to the requirement of automatic suspensive effect. A similar development may be observed in the CJ's jurisprudence.

Initially, the CJ showed an indecisive approach to this matter. The case of *Dörr and Ünal*, concerning the expulsions of a German and a Turkish national from Austria, is the most illustrative in this regard. On the one hand, the Luxembourg Court held that an appeal against a decision refusing a renewal of a residence permit or ordering an expulsion must have an automatic suspensive effect, and that the possibility to apply for a stay of an expulsion could not be considered sufficient.[2295] Thus, it applied a high standard of interim protection in expulsion proceedings, even though the case did not concern the risk of ill-treatment after a removal. On the other hand, in this ruling the court also allowed for the possibility that a remedy against a removal decision could have no suspensive effect at all provided that additional procedural guarantees had been secured.[2296] Taking into account the above-mentioned jurisprudence of the ECtHR, this standard could not be applied in subsequent cases concerning returns of asylum seekers.[2297]

2294 Cf. Boeles et al. (2014), 425, claiming that the standard under Article 13 of the ECHR in this regard is clear. See also Costello and Hancox (2016), 433.

2295 CJ, case C-136/03 *Dörr and Ünal* (2005), paras 50-51.

2296 The additional opinion of a competent body was issued during first-instance proceedings, see Article 9(1) of the Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health. See CJ, case C-136/03 *Dörr and Ünal* (2005), paras 54-57. See also CJ, case C-48/75 *Royer* (1976), paras 60-61; CJ, case C-98/79 *Pecastaing* (1980), para 18.

2297 Reneman (2014) *EU Asylum Procedures (...)*, 138.

In the case of *Abdida*, the CJ made a significant step forward in protecting third-country nationals from refoulement during appeal return proceedings, but it was still not a definitive one. Even though Article 13 of the Return Directive does not require that the remedy against a return decision should entail a suspensive effect,[2298] in the *Abdida* ruling, the Luxembourg Court confirmed that an appeal in return proceedings has to have a suspensive effect in order to be compatible with Article 47 of the EU Charter.[2299] However, the CJ has not once mentioned that this effect must be automatic. Only when it referred to the ECtHR's case-law, did the CJ point out that 'the right to an effective remedy provided for in Article 13 ECHR requires that a remedy enabling suspension of enforcement of the measure authorising removal should, *ipso jure,* be available to the persons concerned'.[2300] The court's omission in this regard seems meaningful, particularly because the AG Bot repeatedly confirmed in the opinion delivered in this case that a remedy against a return decision should, pursuant to the EU Charter, entail an automatic suspensive effect.[2301]

Only in 2018, in the *Gnandi* ruling, did the Luxembourg Court explicitly admit that Article 47 of the EU Charter requires a remedy that enables the automatic suspension of the enforcement of a measure authorizing an asylum seeker's removal.[2302] Moreover, the court emphasized that both during the period prescribed for bringing an appeal in asylum proceedings and, if such an appeal is brought, until the resolution of the appeal, the states should refrain from enforcing a return decision.[2303] Since then, it cannot be doubted that the suspensive effect of a remedy available in asylum and return proceedings has to be automatic under the EU law, in compliance with the ECtHR's case-law.[2304]

Under the 2013 Procedures Directive and Dublin III Regulation attaching a suspensive effect only to a request for the right to remain during the appeal asylum and Dublin proceedings is permissible in some circumstances. The

2298 See Article 13(2) of the Return Directive.

2299 CJ (GC), case C-562/13 *Abdida* (2014), para 53. See more this Chapter, Title IV, point 2.1.

2300 Ibid., para 52. See also, similarly, CJ, case C-239/14 *Tall* (2015), para 54.

2301 Opinion of AG Bot delivered on 4 September 2014 in case C-562/13 *Abdida*, EU:C:2014:2167, para 104.

2302 Interestingly, in the *Gnandi* case [CJ (GC), case C-181/16 *Gnandi* (2018), para 54, see also paras 56 and 58], the CJ referred to CJ (GC), case C-562/13 *Abdida* (2014) and CJ, case C-239/14 *Tall* (2015), where the required suspensive effect was not expressly described as automatic.

2303 CJ (GC), case C-181/16 *Gnandi* (2018), paras 61-62.

2304 The rule reiterated in CJ, case C-175/17 *X* (2018), paras 32-33; CJ, case C-180/17 *X and Y* (2018), paras 28-29. See also CJ, case C-269/18 PPU *C and J and S*, order (2018), para 50; CJ, case C-402/19 *LM* (2020), para 35; CJ, case C-233/19 *B.* (2020), para 46.

Luxembourg Court does not seem to find it conflicting with the right to an effective remedy.

Articles 46(6) and (8) of the 2013 Procedures Directive enable–in relation to some asylum decisions–the attachment of a suspensive effect not to a remedy itself, but only to a request for interim protection. In the case of *C and J and S*,[2305] the CJ relied heavily on those provisions. Importantly, nothing in this judgment suggests that the court could perceive this procedural solution as being contrary to the requirements arising from the right to an effective remedy. Moreover, in the case of *FR*, the Luxembourg Court expressly allowed for national legislation that provided for only the possibility to request interim protection during further appeal asylum proceedings. Such legislation was considered acceptable, even though under the domestic law in question, the decision on interim measures was made on the basis of an assessment of the well-foundedness of the grounds raised in a further appeal, rather than of the existence of a risk of serious and irreparable harm to the appellee after a removal.[2306]

Article 27(3)(c) of the Dublin III Regulation also expressly allows states to limit procedural safeguards in appeal proceedings by providing for only the opportunity to request the suspension of a transfer pending the outcome of an appeal or review. The request should be of itself suspensive. In the case of *Ghezelbash*, the Luxembourg Court–responding to the states' apprehension that availing of a remedy in Dublin proceedings may extend (even excessively) the process for determining the Member State responsible and postpone the implementation of a transfer–emphasized that in accordance with Article 27(3)(c) of the Dublin III Regulation a transfer could be carried out when a suspension was not requested or one was denied.[2307] Thus, not only does the court seem to consider a suspensive request for interim protection during appeal proceedings to be acceptable and coherent with the requirements arising from the right to an effective remedy, but also it may be argued that it encourages the Member States to apply Article 27(3)(c) of the Dublin III Regulation for the sake of the effectiveness of this act.

With regard to Article 13 of the Return Directive, the CJ elucidated in the *B.* case that the possibility to request a suspensive effect of a remedy is a sufficient procedural safeguard. It noticed that 'EU law does not define precisely the

2305 CJ, case C-269/18 PPU *C and J and S*, order (2018). See also this Chapter, Title IV, point 2.3(a).

2306 CJ, case C-422/18 PPU *FR*, order (2018), paras 46-47. For more on further appeals, see these Chapter and Title, point 3.

2307 CJ (GC), case C-63/15 *Ghezelbash* (2016), paras 56-59.

actual modalities of the automatic suspensive appeal against the return decision', thus 'Member States have some leeway in this respect'.[2308] Accordingly,

> in the context of the organisation of appeal procedures against a return decision, a Member State may provide for a specific remedy for that purpose, in addition to an action for annulment without suspensive effect, which may also be brought against the decision, provided that the applicable national procedural rules are sufficiently precise, clear and foreseeable to enable individuals to know precisely their rights (...).[2309]

Next, the court stressed that national authorities deciding on suspension do not have to establish that the risk of refoulement or of a grave and irreversible deterioration in the applicant's state of health actually exist. If such were required, 'the conditions for the application of automatic suspensive effect would be confused with those for the success of the appeal against the return decision'. Hence, in order for a return decision to be suspended with automatic effect, it is enough that the arguments made in a remedy concerning the risks upon removal be not 'manifestly unfounded'. Then, a national authority must 'hold that the return decision is suspended with automatic effect, from the lodging of that appeal, and to give due effect to that finding under its powers'.[2310]

The reasoning given in the *C and J and S*, *FR*, *Ghezelbash* and *B.* cases was rooted in the secondary asylum law and the principle of procedural autonomy. Article 47 of the EU Charter was mentioned–rather *en passant*–only in the *FR* and *B.* cases. No reference was made to the ECHR or the ECtHR's case-law in any of those rulings and orders. However, this is not particularly surprising taking into account the uncertain position of the Strasbourg Court in regard to the possibility of lodging a request for a stay of a removal pending the outcome of appeal proceedings.

2. Suspensive Effect in Specific Procedures

The right of asylum seekers to an effective remedy, guaranteed under the ECHR and EU Charter, is strengthened by specific provisions of the secondary EU law. However, the scope of this right differs between return, Dublin and asylum proceedings as regards the requirement of a suspensive effect.

The Return Directive does not require that a remedy against a return decision must entail a suspensive effect. Article 13(2) of the Directive merely

2308 CJ, case C-233/19 *B.* (2020), para 49.

2309 Ibid., para 50, see also para 57.

2310 Ibid., paras 64-66.

states that an appeal authority or body 'shall 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'.[2311] Thus, the Return Directive does not oblige the Member States to attach a suspensive effect to a remedy or even to a request for the suspension of a return pending the outcome of appeal proceedings.[2312] In practice, in most Member States the stay of removal for the duration of appeal proceedings has to be applied for.[2313]

Under Article 27(3) of the Dublin III Regulation, the Member States can choose how they want to apply the requirement of a suspensive effect in regard to a remedy against a transfer decision. A Dublin transfer should be automatically suspended for the duration of appeal proceedings, or at least until a court or tribunal decides whether to grant suspensive effect to an appeal or review (*proprio motu* or on a request). This represents great progress in comparison with the Dublin II Regulation, which did not confer the obligation to provide for an effective remedy against a transfer decision at all. When a remedy was made available in a state, lodging it could not suspend the implementation of a transfer. At most, national legislation could allow domestic courts or bodies to decide on the suspension of a transfer on a case-by-case basis.[2314]

Pursuant to Article 46(5) of the 2013 Procedures Directive, an asylum seeker is allowed to remain in the territory of a Member State until the time-limit within which he may exercise his right to an effective remedy has expired and, when such a right has been exercised within the time-limit, pending the outcome of the remedy. Thus, in principle, the remedy in asylum proceedings has to have automatic suspensive effect. However, the directive provides as well for exceptions to this rule, e.g. regarding remedies in subsequent asylum proceedings or against decisions considering an application to be manifestly unfounded.[2315] If an exception is applied, a national court or tribunal shall have the power to rule whether or not an applicant may remain

2311 The provision was 'substantially watered down' by the European Commission in comparison to the initial draft of the directive, which had included automatic suspensive effect of a remedy in return proceedings [Mananashvili (2016), 723].

2312 See also CJ (GC), case C-562/13 *Abdida* (2014), paras 43-44; CJ, case C-233/19 *B.* (2020), para 44.

2313 European Commission (2014), 23.

2314 Article 19(2) of the Dublin II Regulation.

2315 Costello and Hancox (2016), 433, noted in regard to those exceptions: 'It is difficult to see how in implementation it will not lead to breaches of Article 13 ECHR (...)'. See also Vedsted-Hansen (2014), 458, claiming that those exceptions 'go beyond just a few narrowly and objectively defined cases.'

on the territory of a Member State, either upon the applicant's request or acting *ex officio*.[2316] Pending the outcome of this procedure the asylum seeker is allowed to remain on the respective territory.[2317]

It cannot be overlooked that under the 2013 Procedures Directive the procedural safeguards in asylum proceedings were expanded in comparison with its predecessor. According to the 2005 Procedures Directive, the decision as to whether a remedy in asylum proceedings should entail a suspensive effect, or instead an asylum seeker should have the possibility to request the right to remain in a territory pending the outcome of appeal proceedings, was left to the discretion of the Member States.[2318] It was stipulated that the rules regarding a suspensive effect have to be in accordance with states' international obligations, but that stipulation could not be considered a sufficient guarantee that the right to an effective remedy would be respected in the Member States, even though the standards arising from international law did in fact require remedies with suspensive effect.[2319] In practice, the Member States applied Article 39(3) of the 2005 Procedures Directive in a very diverse manner, and some of them disregarded the requirement of an automatic suspensive effect.[2320]

Thus, the matter of the suspensive effect of a remedy available in the proceedings concerning asylum seekers is diversely approached in the secondary law. In consequence, the respective jurisprudence of the ECtHR and CJ is analysed separately in regard to return (2.1), Dublin (2.2) and asylum (2.3) procedures.

2316 Article 46(6-7) of the 2013 Procedures Directive.

2317 Article 46(8) of the 2013 Procedures Directive. However, as regards subsequent applications, the Member States can derogate from this article [Article 41(2)(c) of the 2013 Procedures Directive]. It was seen as running counter to the ECtHR's case-law concerning the right to an effective remedy [see Garlick (2015) 'Asylum Procedures', 281].

2318 Article 39(3) of the 2005 Procedures Directive. The procedural safeguards in this regard were watered down in the negotiation process [Brouwer (2008), 289]. See also CJ, case C-534/11 *Arslan* (2013), para 47, where the court explained that 'Article 39(3) of Directive 2005/85 grants each Member State the *possibility* of extending the right established by Article 7(1) of the directive by providing that lodging an appeal against the decision of the responsible authority at first instance has the effect of allowing asylum applicants to remain on the territory of that State pending the outcome of that remedy' (emphasis added).

2319 Vedsted-Hansen (2012), 261. In fact, Article 39(3) of the 2005 Procedures Directive was widely criticized, see e.g. Byrne (2005); Craig and Fletcher (2005), 75-76; Battjes (2006), 331-332; Peers and Rogers (2006), 408-409; Staffans (2010), 282, 286; Vedsted-Hansen (2014), 457. Hofmann and Löhr (2011), 1105, concluded that this provision 'constitutes a potential breach of the principle of non-refoulement'.

2320 See European Commission (2010), 14-15; UNHCR (2010), 88.

2.1 Return Proceedings

The Strasbourg Court reiterates that if a person alleges that his removal would expose him to a real risk of suffering treatment contrary to Article 3 of the ECHR, a remedy against that expulsion or extradition decision must entail an automatic suspensive effect. This firm stance results from the importance that the court attaches to Article 3 of the ECHR and the irreversibility of the harm that might occur if a risk of torture or ill-treatment materializes after a removal.[2321] Thus, in return proceedings concerning asylum seekers, the suspension of an expulsion or extradition for the duration of the appeal procedure (or at least for the time needed to consider a request for the stay of a removal[2322]) is usually obligatory.[2323]

The requirement of an automatic suspensive effect is most often invoked by the Strasbourg Court as regards arguable claims of asylum seekers under Article 3 of the ECHR. However, it was found applicable as well to remedies against expulsions and extraditions that would expose a person to a real risk of the violation of his right to life guaranteed under Article 2 of the ECHR[2324] and those that amount to collective removals prohibited pursuant to Article 4 of the Protocol no. 4[2325]. However, the Grand Chamber explained in the case of *Khlaifia and Others v. Italy,* that 'the lack of suspensive effect of a removal decision does not in itself constitute a violation of Article 13 of the Convention where, as in the present case, the applicants do not allege that there is a real risk of a violation of the rights guaranteed by Articles 2 or 3 in the destination country'.[2326] Consequently, it held that there had been no violation of Article 13 of the Convention taken together with Article 4 of Protocol No. 4.[2327]

2321 E.g. ECtHR, *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05 (2007), §66; ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §293; ECtHR (GC), *De Souza Ribeiro v. France*, no. 22689/07 (2012), §82; ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), §200.

2322 For more on suspensive requests for interim protection, see this Chapter, Title IV, point 1.

2323 See also Morgades-Gil (2017) 'The Right…', 260. See also, as regards a refusal of entry to presumptive asylum seekers, ECtHR, *M.K. and Others v. Poland*, nos. 40503/17, 42902/17 and 43643/17 (2020), §220.

2324 See e.g. ECtHR (GC), *De Souza Ribeiro v. France*, no. 22689/07 (2012), §82; ECtHR, *M.A. v. Cyprus*, no. 41872/10 (2013), §133; ECtHR, *S.K. v. Russia*, no. 52722/15 (2017), §77. See also ECtHR, *D. and Others v. Romania*, no. 75953/16 (2020), §§129-130.

2325 See e.g. ECtHR, *Čonka v. Belgium*, no. 51564/99 (2002), §§81-85; ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), §§206-207; ECtHR, *Moustahi v. France*, no. 9347/14 (2020), §164; ECtHR, *M.K. and Others v. Poland*, nos. 40503/17, 42902/17 and 43643/17 (2020), §220.

2326 ECtHR (GC), *Khlaifia and Others v. Italy*, no. 16483/12 (2016), §281.

2327 For critical comments in this regard, see in particular partly dissenting opinion of judge Serghides in ECtHR (GC), *Khlaifia and Others v. Italy*, no. 16483/12 (2016), paras 69-76.

An automatic suspensive effect of a remedy is required as regards removal orders because the ECHR has to be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory.[2328] If an asylum seeker is removed before the remedy against the decision ordering his removal is examined by national authorities, to a country where, he had alleged, he would suffer treatment contrary to Article 3 of the ECHR, this remedy cannot be considered effective for one simple reason. Even if those authorities decide to grant him international (or any other) protection after the removal, it is of no use, as the asylum seeker is already facing the situation that he feared and his life and limb may be by then in danger. The execution of a removal order that was contrary to the ECHR may lead to effects that are potentially irreversible[2329] and sometimes even life-threatening. A remedy needs to have a suspensive effect in order to prevent the harm that might occur after a removal.[2330]

This approach was followed by the CJ. In the case of *Abdida*, the Luxembourg Court concluded that Articles 5 and 13 of the Return Directive, taken in conjunction with Articles 19(2) and 47 of the EU Charter, 'must be interpreted as precluding national legislation which does not make provision for a remedy with suspensive effect in respect of a return decision whose enforcement may expose the third country national concerned to a serious risk of grave and irreversible deterioration in his state of health'.[2331] The case concerned a seriously ill foreigner who was ordered to leave Belgium. The Return Directive, applicable in this case, does not require that a remedy against a return decision should entail a suspensive effect.[2332] However, the CJ highlighted that this remedy must be compatible with the requirements of Article 47 of the EU Charter. It decided that

> (i)n order for the appeal to be effective in respect of a return decision whose enforcement may expose the third country national concerned

2328 See e.g. ECtHR (GC), *Mamatkulov and Askarov v. Turkey*, nos. 46827/99 and 46951/99 (2005), §121. See also ECtHR, *Amerkhanov v. Turkey*, no. 16026/12 (2018), §56, where the court stated that it could not 'attach any importance' to the appeal judicial proceedings that had been concluded after the applicant's deportation.

2329 ECtHR, *Čonka v. Belgium*, no. 51564/99 (2002), §79; ECtHR, *Salah Sheekh v. the Netherlands*, no. 1948/04, (2007), §153.

2330 Cf. ECtHR, *Moustahi v. France*, no. 9347/14 (2020), §§152–155, where the court decided that a suspensive effect was not required with regard to the remedy against the mere practical arrangements for the removal.

2331 CJ (GC), case C-562/13 *Abdida* (2014), para 53.

2332 Ibid. para 44. See Article 13(2) of the Return Directive, merely stating that the appeal authority or body 'shall 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'.

> to a serious risk of grave and irreversible deterioration in his state of health, that third country national must be able to avail himself, in such circumstances, of a remedy with suspensive effect, in order to ensure that the return decision is not enforced before a competent authority has had the opportunity to examine an objection alleging infringement of Article 5 of Directive 2008/115, taken in conjunction with Article 19(2) of the Charter.[2333]

Hence, in the *Abdida* ruling, the Luxembourg Court went beyond the literal–and clear–wording of the Return Directive. It took into account the right to an effective remedy arising from the EU Charter as well as–pursuant to Article 52(3) of the EU Charter–the ECtHR's case-law concerning the requirement of a suspensive effect as regards remedies against removal orders.[2334] It highlighted as well that Article 47(1) of the EU Charter is based on Article 13 of the ECHR.[2335] In consequence, the CJ overruled the wording of the secondary EU law, giving a 'clear preference to humanity'[2336] over the evident intent of the Member States enshrined in Article 13(2) of the Return Directive.

In the *LM* case, humanity again prevailed. The Luxembourg Court decided that both a seriously ill child and his parent (a child's caregiver) were entitled to an appeal with automatic suspensive effect against a return decision. It stressed that

> (t)he fact that the child concerned was an adult on the date of the adoption of the return decision concerning his or her parent or that that child has become an adult in the course of the proceedings is immaterial in that regard, in so far as it is established that, notwithstanding the fact that that child is an adult, his or her dependence on the parent continues to exist.[2337]

The court based its conclusions on the necessity of ensuring the effectiveness of the protection that an ill child (or a dependent adult) should enjoy pursuant to Articles 5 and 13 of the Return Directive, read in the light of Articles 19(2) and 47 of the EU Charter. The removal of his parent, whose presence at the

2333 CJ (GC), case C-562/13 *Abdida* (2014), para 50. See also CJ, case C-233/19 *B.* (2020), paras 45, 47; CJ, case C-402/19 *LM* (2020), paras 34-36.

2334 CJ (GC), case C-562/13 *Abdida* (2014), para 52. The court referred to ECtHR, *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05 (2007) and ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012).

2335 CJ (GC), case C-562/13 *Abdida* (2014), para 51.

2336 Peers (2015) 'Irregular Migrants…', 304.

2337 CJ, case C-402/19 *LM* (2020), para 42.

child's side was essential, would most probably entail the departure of that minor. Thus, the ill child would not be able to benefit from the automatic suspensive effect of a remedy given in his own case.[2338]

The *Abdida* and *LM* rulings concern the very particular situation of ill returnees.[2339] However, in other cases the CJ confirmed that the procedural safeguards determined therein are of broader applicability.[2340] In the case of *Gnandi*, the Luxembourg Court clarified the standard that is required in this regard in asylum cases, i.e.

> an appeal brought against a return decision (…) must, in order to ensure, as regards the third-country national concerned, compliance with the requirements arising from the principle of non-refoulement and Article 47 of the Charter, enable automatic suspensory effect, since that decision may expose the person concerned to a real risk of being subjected to treatment contrary to Article 18 of the Charter, read in conjunction with Article 33 of the Geneva Convention, or contrary to Article 19(2) of the Charter.[2341]

Thus, if a foreigner appeals against or seeks a review of a decision regarding his return, claiming that it would violate the principle of non-refoulement, it is now indubitable under the case-law of both European asylum courts, that this remedy should entail automatic suspensive effect.[2342] Moreover, according to the CJ, this rule applies irrespective of (even numerous) asylum proceedings that preceded the return proceedings.[2343]

The above-mentioned rulings instruct the Member States as to when the automatic suspensive effect of a remedy against a return decision is required, i.e. when the enforcement of this decision may expose a third-country national 'to a real risk of being subjected to treatment contrary to Article 19(2) of the Charter' (the principle of non-refoulement), in particular 'to a serious risk of grave and irreversible deterioration in his or her state of health'.[2344] In the

2338 Ibid., paras 32-41.

2339 For more on medical cases, see Chapter 4, Title II, point 4.

2340 CJ, case C-239/14 *Tall* (2015), para 58: '(…) appeal must necessarily have suspensory effect when it is brought against a return decision whose enforcement may expose the third-country national concerned to a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment (…)'.

2341 CJ (GC), case C-181/16 *Gnandi* (2018), para 56. See also CJ, case C-233/19 *B.* (2020), para 46; CJ, case C-402/19 *LM* (2020), para 35.

2342 See also CJ, case C-233/19 *B.* (2020), para 48, where the court emphasized that 'it is for the national legislature, where appropriate, to amend national legislation to ensure that an appeal' in return proceedings entails automatic suspensive effect.

2343 CJ, case C-239/14 *Tall* (2015), para 57.

2344 CJ, case C-233/19 *B.* (2020), paras 46-48; CJ, case C-402/19 *LM* (2020), paras 35-36.

case of *B.*, the Luxembourg Court confirmed that not all appeals against return decisions must entail a suspensive effect. Importantly though, when the argument that the removal would expose an appellee to the risk of ill-treatment 'does not appear to be manifestly unfounded', the automatic suspensive effect must be granted.[2345]

Despite the fact that references to the ECHR and the case-law of the Strasbourg Court are absent from most of the preliminary rulings mentioned above,[2346] the CJ's stance on the automatic suspensive effect of a remedy in return proceedings must be considered to be compliant with the ECtHR's requirements in this regard. In particular, the Luxembourg Court's insistence on the effectiveness of the protection stemming from Articles 5 and 13 of the Return Directive, read in the light of Article 19(2) and Article 47 of the EU Charter,[2347] seems to mirror the approach of the Strasbourg Court, which reiterates that the rights arising from the ECHR are 'practical and effective, not theoretical and illusory'.[2348]

2.2 Dublin Proceedings

A transfer under the Dublin II or III Regulation is essentially a (frequently forced) removal from one country to another, just as are returns, expulsions or extraditions described in the previous section. As such, taking into account the above-mentioned ECtHR jurisprudence, a Dublin transfer should be suspended for the duration of appeal proceedings, when a claim of a risk of treatment contrary to Article 3 of the ECHR in a responsible state has been arguable.

Meanwhile, in the text of the Dublin II Regulation the requirement of an automatic suspensive effect of a remedy was disregarded,[2349] due to the fact that Dublin transfers were considered removals to safe countries.[2350]

2345 CJ, case C-233/19 *B.* (2020), paras 61-66. See also European Commission (2017), 135, stating that: 'When the appeal refers to other reasons (…) Member State can decide not to grant automatic suspensive effect to appeals. However, the competent national authorities or bodies must in any case retain the power to decide to temporarily suspend the enforcement of a decision in individual cases where deemed necessary for other reasons (…)'.

2346 They were mentioned only in the *Abdida* case, see CJ (GC), case C-562/13 *Abdida* (2014), para 52.

2347 CJ, case C-402/19 *LM* (2020), para 41.

2348 See e.g. ECtHR (GC), *Mamatkulov and Askarov v. Turkey,* nos. 46827/99 and 46951/99 (2005), §121.

2349 See e.g. Lenart (2012), 15. Brandl (2004), 66, emphasized that the Dublin II Regulation did not oblige the Member States to change the law and practice established under the Dublin Convention in this regard (under which some Member States did not grant a suspensive effect at all).

2350 See Recital 2 in the preamble to the Dublin II Regulation. See also Battjes (2002), 186-187; Moreno-Lax (2012), 4; Morgades-Gil (2017) 'The Right…', 267.

Pursuant to Article 19(2), the Member States were not obliged to provide for a remedy against a transfer decision at all. When a remedy was made available, lodging it could not suspend the implementation of a transfer.[2351] At most, national legislation could allow domestic courts or bodies to decide on the suspension of a transfer on a case-by-case basis.[2352] Under the Dublin II Regulation the practice of the Member States diverged, and a remedy with automatic suspensive effect was not ensured in Dublin proceedings conducted in all of the states.[2353]

In this context, the ECtHR was challenged with a rising number of complaints regarding Dublin transfers carried out between Member States of the EU. In those cases, it *inter alia* considered whether remedies available to asylum seekers in Dublin proceedings were compatible with the requirements arising from Article 13 of the ECHR.[2354] In its landmark judgment in the case of *M.S.S. v. Belgium and Greece,* the ECtHR decided that the Dublin transfer from Belgium to Greece exposed the asylum seeker to a risk of torture or inhuman or degrading treatment arising from the shortcomings in the Greek asylum system.[2355] The court also found a violation of Article 13 in conjunction with Article 3 of the ECHR as regards the appeal procedure in Belgium. It confirmed that the right to an effective remedy (with all its specific requirements established in expulsion cases) applies to Dublin proceedings. When an asylum seeker has an arguable claim, in particular under Article 3 of the ECHR, Article 13 of the Convention requires an effective remedy against a transfer decision, one that entails an automatic suspensive effect,[2356] in order to prevent the irreversible harm from occurring. However, the 'arguability' threshold in this regard is set high.[2357]

2351 Cf. Battjes (2006), 331.

2352 The same rules were applicable in the 'take-back' procedure, see Article 20(1)(e) of the Dublin II Regulation.

2353 See e.g. Hurwitz (2009), 114; Hruschka and Maiani (2016), 1566-1567.

2354 See e.g. ECtHR, *T.I. v. the United Kingdom,* no. 43844/98, dec. (2000). However, in this case the court did not refer to the requirement of an automatic suspensive effect.

2355 ECtHR (GC), *M.S.S. v. Belgium and Greece,* no. 30696/09 (2011), §§367-368. See also ECtHR, *Sharifi and Others v. Italy and Greece,* no. 16643/09 (2014), §§ 232-235; ECtHR (GC), *Tarakhel v. Switzerland,* no. 29217/12 (2014), §122.

2356 ECtHR (GC), *M.S.S. v. Belgium and Greece,* no. 30696/09 (2011), §§386, 388, 393, 396. See also ECtHR, *Mohammed Hussein and Others v. the Netherlands and Italy,* no. 27725/10, dec. (2013), §83; ECtHR, *Safaii v. Austria,* no. 44689/09 (2014), §53; ECtHR (GC), *Tarakhel v. Switzerland,* no. 29217/12 (2014), §§126-132.

2357 See e.g. ECtHR, *Halimi v. Austria and Italy,* no. 53852/11, dec. (2013), §75, where the court found that there was no arguable claim for the purposes of Article 13 of the ECHR as regards the Dublin transfer to Italy. See also Dembour (2015), 424. For more see Chapter 4, Title II, point 5, and Title III, point 2.1.

One more—quite exceptional—ECtHR case has to be mentioned as regards the requirement of a suspensive effect of a remedy in Dublin proceedings. In the case of *Mohammed v. Austria,*[2358] the asylum seeker from Sudan applied for international protection in Austria, but his application was rejected and his transfer to Hungary under the Dublin II Regulation was ordered but not executed. Taking into account the worsening situation of asylum seekers in Hungary, he again applied for asylum in Austria. This application was not suspensive in relation to the valid transfer order. In those circumstances, the Strasbourg Court found a violation of Article 13 in conjunction with Article 3 of the ECHR. It emphasized that

> (i)n the specific circumstances of the present case, especially having regard to the period of time elapsed between the transfer order and its enforcement and the change of circumstances manifesting itself during that time, the law as it has been applied to the applicant, which *did not afford protection from forced transfer* and thus deprived him of a meaningful substantive examination of both the changed situation and his arguable claim under Article 3 concerning the situation of asylum-seekers in Hungary, denied the applicant access to an effective remedy against the enforcement of the order for his forced transfer.[2359]

The judgment proves that, pursuant to Article 13 of the ECHR, an automatic suspensive effect of a remedy may be required not only in appeal proceedings regarding a first asylum application,[2360] but also in subsequent first-instance asylum proceedings regarding, *de facto,* the legitimacy of this transfer.[2361]

The CJ was confronted with questions connected to the suspensive effect of a remedy in Dublin proceedings in the first asylum case it adjudicated on. In the *Petrosian and Others* ruling, the Luxembourg Court emphasized that when a remedy in Dublin proceedings did not entail a suspensive effect, the period of six months during which a Member State was permitted to carry out a Dublin transfer started to run from the first-instance decision, even if the asylum seeker appealed against it.[2362] However, if a remedy was granted a suspensive effect by a court or tribunal under a national law, it was suspensive both for the asylum seeker (a transfer could not be carried out for the duration of appeal proceedings) and for the Member State (the six-month period would

2358 ECtHR, *Mohammed v. Austria,* no. 2283/12 (2013).

2359 Ibid., §81 (emphasis added).

2360 For more see this Chapter, Title IV, point 2.3(a).

2361 See also this Chapter, Title IV, point 2.3(b).

2362 CJ, case C-19/08 *Petrosian and Others* (2009), paras 38-40.

start to run after the decision regarding the appeal was issued).[2363] Thus, the CJ–albeit indirectly–allowed for national legislation that does not provide for a suspensive effect of a remedy against a transfer decision.[2364] It did not consider whether such legislation was contrary to the principle of effective judicial protection.[2365] In the subsequent rulings concerning the interpretation of the Dublin II Regulation, the Luxembourg Court still did not comment on the compatibility of Article 19(2) of that act with the right to an effective remedy.[2366]

In 2013 the Dublin III Regulation entered into force. The presumption of safety in the Member States endured,[2367] but the right to an effective remedy against a transfer decision was finally guaranteed.[2368] A transfer should be automatically suspended for the duration of appeal proceedings or, at least, until a court or tribunal decides whether or not grant a suspensive effect to an appeal or review (*proprio motu* or upon a request).[2369] Member States were given meaningful discretion in this regard. Velluti predicted that it might weaken the procedural guarantees in practice and impede the real harmonization of the Dublin system.[2370]

Relying on the Dublin III Regulation, the CJ confirmed in multiple rulings that asylum seekers should have access to effective remedy against a transfer decision.[2371] In the case of *Ghezelbash*, the Luxembourg Court explained that

2363 Ibid., paras 42-46. This finding was confirmed as regards the Dublin III Regulation in CJ (GC), case C-490/16 *A.S.* (2017), paras 57-60.

2364 Cf. Moreno-Lax (2012), 5-6 fn 33, claiming that the *Petrosian* ruling can be understood 'as favouring the introduction of suspensive effect in Dublin appeals.'

2365 It was not the essence of the preliminary question. Moreover, the case concerned a national system where a remedy did have a suspensive effect in Dublin proceedings.

2366 In particular, in the case of *N.S. and M.E.*, the CJ did not analyse the requirements arising from the right to an effective remedy in the context of Dublin proceedings. This could result from the fact that the preliminary question asked in this case that invoked Article 47 of the EU Charter lost salience after the ECtHR's judgment in the *M.S.S. v. Belgium and Greece* case [Costello (2012) 'Courting Access…', 327; Velluti (2015), 152]. Interestingly, answering this question, the Luxembourg Court referred to the *M.S.S.* judgment, but it omitted that the Strasbourg Court had held Belgium responsible for a violation of Article 13 in conjunction with Article 3 of the ECHR by not guaranteeing an effective remedy in the Dublin proceedings, *inter alia* due to the lack of a suspensive effect of an appeal [CJ (GC), joined cases C-411/10 and C-493/10 *N.S. and M.E.* (2011), para 112].

2367 Recital 3 in the preamble to the Dublin III Regulation.

2368 Under Recital 19 in the preamble and Article 27(1) of the Dublin III Regulation.

2369 Under Article 27(3) of the Dublin III Regulation.

2370 Velluti (2015), 146.

2371 See e.g. CJ (GC), case C-155/15 *Karim* (2016), para 22; CJ (GC), case C-490/16 *A.S.* (2017), paras 25-26; CJ (GC), case C-670/16 *Mengesteab* (2017), paras 45-46; CJ (GC), case C-201/16 *Shiri* (2017), para 46; CJ (GC), joined cases C-582/17 and C-583/17 *H. and R.* (2019), paras 38-40.

the Dublin III Regulation had strengthened the judicial protection of asylum seekers in comparison to the previous rules, including as regards the suspensive effect of an appeal or review.[2372] The court noticed as well that an asylum seeker's availing of a remedy may postpone (even excessively) the conclusion of the process for determining the Member State responsible under the Dublin III Regulation and the implementation of a transfer. It pointed out though, that pursuant to Article 27(3)(c), a Member State can decide that the lodging of a remedy against a transfer decision does not, in itself, have a suspensive effect, but a person concerned can request the suspension of a Dublin transfer for the duration of appeal proceedings. A request should have suspensive effect until it is decided by a competent authority. Thus, when a suspension is not requested or one is denied, a transfer can be carried out.[2373] *Ipso facto,* the court identified the weakest point of the right to an effective remedy as it is guaranteed under the Dublin III Regulation. In those circumstances, a removal can be executed despite the ongoing appeal proceedings concerning a transfer decision, even when an asylum seeker alleges that a transfer would expose him to a risk of torture or ill-treatment.[2374] Despite this, the Luxembourg Court seems to encourage the Member States to apply Article 27(3)(c) of the Dublin III Regulation in their systems for the sake of the effectiveness of this act.

A system whereby a request for interim protection is in itself suspensive, as is provided for in Article 27(3)(c) of the Dublin III Regulation, can be regarded as compatible with the requirements of an effective remedy arising from Article 13 in conjunction with Article 3 of the ECHR,[2375] when additional procedural guarantees are in place. A request for a suspension has to be accessible and decided on promptly and with rigorous scrutiny. In fact, most of those guarantees, listed in detail by Reneman[2376], are directly secured under the

2372 CJ (GC), case C-63/15 *Ghezelbash* (2016), paras 50-52.

2373 Ibid., paras 56-59.

2374 In those circumstances, a court deciding on a request for an interim protection should grant it [see also Hruschka and Maiani (2016), 1569], but wrongful denials cannot be excluded in practice. Moreover, an asylum seeker might not ask for a stay of a transfer because he does not know that requesting is required or possible. Interim protection in Dublin proceedings is denied in practice. See e.g. CJ, case C-360/16 *Hasan* (2018), para 19, where the German court rejected the asylum seeker's application for a stay of the transfer to Italy for the duration of appeal Dublin proceedings.

2375 See also Maiani (2016) 'The Dublin III Regulation…', 126-127. He also pointed out that Article 13 of the ECHR is applicable only when there is an arguable claim under the ECHR, while Article 27 of the Dublin III Regulation secures the effective remedy irrespective of the grounds of an appeal.

2376 See Reneman (2014) 'The Right to Remain …', 55-56; Reneman (2014) *EU Asylum Procedures (…),* 143. See also this Chapter, Title IV, point 1.

Dublin III Regulation.[2377] However, it should not be overlooked that in the case of *Čonka v. Belgium*, the ECtHR highlighted that in a situation where a national authority wrongly denied a request for a suspension of a removal–i.e. subsequently it was established that the removal violated Article 3 of the ECHR–the remedy could not be considered effective for the purposes of Article 13.[2378] Thus, close, independent and rigorous scrutiny is indispensable when considering a request for the stay of a Dublin transfer for the duration of appeal proceedings.

Despite the persistence of some doubts as regards the interpretation of Article 27(3) of the Dublin III Regulation, it is pointed out that 'it is unlikely that the Regulation could be challenged as incompatible with fundamental rights of an effective remedy and of access to a court'.[2379] The Luxembourg Court seems to share this point of view, albeit not expressly. In most of its recent rulings regarding the Dublin III Regulation, including the case of *Ghezelbash*, the court relied on only Article 27 of this act and referred to neither Article 47 of the EU Charter nor Article 13 of the ECHR.[2380]

While the *Ghezelbash* ruling provides insight into the CJ's interpretation as regards the suspensive effect of an appeal in Dublin proceedings, the case of *C.K. and Others* responds to doubts concerning the suspension of the execution of a transfer after the conclusion of those proceedings. The latter case concerned the Dublin transfer of a seriously ill asylum seeker. The Luxembourg Court found that a court considering an appeal against a transfer decision should first determine whether the state of health of the asylum seeker was of such seriousness that there were substantial grounds for believing that his transfer would result in a real risk of inhuman or degrading treatment. In case of an affirmative answer, the domestic court was obliged to take additional precautions, e.g. provide the asylum seeker with sufficient medical assistance during the transfer and guarantee that the asylum seeker receives

2377 See Article 27(3)(c), (5-6) of the Dublin III Regulation.

2378 ECtHR, *Čonka v. Belgium*, no. 51564/99 (2002), §82. See also Spijkerboer (2009), 72.

2379 Leczykiewicz (2017), 66. See also Hruschka and Maiani (2016), 1567, claiming that Article 27 (1) and (2) contains 'the standards set up by the jurisprudence of the ECtHR' and referring to the cases of *Čonka v. Belgium*, no. 51564/99 (2002), *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05 (2007), *I.M. v. France*, no. 9152/09 (2012) and *Jabari v. Turkey*, no. 40035/98 (2000).

2380 As explained before (see this Chapter, Title III, point 2), the court only incidentally referred to Article 47 of the EU Charter in some cases. Den Heijer (2017), 866, noted–as regards the cases of *Karim* and *Ghezelbash*–that 'it is rather remarkable that the Court avoids any analysis of the relevance and meaning of Article 47' and attached the court's silence in this regard to the reluctance to jeopardize the reasoning in the case of *Abdullahi*.

care upon his arrival in the Member State responsible.[2381] When those precautions turned out to be insufficient 'to ensure that his transfer will not result in a real risk of a significant and permanent worsening of his state of health', the transfer of a seriously ill asylum seeker should be suspended 'for such time as his state of health renders him unfit for such a transfer'.[2382] Thus, in the *C.K. and Others* ruling, the CJ laid a burden on national authorities to take all the measures, including the suspension of an execution of a transfer, that are necessary in order to preclude a situation in which a removal results in treatment contrary to Article 4 of the EU Charter.

The CJ has not addressed the question of whether a suspensive effect is required in subsequent asylum proceedings initiated after issuing a final transfer decision. However, it cannot be overlooked that the 2013 Procedures Directive directly allows for exceptions to the right to remain in the territory where a person has lodged a subsequent asylum application, unless the principle of non-refoulement is violated.[2383] Moreover, in the case of *Tall*,[2384] which is closely examined in the next section, the Luxembourg Court found that the lack of suspensive effect of a remedy available in subsequent asylum proceedings was not contrary to Article 47 of the EU Charter. Taking that into account, it seems improbable that the CJ will follow the high standard established by the ECtHR in the case of *Mohammed v. Austria*.

2.3 Asylum Proceedings

While the 2013 Procedures Directive clearly establishes rules in regard to the suspensive effect of an appeal in asylum proceedings, including subsequent ones,[2385] its predecessor did not provide states with much guidance. The matter of a suspensive effect of a remedy in asylum proceedings was left to the discretion of the states. Only the vague stipulation was made that a Member State should act 'in accordance with its international obligations'.[2386] In practice, under the 2005 Procedures Directive, some of the Member States did not provide for an automatic suspensive effect of a remedy in asylum proceedings.[2387]

The question arises of whether a suspensive effect is demanded in all asylum appeal proceedings. When a decision on asylum is aggregated with a decision ordering a removal in one administrative act, it is clear under the

2381 CJ, case C-578/16 PPU *C.K. and Others* (2017), paras 81-83, 90.

2382 Ibid., paras 85, 90.

2383 Article 41(1) of the 2013 Procedures Directive.

2384 CJ, case C-239/14 *Tall* (2015). For more see this Chapter, Title IV, point 2.3(b).

2385 Article 46(5-8) of the 2013 Procedures Directive.

2386 Article 39(3) of the 2005 Procedures Directive.

2387 See European Commission (2010), 14-15; UNHCR (2010), 88.

ECtHR's and CJ's jurisprudence that a remedy with a suspensive effect is required, as in the case of any other decision on expulsion or extradition.[2388] However, when return and asylum procedures are not linked, it may be contested whether a remedy in such asylum proceedings needs to have a suspensive effect, in particular when no removal is in sight: no return decision was issued and the authorities have not taken any steps–legal or factual–to enforce an expulsion or extradition. Moreover, the requirement of a suspensive effect of an appeal is questioned in the context of subsequent asylum proceedings. States tend to restrict the procedural safeguards in those proceedings, in particular by excluding an automatic suspensive effect of a remedy.[2389]

Thus, in this section, two questions are answered: (a) whether the requirement of a suspensive effect is applicable to remedies in asylum proceedings alone, in particular when there is no removal in sight, and (b) whether states are allowed to exclude a suspensive effect of a remedy in regard to subsequent asylum proceedings.

a. Asylum Proceedings and Risk of Removal

An automatic suspensive effect may be indispensable for a remedy in asylum proceedings, as was blatantly shown in the case of *I.M. v. France*.[2390] The Sudanese national was served with the order for his removal and subsequently applied for asylum. His application was refused. He appealed, but that remedy did not confer a suspensive effect, because the asylum application was considered under the fast-track procedure. Only because the Strasbourg Court applied Rule 39 was the foreigner not deported.[2391] On appeal, the applicant was granted refugee status. The ECtHR found a violation of Article 13 of the ECHR and emphasized that under national law nothing could have prevented the asylum seeker's expulsion after the rejection of his asylum application at first instance, even though, as confirmed by the second-instance decision, his removal would be in violation of Article 3 of the ECHR.[2392] Only the Strasbourg Court's intervention saved the asylum seeker from harm.[2393]

2388 For more see this Chapter, Title IV, point 2.1.

2389 For the practice of the Member States of the EU in this regard, see e.g. European Commission (2010), 14; ICommJ and ECRE (2018), 7-8.

2390 ECtHR, *I.M. v. France*, no. 9152/09 (2012). Cf. ECtHR, *M.E. v. France*, no. 50094/10 (2013), §69, where the court did not find a violation of Article 13 in conjunction with Article 3 of the ECHR, because the foreigner, after the removal order had been issued, had had access to the remedy with a suspensive effect in the return proceedings and could apply for asylum that also entailed a suspensive effect on his removal.

2391 For more on interim measures, see Chapter 3, Title III, point 1.1.

2392 ECtHR, *I.M. v. France*, no. 9152/09 (2012), §§156-158.

2393 See also ECtHR, *M.A. v. Cyprus*, no. 41872/10 (2013), §139.

In the *Labsi* case, the Strasbourg Court decided that the asylum seeker's right to an effective remedy was violated exclusively as regards the remedies in asylum proceedings. It held that Article 13 of the ECHR was violated, because the complaint to the Constitutional Court had no automatic suspensive effect and the applicant was deprived of the practical possibility of using the constitutional remedy prior to his expulsion, as he had been removed in haste.[2394]

In some other cases, the finding that a remedy in asylum proceedings lacked a suspensive effect contributed to the court's final conclusion that Article 13 of the ECHR had been violated.[2395] In the case of *Allanazarova v. Russia,* the ECtHR analysed not only the remedy available to the foreigner in the extradition procedure (it was suspensive, but lacked the required scrutiny under Article 3 of the ECHR[2396]), but also the remedies in the proceedings regarding refugee status (none of the criteria of an effective remedy were satisfied) and the temporary asylum procedure (it lacked a suspensive effect).[2397] The Strasbourg Court concluded that the procedure for judicial review of the extradition decision, alone or in combination with the refugee status or temporary asylum proceedings, did not constitute an 'effective remedy' within the meaning of Article 13 of the ECHR in respect of the applicant's allegation that she was at risk of being subjected to treatment contrary to Article 3 of the ECHR in the event of her extradition to Turkmenistan.[2398] In the case of *Diallo,* the court examined the remedies available to the asylum seekers in both the asylum and expulsion proceedings and reached the conclusion that Article 13, taken in conjunction with Article 3 of the ECHR, was violated, because 'none of the domestic authorities examined the merits of the applicants' arguable claim under Article 3 of the Convention and there were no remedies with automatic suspensive effect available to the applicants regarding the authorities' decision not to grant them asylum and to expel them'.[2399]

Contrariwise, the fact that a remedy in asylum proceedings entails a suspensive effect may be considered decisive by the court as well. In the case of *Abdi Ahmed and Others v. Malta,* the ECtHR held that the asylum seekers'

2394 ECtHR, *Labsi v. Slovakia,* no. 33809/08 (2012), §§138-140. For more, see these Chapter and Title, point 2.3(b). See also ECtHR, *Mohammed v. Austria,* no. 2283/12 (2013), §85.

2395 See e.g. ECtHR, *Diallo v. the Czech Republic,* no. 20493/0 (2011), §85; ECtHR, *I.M. v. France,* no. 9152/09 (2012), §156; ECtHR (GC), *M.S.S. v. Belgium and Greece,* no. 30696/09 (2011), §317; ECtHR, *S.K. v. Russia,* no. 52722/15 (2017), §§81, 93, 99.

2396 For more see this Chapter, Title III.

2397 ECtHR, *Allanazarova v. Russia,* no. 46721/15 (2017), §§100-114.

2398 Ibid., §115.

2399 ECtHR, *Diallo v. the Czech Republic,* no. 20493/0 (2011), §85, see also in regard to asylum proceedings, §§77-80. See also ECtHR, *M.E. v. France,* no. 50094/10 (2013), §69; ECtHR, *D. and Others v. Romania,* no. 75953/16 (2020), §§129-130.

complaints under Article 3 of the ECHR were inadmissible because there were no final decisions on removal issued and the asylum proceedings were still ongoing. The court considered it important to emphasize that the remedies in those proceedings had had a suspensive effect.[2400] Similarly, in the admissibility decision issued in the case of *N. and Others v. the United Kingdom*, the court highlighted that in the first set of asylum proceedings the applicant 'enjoyed various remedies, all of which had suspensive effect'.[2401]

In all of the above-mentioned cases the court examined whether the remedies available in asylum proceedings had a suspensive effect and put considerable weight on those findings. This may suggest that the requirement of a suspensive effect applies to remedies in asylum proceedings. However, none of those cases considered a situation in which no return order had been issued. As the Strasbourg Court allows the aggregate of remedies provided for under a domestic law to satisfy the requirements of Article 13 of the ECHR,[2402] in those cases diverse domestic proceedings available to the applicants at the respective time, including procedures regarding removals, refugee status determination and the granting of other forms of protection, must have been taken into account. Thus, the above-mentioned cases cannot be considered decisive in answering the question of whether the requirement of a suspensive effect is applicable to remedies in asylum proceedings alone.[2403]

However, the court's case-law concerning the reasons to strike out applications out of its list of cases pursuant to Article 37(1)(b) or (c) of the ECHR may provide—by analogy—some guidance in this regard. Under those provisions, the court 'has found on many occasions that a matter had been resolved or that it was no longer justified to continue the examination of an application when it appeared that an applicant would not be expelled'.[2404] In the court's opinion, the threat of a violation of Article 3 of the ECHR is removed when an

2400 ECtHR, *Abdi Ahmed and Others v. Malta*, no. 43985/13, dec. (2014), §§80–82.

2401 ECtHR, *N. and Others v. the United Kingdom*, no. 16458/12, dec. (2014), §137.

2402 See e.g. ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §§145, 155; ECtHR, *Jabari v. Turkey*, no. 40035/98 (2000), §48; ECtHR, *Čonka v. Belgium*, no. 51564/99 (2002), §75; ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §289; ECtHR, *S.K. v. Russia*, no. 52722/15 (2017), §73. See also ECtHR (Plenary), *Klass and Others v. Germany*, no. 5029/71 (1978), §72.

2403 Moreover, it is conceivable that under the concept of 'aggregate of remedies' the court may find that no violation of Article 13 of the ECHR has occurred when an appeal against an asylum decision was not suspensive, but a remedy against an expulsion, extradition or transfer decision (that followed asylum proceedings) met all the requirements arising from the right to an effective remedy.

2404 ECtHR, *J.W. v. the Netherlands*, no. 16177/14, dec. (2017), §31. See also ECtHR, *M.S. v. Hungary*, no. 64194/16, dec. (2017), §§22–26. Cf. ECtHR, *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05 (2007), §55.

applicant no longer faces a real and imminent risk of being expelled.[2405] In those circumstances the application should be struck out of the list of cases. Thus, when an asylum seeker is served with a decision rejecting his application for international protection but no return order is issued, it can be assumed that there is no real and imminent risk of a removal, so Article 3 of the ECHR is not violated. Thus, a claim under Article 3 of the ECHR cannot be considered arguable and the protection pursuant to Article 13 of the Convention is not activated.[2406]

It is then plausible to conclude that under the case-law of the Strasbourg Court remedies in asylum proceedings do not have to entail a suspensive effect pursuant to Article 13 of the ECHR when no expulsion or extradition decision was issued and authorities are not taking any steps to enforce a removal in practice.[2407] However, when a return has been ordered or is being organized without a formal decision, the ECtHR requires that a returnee has access to a remedy with an automatic suspensive effect if he alleges that his removal would expose him to a real risk of suffering treatment contrary to Article 3 of the ECHR. This requirement can and in some circumstances must be satisfied through the provision of a remedy with a suspensive effect in asylum proceedings. Thus, under the ECtHR's case-law the requirement of the suspensive effect of a remedy cannot be considered irrelevant in regard to an asylum procedure. Nevertheless, it is not applicable when there is no real and imminent risk of a removal.

The CJ seems to agree in general with this reasoning. In the case of *Gnandi*, concerning the 2005 Procedures Directive, the Luxembourg Court stated that

> the lack of suspensory effect of an appeal brought solely against a decision rejecting an application for international protection is, in principle,

2405 ECtHR, *J.W. v. the Netherlands*, no. 16177/14, dec. (2017), §32

2406 For this effect, see ECtHR, *J.W. v. the Netherlands*, no. 16177/14, dec. (2017), §32, where the court stated: 'In the present case, although the applicant has also raised complaints under Article 13 and on the procedural requirements of Article 3, in essence those complaints are inextricably connected to his proposed expulsion (...). Now that the Netherlands authorities do not intend to proceed with the applicant's actual removal to either Canada or Somalia, the alleged threat of a violation has, as a consequence, been removed and thus there is no risk of the alleged risk of treatment contrary to Article 3 of the Convention materialising'. The application was struck out of the list of cases. See also ECtHR, *Müslim v. Turkey*, no. 53566/99 (2005), §§80-81, where no deportation order was issued at the time of proceedings before the court; ECtHR, *Joesoebov v. the Netherlands*, no. 44719/06, dec. (2010), §§60, 64, where the return order was issued but it could not be enforced in practice; ECtHR, *Shakor and Others v. Finland*, no. 10941/10 etc., dec. (2011), in regard to the Dublin transfers to Greece that no longer could be executed; ECtHR, *P.Z. and Others v. Sweden*, no. 68194/10, dec. (2012), §§15-17, where the validity of the return order had expired during the proceedings before the ECtHR.

2407 See also Reneman (2014) *EU Asylum Procedures (...)*, 388.

> compatible with the principle of non-refoulement and Article 47 of the Charter, since the enforcement of such a decision cannot, as such, lead to removal of the third-country national concerned (...).[2408]

Thus, in principle, if a decision only refuses the granting of international protection to an asylum seeker, but does not contain a return order, a remedy against this decision does not have to entail a suspensive effect.

Moreover, the court concluded in the *Gnandi* case, contrary to the AG Mengozzi's opinion,[2409] that it is acceptable under the EU law for a return decision to be issued after the rejection of an asylum application at first instance and before the conclusion of asylum appeal proceedings.[2410] This finding is in line with the court's previous case-law. In the case of *J.N.*, the court criticized the domestic policy that all adopted return decisions lapsed with the introduction of an asylum application, as contradicting the principle that the Return Directive should be effective.[2411] The court emphasized that return proceedings must be suspended for the duration of the asylum proceedings and resumed 'at the stage at which it was interrupted, as soon as the application for international protection which interrupted it has been rejected *at first instance*'.[2412]

Even though a return decision can be issued before the conclusion of an asylum procedure on appeal, it cannot be enforced until then. The CJ made an important stipulation in the *Gnandi* case that the Member States are obliged to ensure that 'all the legal effects of the return decision are suspended pending the outcome of the appeal' in asylum proceedings.[2413] Both during the period prescribed for bringing that appeal and, if such an appeal is brought, until resolution of the appeal, the states should refrain from enforcing a return

2408 CJ (GC), case C-181/16 *Gnandi* (2018), para 55.

2409 Opinion of AG Mengozzi delivered on 15 June 2017 in case C-181/16 *Gnandi*, EU:C:2017:467.

2410 CJ (GC), case C-181/16 *Gnandi* (2018), para 59. Thus, it is also acceptable to aggregate in a single administrative act a decision rejecting an application for international protection and a return decision.

2411 CJ (GC), case C-601/15 PPU *J.N.* (2016), paras 75-76. See also CJ, case C-534/11 *Arslan* (2013), para 60, where the CJ emphasized that although the Return Directive 'is not applicable during the procedure in which an application for asylum is examined, that does not mean that the return procedure is thereby definitively terminated, as it may continue if the application for asylum is rejected'.

2412 CJ (GC), case C-601/15 PPU *J.N.* (2016), para 75 (emphasis added).

2413 CJ (GC), case C-181/16 *Gnandi* (2018), para 62. See also CJ, case C-269/18 PPU *C and J and S*, order (2018), para 51; CJ, case C-175/17 *X* (2018), para 33; CJ, case C-180/17 *X and Y* (2018), para 29.

decision.[2414] Such a stance results from the obligation of the Member States to guarantee the full effectiveness of an appeal against decisions refusing international protection, in accordance with the principle of equality of arms.[2415]

Thus, in general an appeal in asylum proceedings does not have to entail a suspensive effect. However, when a return decision is issued it cannot be enforced for the duration of an appeal procedure regarding international protection. A remedy in asylum proceedings should then have a suspensive effect on a removal.[2416] The reasoning of the *Gnandi* ruling may seem precarious in some parts,[2417] but in fact the CJ managed to find there a middle-ground between effectiveness and fairness. Its interpretation enables the efficient issuance of return decisions as well as the aggregation of asylum and return decisions into a single administrative act. At the same time, it guarantees that a return decision cannot be enforced during appeal asylum proceedings, even though Article 39(3) of the 2005 Procedures Directive, applicable in this case, did not require an automatic suspensive effect of a remedy.

The *Gnandi* reasoning is deeply rooted in the EU Charter, notably Articles 18, 19(2) and 47. In particular, the court emphasized that the characteristics of remedies against asylum and return decisions 'must be determined in a manner that is consistent with Article 47 of the Charter'.[2418] It derived the requirement of the suspension of the enforcement of a return decision during the appeal asylum procedure from the principle of equality of arms,[2419] which is one of the elements comprising the principle of effective judicial protection.[2420] It did not rely on the ECHR or the ECtHR's case-law though.[2421] That is not surprising taking into account that a standard in this regard under the Strasbourg Court's jurisprudence is not easily comprehensible.

2414 CJ (GC), case C-181/16 *Gnandi* (2018), para 61. See also CJ, case C-269/18 PPU *C and J and S*, order (2018), para 50. Those rules are applicable as well when asylum and return decisions are combined in one administrative act [Progin-Theuerkauf (2019), 1].

2415 CJ (GC), case C-181/16 *Gnandi* (2018), para 61.

2416 See also Progin-Theuerkauf (2019), 1, 5.

2417 In particular, its conclusion that the right to remain during the asylum proceedings pursuant to the national law does not preclude the conclusion that this stay is illegal under the Return Directive.

2418 CJ (GC), case C-181/16 *Gnandi* (2018), para 52. See also CJ, case C-239/14 *Tall* (2015), para 51; CJ, case C-651/19 *JP* (2020), para 27.

2419 CJ (GC), case C-181/16 *Gnandi* (2018), para 61.

2420 See e.g. CJ, case C-348/16 *Sacko* (2017), para 32.

2421 AG Mengozzi claimed that the ECtHR's case-law regarding Article 13 in conjunction with Article 3 of the ECHR is not applicable in regard to remedies against decisions rejecting an application for international protection [opinion of AG Mengozzi delivered on 15 June 2017 in case C-181/16 *Gnandi,* EU:C:2017:467, paras 66–67].

The *Gnandi* ruling provided national authorities with the interpretation of the 2005 Procedures Directive. Article 46(5) of its successor requires, as a rule, that remedies in asylum proceedings must entail an automatic suspensive effect, irrespectively of whether a return decision have been already issued. Thus, the question of whether remedies in asylum proceedings are required to entail a suspensive effect is now–at least in the EU–obsolete. However, the 2013 Procedures Directive also introduces exceptions to the rule of a suspensive effect. Remedies against some types of asylum decisions, e.g. those rejecting applications for international protection as manifestly unfounded, can lack automatic suspensive effect in accordance with the EU law.

With regard to the exceptions to the rule of a suspensive effect provided for in the 2013 Procedures Directive, in the case of *C and J and S*, the CJ first confirmed the rules established in the *Gnandi* ruling, notably that a return decision can be issued directly after the rejection of an asylum application at first instance (also when it is considered manifestly unfounded) and that all the legal effects of the return decision has to be suspended pending the outcome of the appeal asylum proceedings.[2422] Secondly, the court recalled that pursuant to Article 46(6) of the 2013 Procedures Directive a remedy against a decision rejecting an asylum application as manifestly unfounded does not have to have an automatic suspensive effect. However, if it does not, an asylum seeker 'must be able to have recourse to the courts, which will decide whether he may remain on that territory until judgment has been given on his appeal', and the request for interim protection has to be–according to Article 46(8) of the Directive–suspensive.[2423] Thus, the court found–answering the crux of the preliminary question–that an asylum seeker cannot be detained pursuant to Article 15 of the Return Directive during the period prescribed for bringing an appeal in asylum proceedings and, if such an appeal was brought, until the consideration of a request for a stay for the duration of appeal proceedings.[2424] Despite the fact that the CJ did not state directly that in that period a return decision should not be executed, such conclusion can be convincingly drawn from the reasoning in the cases of *Gnandi* and *C and J and S*.

In the latter case, the Luxembourg Court did not conclude that the exceptions to the rule of the automatic suspensive effect of a remedy in asylum proceedings provided for in Article 46(6) of the 2013 Procedures Directive were in breach of the right to an effective remedy. It relied on the secondary EU law and left Article 47 of the EU Charter and Article 13 of the ECHR out of its

2422 CJ, case C-269/18 PPU *C and J and S,* order (2018), paras 47-52.

2423 Ibid., para 53.

2424 Ibid., para 54.

considerations. However, as already explained,[2425] legislation in which a remedy does not entail a suspensive effect by itself, but an appellant can apply for interim protection for the duration of appeal proceedings and such a request is in itself suspensive (as provided for in Article 46(6) and (8) of the 2013 Procedures Directive) may be considered by the ECtHR sufficient for the purposes of Article 13 of the ECHR.[2426]

b. Subsequent Asylum Proceedings

In regard to subsequent asylum applications, states tend to limit the procedural safeguards that are usually made available to asylum seekers in first-time asylum proceedings. Those restrictions are based on an assumption that subsequent applications are often repetitive or are lodged to abuse the asylum or return procedure since the case has already been considered in full in the first set of proceedings. The lack of suspensive effect of a remedy against a decision refusing a subsequent application is viewed as enabling the effective enforcement of a removal and, accordingly, not giving a rejected asylum seeker an incentive to apply again for asylum only in order to protect himself from being removed.

The ECtHR is aware of the realities of subsequent asylum proceedings. It 'acknowledges the need of EU Member States to ease the strain of the number of asylum applications received by them and in particular to find a way to deal with repetitive and clearly abusive or manifestly ill-founded applications for asylum'.[2427] It emphasized that 'accelerated asylum proceedings, as practiced *[sic]* in a number of European countries, make it easier for those countries to process asylum applications that are of a clearly unreasonable nature or manifestly ill-founded'.[2428] Moreover, in some cases the ECtHR allowed limitations to procedural guarantees in subsequent asylum proceedings, provided that the first asylum procedure included a substantive examination and the circumstances of the case did not change.[2429]

2425 See this Chapter, Title IV, point 1.

2426 Cf. Costello and Hancox (2016), 433, noting in regard to the exceptions to the requirement of a suspensive effect provided for in the 2013 Procedures Directive that it 'is difficult to see how in implementation it will not lead to breaches of Article 13 ECHR (...)'. See also Garlick (2015) 'Asylum Procedures', 281, claiming that the possibility to derogate from Article 46(8) of the 2013 Procedures Directive in regard to subsequent applications [see Article 41(2)(c) of the 2013 Procedures Directive] runs counter to the ECtHR's case-law concerning the right to an effective remedy.

2427 ECtHR, *Mohammed v. Austria*, no. 2283/12 (2013), §80.

2428 Ibid., §79.

2429 Ibid. See also ECtHR, *Sultani v. France*, no. 45223/05 (2007), §65; ECtHR, *I.M. v. France*, no. 9152/09 (2012), §142; ECtHR, *I.K. v. Austria*, no. 2964/12 (2013), §§72–75.

However, the Strasbourg Court does not presuppose that remedies in asylum subsequent proceedings do not need to have automatic suspensive effect. In fact, in some cases the court found a violation of Article 13 of the ECHR due to the lack of a suspensive effect exclusively as regards the remedies in asylum subsequent proceedings. Particularly noteworthy in this regard is the case of *Labsi v. Slovakia*.[2430] The foreigner applied for international protection in Slovakia three times. After the first refusal of asylum, an expulsion order was issued. As regards his third asylum application, the Migration Office decided not to grant him asylum and not to provide him with subsidiary protection. The asylum seeker appealed to the Regional and, subsequently, the Supreme Court. He could not challenge the ruling of the latter court before the Constitutional Court, because he had been deported in haste. The Strasbourg Court held that Article 13 of the ECHR was violated, because the complaint to the Constitutional Court had no automatic suspensive effect and the applicant was deprived of the practical possibility of using the constitutional remedy prior to his expulsion.

In the case of *Mohammed v. Austria* as well, the ECtHR found a violation of Article 13 of the ECHR only as regards the subsequent asylum proceedings.[2431] The applicant's first asylum application was not considered on the merits, as his transfer to Hungary was decided as justified under the Dublin II Regulation.[2432] One year later, the asylum seeker applied again for asylum in Austria. The Strasbourg Court reproached the national authorities for not ensuring that the second asylum application entailed a suspensive effect in relation to the valid transfer order even though the applicant had an arguable claim under Article 3 of the ECHR in respect of his forced transfer to Hungary due to a change in circumstances.[2433] In this case, the court emphasized that the asylum seeker's 'second application cannot prima facie be considered abusively repetitive or entirely manifestly ill-founded'.[2434] When an asylum seeker 'makes an arguable claim under Article 3 of the Convention, he or she should have access to a remedy with automatic suspensive effect, meaning a stay on a potential deportation',[2435] irrespectively of whether the claim is made in a first or subsequent set of asylum proceedings.

2430 ECtHR, *Labsi v. Slovakia*, no. 33809/08 (2012), §§138-140.

2431 ECtHR, *Mohammed v. Austria*, no. 2283/12 (2013), §§76-81, 85.

2432 See also this Chapter, Title IV, point 2.2.

2433 ECtHR, *Mohammed v. Austria*, no. 2283/12 (2013), §85.

2434 Ibid., §80.

2435 Ibid.

Thus, pursuant to Article 13 of the ECHR, national authorities are expected to provide an asylum seeker with access to a remedy with a suspensive effect in subsequent asylum proceedings when he shows that he has an arguable claim under Article 3 of the ECHR. The claim may be considered arguable *inter alia* due to a change in the situation in the receiving country, as in the circumstances of the case of *Mohammed v. Austria,* or as a result of the acquisition of substantial evidence not considered in the first set of asylum proceedings.[2436] Conversely, when a subsequent application is not based on an arguable claim, i.e. it is 'abusively repetitive or entirely manifestly ill-founded',[2437] the ECtHR may accept a remedy that does not entail a suspensive effect as sufficient for the purposes of Article 13 of the ECHR.[2438]

The Luxembourg Court had an opportunity to answer the question of whether remedies in subsequent asylum proceedings require a suspensive effect in the case of *Tall*. The Belgium law denied a suspensive effect to remedies against decisions to not further examine subsequent applications. Pursuant to Article 39 of the 2005 Procedures Directive, applicable in this case, asylum seekers had a right to an effective remedy against those decisions, but a suspensive effect was not required in subsequent asylum proceedings.[2439] The referring court asked whether the national legislation that did not confer a suspensive effect upon an appeal against those decisions had to be precluded in the light of Article 47 of the EU Charter.[2440]

Relating to the same case-law of the ECtHR as in the case of *Abdida,* the Luxembourg Court reached different conclusions,[2441] i.e. that the lack of suspensive effect of a remedy is not contrary to Article 47 of the EU Charter. The court's ruling was based on the assertion that the enforcement of a decision not to further examine a subsequent asylum application could not by itself expose a foreigner to a risk of ill-treatment prohibited under Article 3 of the ECHR.[2442] In contrast, the CJ emphasized again that an asylum seeker must be able to exercise his right to an effective remedy with a suspensive effect against a return decision.[2443]

2436 See e.g. ECtHR, *M.D. and M.A. v. Belgium,* no. 58689/12 (2016), §64.

2437 ECtHR, *Mohammed v. Austria,* no. 2283/12 (2013), §80.

2438 See also Reneman (2014) *EU Asylum Procedures (...),* 120. Reneman seemed to find it possible, but noted that 'this is a very high standard which will not be easily met'.

2439 CJ, case C-239/14 *Tall* (2015), para 49. See Article 39(1)(c) and (3) of the 2005 Procedures Directive.

2440 CJ, case C-239/14 *Tall* (2015), para 39.

2441 CJ (GC), case C-562/13 *Abdida* (2014), para 52. For more see these Chapter and Title, point 2.1.

2442 CJ, case C-239/14 *Tall* (2015), para 59, also paras 56, 60.

2443 Ibid., paras 57-58.

The Luxembourg Court thus considers the lack of suspensive effect of a remedy in subsequent asylum proceedings acceptable under the requirements arising from the right to an effective remedy enshrined in the EU Charter and the ECHR. The CJ rightly reckoned that a suspensive effect of a remedy is required by the ECtHR only in regard to decisions that are 'likely to expose the third-country national concerned to a risk of ill-treatment contrary to Article 3 ECHR'.[2444] However, it wrongly assumed that decisions in subsequent asylum proceedings never carry such risk. The Strasbourg Court did not exclude *in abstracto* the requirement of a suspensive effect of a remedy in regard to subsequent asylum proceedings. On the contrary, in some cases, as shown above, it found a violation of the right to an effective remedy exclusively in relation to a subsequent asylum procedure. Those cases, however, were overlooked by the CJ.[2445]

3. Suspensive Effect and Further Appeals

On the one hand, the EU law does not require that an asylum seeker must have access to two or more levels of a judicial decision after his application for asylum has been rejected.[2446] The same applies to a return decision.[2447] As emphasized already in the *Samba Diouf* ruling, 'the principle of effective judicial protection affords an individual a right of access to a court or tribunal but not to a number of levels of jurisdiction'.[2448] In the case of *Gnandi*, the CJ confirmed that under the EU Charter an asylum seeker must be afforded the right to an effective remedy enabling an automatic suspensive effect before at least one judicial body.[2449]

On the other hand, the current EU law does not prevent a Member State from introducing more than one level of jurisdiction for appeals against decisions refusing an application for international protection or against return decisions.[2450] However, the EU asylum law does not contain any rule requiring

2444 Ibid., paras 56, 59.

2445 The CJ referred to two ECtHR cases (para 54): ECtHR, *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05 (2007), and ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012). Neither of those cases considered subsequent asylum proceedings.

2446 As regards the 2005 Procedures Directive, see CJ, case C-69/10 *Samba Diouf* (2011), para 69; CJ (GC), case C-181/16 *Gnandi* (2018), para 57; CJ, case C-175/17 *X* (2018), paras 28-29, 34. As regards the 2013 Procedures Directive, see CJ, case C-180/17 *X and Y* (2018), paras 23-25, 30.

2447 CJ (GC), case C-181/16 *Gnandi* (2018), para 57; CJ, case C-175/17 *X* (2018), paras 28-29, 34; CJ, case C-180/17 *X and Y* (2018), paras 23-24, 30.

2448 CJ, case C-69/10 *Samba Diouf* (2011), para 69. See also CJ, case C-239/14 *Tall* (2015), para 57.

2449 CJ (GC), case C-181/16 *Gnandi* (2018), para 58.

2450 CJ, case C-175/17 *X* (2018), para 30; CJ, case C-180/17 *X and Y* (2018), para 26.

the introduction and organization of such additional levels of jurisdiction.[2451] Member States enjoy procedural autonomy in this regard, although they must observe the principles of equivalence and effectiveness.[2452]

In the cases of *X* and *X and Y*, the Luxembourg Court was challenged with the question of whether the EU law must be interpreted as precluding national legislation which, whilst making provision for appeals against a judgment delivered at first instance upholding a decision rejecting an application for international protection and imposing an obligation to return, does not confer an automatic suspensive effect on that remedy even where the person concerned invokes a serious risk of infringement of the principle of non-refoulement.[2453] The CJ concluded that the automatic suspensive effect is required only in regard to the first remedy available to an asylum seeker against a decision refusing him international protection and ordering his return. The lack of suspensive effect of any subsequent remedies does not violate the principle of effectiveness.[2454]

The Luxembourg Court relied, following the AG's opinion, on the ECtHR's judgment given in the case of *A.M. v. the Netherlands*.[2455] In this case the Strasbourg Court assessed the remedies available to asylum seekers in the Netherlands. They could appeal first to the Regional Court and subsequently to the Administrative Jurisdiction Division of the Council of State. Only the first appeal had an automatic suspensive effect. The Strasbourg Court held that 'Article 13 does not compel Contracting States to set up a second level of appeal' and concluded that there had been no violation of Article 13 in conjunction with Article 3 of the ECHR, because the applicant could appeal to the Regional Court and this remedy was compliant with all the requirements established pursuant to those provisions, *inter alia* having automatic suspensive effect.[2456]

The rule that for the purposes of Article 13 of the ECHR it is 'sufficient that there is at least one domestic remedy which fully satisfies the requirements of this Article, namely that it provides for independent and rigorous scrutiny

2451 CJ, case C-175/17 *X* (2018), para 30; CJ, case C-180/17 *X and Y* (2018), para 26.

2452 CJ, case C-175/17 *X* (2018), paras 38-39; CJ, case C-180/17 *X and Y* (2018), paras 34-35.

2453 CJ, case C-175/17 *X* (2018), para 25, regarding the 2005 Procedures Directive, and CJ, case C-180/17 *X and Y* (2018), para 20, concerning the 2013 Procedures Directive.

2454 CJ, case C-175/17 *X* (2018), para 47; CJ, case C-180/17 *X and Y* (2018), para 43. See also CJ, case C-422/18 PPU *FR*, order (2018), paras 46-47, where the court found that the principle of effectiveness was also not violated when national procedure provided for a possibility to request interim protection during further appeal asylum proceedings, but the decision on this request was made on the basis of the assessment of the well-foundedness of the grounds raised in a further appeal instead of the existence of a risk of serious and irreparable damage caused to the appellee after a removal.

2455 CJ, case C-175/17 *X* (2018), para 36; CJ, case C-180/17 *X and Y* (2018), para 32.

2456 ECtHR, *A.M. v. the Netherlands*, no. 29094/09 (2016), §§70-71.

for a complaint relating to Article 3 of the Convention and has automatic suspensive effect in respect of the impugned measure' was reiterated in several judgments[2457] and seems unquestionable. However, the finding of a non-violation of the right to an effective remedy, as in the case of *A.M. v. the Netherlands*, when a further appeal did not entail a suspensive effect, because the first remedy was suspensive, cannot be considered a well-established standard before the ECtHR.[2458] The court's jurisprudence in this regard is not uniform. Even in the cases where the court recalled the rule that one effective remedy is enough for the purposes of Article 13 of the ECHR, it afterwards analysed whether the remedies in question–both first and further appeals–had had automatic suspensive effect.[2459] In some exceptional cases, the Strasbourg Court even held–in opposition to the *A.M. v. the Netherlands* judgment–that Article 13 of the ECHR was violated, exclusively because a further appeal in asylum proceedings had no automatic suspensive effect.[2460]

To summarize, the two European asylum courts agree that Article 13 of the ECHR and Article 47 of the EU Charter do not compel states to set up multiple levels of appeal proceedings. One remedy compliant with the requirements arising from the above-mentioned provisions is considered sufficient. However, they differ in the assessment of a situation when a state in fact decides to provide for a further appeal(s). The CJ ruled that the automatic suspensive effect is then not required in relation to a further appeal. Meanwhile, the ECtHR seems to allow for the possibility that the right to an effective remedy can be violated due to the lack of suspensive effect of the further remedy.

V. Conclusions

In this chapter, the three requirements arising from the right to an effective remedy as they are determined by the Strasbourg Court in its abundant case-law, namely the criteria of a prompt response, independent and rigorous

2457 ECtHR, *S.K. v. Russia*, no. 52722/15 (2017), §76; ECtHR, *Allanazarova v. Russia*, no. 46721/15 (2017), §98; ECtHR, *A.S. v. France*, no. 46240/15 (2018), §54. See also ECtHR, *Tsvetkova and Others v. Russia*, no. 54381/08 etc. (2018), §195.

2458 For this conclusion, see also ECtHR, *H.R. v. France*, no. 64780/09 (2011), §§78–80.

2459 See e.g. ECtHR, *S.K. v. Russia*, no. 52722/15 (2017), §§80–81.

2460 See e.g. ECtHR, *Labsi v. Slovakia*, no. 33809/08 (2012), §§138–140, where the complaint to the Constitutional Court (third level of the appeal proceedings, after the appeals to the Regional and Supreme Courts) was considered ineffective due to the lack of an automatic suspensive effect. See also ECtHR, *Diallo v. the Czech Republic*, no. 20493/0 (2011), §§77, 83, 85, where the lack of suspensive effect of the constitutional appeal both in asylum and expulsion proceedings contributed to the court's finding that Article 13 of the ECHR was violated.

scrutiny and a suspensive effect, were examined and juxtaposed with the respective jurisprudence of the Luxembourg Court. The analysis was meant to enable ascertaining whether the right to an effective remedy in asylum-related proceedings is interpreted in a convergent manner by the two courts, providing a clear and indubitable standard that asylum seekers can rely on in domestic proceedings.

Both Article 13 of the ECHR and Article 47(1) of the EU Charter provide for a right to an effective remedy. While the latter provision is undoubtedly based on the former, it was not included in the list of rights which correspond to rights guaranteed by the ECHR within the meaning of Article 52(3) of the EU Charter.[2461] Despite this, the CJ reiterates that the interpretation of Article 47(1) of the EU Charter must ensure 'a level of protection which does not disregard that guaranteed by Article 13 of the ECHR, as interpreted by the European Court of Human Rights'.[2462] Accordingly, the asylum jurisprudence of the two courts concerning remedies is usually convergent.

The two European asylum courts agree that domestic authorities competent to decide on appeal in asylum-related proceedings should act reasonably promptly. The speed of an appeal procedure should not be achieved, in principle, by sacrificing the thoroughness of a review.[2463] Moreover, the courts convergently point out that in return and Dublin proceedings an appeal of an asylum seeker should entail an automatic suspensive effect to protect him from an irreversible harm and enable a proper examination of the risk of treatment contrary to Article 3 of the ECHR and Article 4 of the EU Charter in the receiving country.[2464] In regard to asylum proceedings, the ECtHR and CJ share the view that remedies against decisions refusing international protection do not have to have a suspensive effect when there is no risk that an asylum seeker is going to be removed. However, when his return has been ordered, he should not be removed until the conclusion of the asylum procedure, i.e. at least until his first appeal is thoroughly scrutinized by competent authorities.[2465]

It is a plausible conclusion that the *ex nunc* assessment of both facts and points of law is the standard that is required by both courts in asylum, Dublin

2461 'Explanations Relating to the Charter of Fundamental Rights' (2007), 29, 33-34. See also CJ (GC), case C-562/13 *Abdida* (2014), para 51. Cf. CJ, case C-348/16 *Sacko* (2017), para 39, where the court stated that Article 47 of the Charter must be interpreted in the light of the ECtHR's case-law, 'as the first and second paragraphs of that article correspond to Article 6(1) and Article 13 of the' ECHR.

2462 CJ, case C-175/17 *X* (2018), para 35; CJ, case C-180/17 *X and Y* (2018), para 31.

2463 See this Chapter, Title II.

2464 See this Chapter, Title IV, points 2.1 and 2.2.

2465 See this Chapter, Title IV, point 2.3(a).

and return appeal proceedings.[2466] Moreover, the Strasbourg and Luxembourg Courts seem to agree, in general, that a suspensive request for the stay of a removal until the outcome of appeal proceedings satisfies the requirement of an automatic suspensive effect.[2467] However, the standard concerning the scope and intensity of scrutiny in asylum-related appeal proceedings, as well as that in regard to how automatic the 'automatic suspensive effect' should be, is not clear and consistent within the courts' own jurisprudence.

The ECtHR's and CJ's case-law diverged in regard to three issues concerning remedies in asylum-related proceedings: the obligation to provide for judicial remedies and the requirement of an automatic suspensive effect in regard to subsequent asylum proceedings and to further appeals.

Firstly, pursuant to Article 47(1) of the EU Charter judicial remedies are required, but Article 13(1) of the Return Directive gave the Member States the discretion to provide for an appeal before a court or 'administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence'. The CJ pointed out that the characteristics of remedies in return proceedings 'must be determined in a manner that is consistent with Article 47 of the Charter', so the right to an effective remedy against a return decision must be secured before 'at least one judicial body'.[2468] Meanwhile, the Strasbourg Court clearly states that remedies of non-judicial nature are allowed under Article 13 of the ECHR.[2469] However, it must be noted that an appeal that is not considered by a court is not easily accepted as an effective remedy. The ECtHR set the threshold high: sufficient independence, powers and procedural safeguards must be in place to convince the court that a non-judicial remedy is sufficient for the purposes of Article 13 of the ECHR.[2470] In fact, taking into account the importance that is attached to Article 3 of the ECHR, it is hard to imagine that the Strasbourg Court would accept a national system where asylum seekers have access only to non-judicial remedies. Thus, the difference in the courts' case-law in this regard seems more theoretical than practical.

Secondly, in regard to subsequent asylum proceedings, the Strasbourg Court does not presuppose that remedies in procedures concerning subsequent applications do not need to have an automatic suspensive effect. Pursuant to

2466 See this Chapter, Title III, points 2 and 3.

2467 See this Chapter, Title IV, point 1. See also points 2.2 and 2.3(a).

2468 CJ (GC), case C-181/16 *Gnandi* (2018), paras 52, 58. For more see this Chapter, Title III, point 1.

2469 ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §152. For more see this Chapter, Title III, point 1.

2470 See this Chapter, Title III, point 1.

Article 13 of the ECHR, national authorities are expected to provide an asylum seeker with access to a remedy with suspensive effect in subsequent asylum proceedings when he shows that he has an arguable claim under Article 3 of the ECHR. Conversely, when a subsequent application is not based on an arguable claim, i.e. it is 'abusively repetitive or entirely manifestly ill-founded',[2471] the ECtHR may accept a remedy that does not entail a suspensive effect as sufficient for the purposes of Article 13 of the ECHR. In the case of *Tall,* the Luxembourg Court considered the lack of suspensive effect of a remedy in subsequent asylum proceedings acceptable under the requirements arising from the right to an effective remedy enshrined in the EU Charter and the ECHR.[2472] It did not condition the lack of a suspensive effect on the arguability of asylum seekers' claims. Such a definitive approach contradicts with the Strasbourg Court's standpoint.[2473]

Lastly, the two European asylum courts show divergent view in regard to the requirement of an automatic suspensive effect in relation to further appeals. When a state decides to provide for a further appeal(s) in asylum-related proceedings, the CJ is of the opinion that an automatic suspensive effect is not required; it has to be guaranteed only in regard to the first remedy. Meanwhile, the ECtHR seems to allow for the possibility that the right to an effective remedy can be violated due to the lack of suspensive effect of a further remedy.[2474]

Taking into account the above-mentioned convergences and divergences it can be concluded, on the one hand, that the procedural protection in asylum-related proceedings is broader under the CJ's jurisprudence in regard to the scrutiny required on appeal. The Luxembourg Court demands judicial remedies[2475] as well as it provides for a clearer and more consistent standard concerning the scope and intensity of scrutiny that is required in respective appeal procedures[2476]. On the other hand, the ECtHR's case-law seems to provide asylum seekers with stronger protection under the requirement of an automatic suspensive effect, in particular in relation to subsequent applications and further appeals.[2477]

2471 ECtHR, *Mohammed v. Austria,* no. 2283/12 (2013), §80.

2472 CJ, case C-239/14 *Tall* (2015), para 60.

2473 See this Chapter, Title IV, point 2.3(b).

2474 See this Chapter, Title IV, point 3.

2475 See this Chapter, Title III, point 1.

2476 See this Chapter, Title III, points 2 and 3. Cf. CJ, case C-652/16 *Ahmedbekova* (2018), paras 91-103.

2477 See this Chapter, Title IV, points 2.3(b) and 3.

Even though the courts' case-law is not convergent in its entirety, the standards arising from the right to an effective remedy under the ECHR, EU Charter and secondary asylum law can be put in accordance on a domestic level. The divergent approaches established by the courts are not of such a nature as to be mutually exclusive. The ECtHR allows for non-judicial remedies, but it does not dismiss judicial ones. Moreover, the fact that the CJ decided that an automatic suspensive effect is not required in regard to remedies in subsequent asylum proceedings or in relation to further appeals does not mean that the Member States are not allowed to provide for such effect in national legislation in accordance with the principle of procedural autonomy. The current secondary asylum law gives states discretion in regard to an automatic suspensive effect afforded to remedies in subsequent asylum proceedings[2478] and does not exclude providing for multiple levels of appeal that entail such effect. Thus, national legislation whereby an asylum seeker has access to a judicial remedy with automatic suspensive effect in asylum (first and subsequent), Dublin and return proceedings, irrespectively of the number of appeals, seems to be in accordance with the jurisprudence of both courts.

In asylum cases, Article 47 of the EU Charter was the provision most often referred to by national courts and the Luxembourg Court itself.[2479] Meanwhile, the ECtHR's case-law concerning Article 13 of the ECHR is largely absent from the CJ's respective jurisprudence.[2480] This particular silence of the Luxembourg Court may result from the fact that some standards established by the Strasbourg Court under Article 13 of the ECHR are obscure and not easily comprehensible.[2481] It may also be a consequence of the peculiar position of the right to an effective remedy under the EU Charter. Unlike Articles 4 and 6 of the EU Charter, which were scrutinized in previous chapters, Article 47(1) is not a right which corresponds to a right guaranteed by the ECHR;[2482] it is merely 'based' on Article 13 of the ECHR.[2483]

Despite being in general unwilling to mention the respective ECtHR's jurisprudence, the Luxembourg Court undoubtedly aimed at accomplishing convergence with the case-law of the Strasbourg Court when it considered

2478 Article 46(6) of the 2013 Procedures Directive.

2479 For more see Chapter 1, Title V, point 1.2. However, Article 47(1) of the EU Charter is often mentioned only incidentally.

2480 Cf. CJ (GC), case C-562/13 *Abdida* (2014), para 52; CJ, case C-239/14 *Tall* (2015), para 54; CJ, case C-175/17 *X* (2018), para 36; CJ, case C-180/17 *X and Y* (2018), para 32.

2481 See e.g. this Chapter, Title III, point 3; Title IV, point 1.

2482 See Article 52(3) of the EU Charter.

2483 CJ (GC), case C-562/13 *Abdida* (2014), para 51; CJ, case C-175/17 *X* (2018), para 35; CJ, case C-180/17 *X and Y* (2018), para 31. Cf. CJ, case C-348/16 *Sacko* (2017), para 39.

the right to an effective remedy in asylum-related proceedings. This trend is visible in multiple CJ rulings. In the case of *C.K. and Others*,[2484] the court decided to put its case-law regarding the scope of judicial review in Dublin proceedings in line with the jurisprudence of the Strasbourg Court, in particular with the case of *Tarakhel v. Switzerland*.[2485] The *Abdida* ruling of the Luxembourg Court also serves well to illustrate the tendency of the courts' case-law to converge.[2486] In this judgment the CJ took into account the right to an effective remedy arising from the EU Charter as well as the ECtHR's case-law concerning the requirement of a suspensive effect as regards the remedies against removal orders. It highlighted there that Article 47(1) of the EU Charter is based on Article 13 of the ECHR. In consequence, it overruled the literal and clear wording of the secondary EU law by guaranteeing the suspensive effect of a remedy in return proceedings. However, in the case of *Abdida*, the Luxembourg Court shied away from specifying that the suspensive effect has to be automatic. Only later on, in the case of *Gnandi*, did it finally expressly and fully accept the ECtHR's requirement of an automatic suspensive effect.[2487]

Those cases show that although it sometimes takes years and requires multiple judicial proceedings to reach a convergence between the courts' jurisprudence,[2488] that is achievable and sought-after in regard to the right to an effective remedy. It is particularly important for asylum seekers who nowadays really need clear, unambiguous and settled standards concerning remedies that they can rely on before national authorities. States feel more and more encouraged to diminish procedural safeguards guaranteed to asylum seekers, despite the character of asylum cases (in particular the risks involved in case of faulty decisions) warranting a high level of procedural protection.[2489] While the 1951 Refugee Convention does not expressly provide for the right to an effective remedy[2490], the standards established under Article 13 of the ECHR and Article 47 of the EU Charter must suffice for asylum seekers.

2484 CJ, case C-578/16 PPU *C.K. and Others* (2017).

2485 ECtHR (GC), *Tarakhel v. Switzerland*, no. 29217/12 (2014), §104. For more see this Chapter, Title III, point 2.

2486 CJ (GC), case C-562/13 *Abdida* (2014). For more see this Chapter, Title IV, point 2.1.

2487 CJ (GC), case C-181/16 *Gnandi* (2018), para 54. For more see this Chapter, Title IV, point 1.

2488 See in particular the judicial 'saga' regarding the scope of judicial remedy in Dublin proceedings initiated with ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011); CJ (GC), joined cases C-411/10 and C-493/10 *N.S.* and *M.E.* (2011). For more see this Chapter, Title III, point 2.

2489 Reneman (2013), 741. See also Forastiero (2018), 108.

2490 At least not in a clear and unquestionable manner, see Title I, point 1.

Thus, the Strasbourg and Luxembourg Courts should not shy away from protecting to the fullest the asylum seekers' right to an effective remedy.[2491] The judgments in which the ECtHR and CJ decided to push for higher standards in this regard had a bearing on national asylum, Dublin and return proceedings,[2492] as on the secondary EU law.[2493] The analysis conducted in this chapter shows clearly that Article 13 of the ECHR is indeed 'a key provision in terms of guaranteeing certain procedural safeguards to aliens',[2494] in particular asylum seekers.[2495] Article 47 of the EU Charter is still making its way into the CJ's asylum jurisprudence,[2496] but it definitely bears the same potential. It is up to the Strasbourg and Luxembourg Court to use that potential in its entirety in order to guarantee that the right to an effective remedy is respected in asylum-related proceedings.

2491 Cf. Bossuyt (2020), 321, calling for a more self-restraint approach from the ECtHR as regards asylum procedures.

2492 See e.g. in regard to CJ (GC), case C-562/13 *Abdida* (2014) and ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011): Moraru and Renaudiere (2016) 'REDIAL…', 17; in regard to ECtHR (GC), *Tarakhel v. Switzerland*, no. 29217/12 (2014): ECRE/ELENA (2015); in regard to ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09(2011): Favilli (2018), 90.

2493 See e.g. the views that Article 46(3) of the 2013 Procedures Directive incorporates the ECtHR's [e.g. ECtHR, *Salah Sheekh v. the Netherlands*, no. 1948/04 (2007)] and CJ's [CJ, case C-69/10 *Samba Diouf* (2011)] standards regarding the scope and intensity of a scrutiny. For more see this Chapter, Title III, introductory remarks.

2494 Lambert (2007), 59.

2495 See e.g. Forastiero (2018), 104. See also Dembour (2015), 426, 433, stating that claims under Article 13 of the ECHR are at least as important as the ones under Article 3 or even more significant in the asylum context because they are likely to have a greater influence on national procedures. However, Dembour pointed out that the ECtHR had used its potential in this regard in an unsatisfactory manner.

2496 Curiously, the CJ avoided referring to Article 47 of the EU Charter in some rulings regarding the remedies in asylum-related proceedings, see this Chapter, Title II; Title III, point 2 *in fine;* Title IV, points 1 and 2.2 *in fine*. However, it did state in regard to remedies in asylum and return proceedings that 'the characteristics of such remedies must be determined in a manner that is consistent with Article 47 of the Charter' [see e.g. CJ (GC), case C-181/16 *Gnandi* (2018), para 52; CJ, case C-564/18 *LH* (2020), para 61].

Chapter 7
Conclusion and Explanation

I. Introduction

The ECtHR and the CJ have been discussing the human rights of asylum seekers for the last twelve years. With the *Cruz Varas and Others v. Sweden* and *Vilvarajah and Others v. the United Kingdom* judgments of 1991, the Strasbourg Court initiated its abundant case-law regarding asylum matters. For the next eighteen years, judicial dialogue between the ECtHR and national authorities in this regard was under way. In 2009, the Luxembourg Court joined the discussion, giving its first asylum preliminary rulings in the *Elgafaji* and *Kadzoev* cases. Since then, not only have both courts been establishing the European standards regarding the treatment of asylum seekers, but they have also partly filled the void left by the insufficient supervisory mechanism offered by international refugee law.[2497]

As shown in chapters 4-6, notwithstanding the differences between the two courts,[2498] the ECtHR and the CJ have managed to deliver asylum case-law on protection against refoulement, detention and remedies that is mostly coherent. Although some divergences can still be traced in the courts' judgments, decisions and orders, they mainly occur when the Luxembourg Court decides to expand the scope of asylum seekers' rights following the principle that the human rights protection under the EU law may be more extensive than under the ECHR. Contrariwise, in some cases, the CJ has tightened this protection too much when compared with the ECtHR's standards, but such divergences have transpired only occasionally and have already been partly rectified.

The accomplished convergence of the asylum case-law is not a coincidence. A relationship between the Strasbourg and Luxembourg Courts that is based on comity, mutual respect and influence, has been advocated for and developed for many years. The two courts agree that harmony between their jurisprudence should be sought where possible. Accordingly, the ECtHR and the CJ are, in principle, respectful of and attentive to each other's case-law.[2499]

2497 For more see Chapter 2.

2498 For more, in general, see Chapter 1, Title II, and, in regard to procedural differences, see Chapter 3.

2499 For more see Chapter 1, Titles III and IV.

The analysis conducted in chapters 4-6 has shown that they did not depart from this well-established approach when they adjudicated on asylum matters. Overall, the two courts do 'strive to achieve convergence'[2500] in their asylum jurisprudence, although they do not always succeed.

In some asylum cases, the mutual respect of the Strasbourg and Luxembourg Courts was clearly visible, in particular when one court decided to directly mention and discuss the other court's jurisprudence. Such outright references were used when the ECtHR and the CJ wanted to highlight the coherency of their views. In other cases, though, indirect or implicit mentions of the other court's case-law have been employed, making the respective judicial dialogue less comprehensible.

In this chapter, first, concluding observations are given on the accomplished convergence in the asylum case-law of the two courts (II). Next, the methods used by the Strasbourg and Luxembourg Courts to reach the coherency of their views on asylum seekers' rights are described (III). Lastly, the question of whether the convergence of asylum jurisprudence is really needed is answered (IV).

II. Achieving Convergence

In chapters 4-6, the asylum jurisprudence of the Strasbourg Court and Luxembourg Court pertaining to three selected areas of interest–protection, detention and remedies–has been examined and juxtaposed. The conducted analysis has clearly shown that the views of the two courts in this regard are nowadays mostly coherent.[2501]

The high level of convergence in those areas is not particularly surprising taking into account the close relation between the ECHR and the EU Charter in this regard. The prohibition of torture or inhuman and degrading treatment or punishment and the principle of non-refoulement, which have been scrutinized in chapter 4, are provided for in Articles 4 and 19(2) of the EU Charter and Article 3 of the ECHR. Article 6 of the EU Charter, pertaining to the right to liberty and looked into in chapter 5, corresponds to Article 5 of the ECHR.[2502] Article 47 of the EU Charter, given attention in chapter 6, is partly based on Article 13 of the ECHR and partly corresponds to Article 6 of

2500 Lenaerts (2018), 34.

2501 For the overview of convergences and divergences identified in each of the areas of interest, see Chapter 4, Title IV; Chapter 5, Title VIII, and Chapter 6, Title V.

2502 'Explanations Relating to the Charter of Fundamental Rights' (2007), 33-34.

the ECHR.[2503] Meanwhile, under Article 52(3) of the EU Charter, the meaning and scope of the corresponding rights shall be the same as those laid down by the ECHR. The EU law may also provide for more extensive protection than the Convention.

The ECtHR and CJ seem to be most inclined to concur on the scope of the principle of non-refoulement provided for in Article 3 of the ECHR and Articles 4 and 19(2) of the EU Charter. In chapter 4, only two remaining divergences were identified in this area: the problematic criterion of 'extreme material poverty' introduced in the *Jawo* ruling[2504] and the courts' approach to Article 15(c) of the 2004 and 2011 Qualification Directives[2505]. Despite that, it should not be overlooked that the biggest struggle for convergence of all also occurred in this area. The judicial saga concerning systemic deficiencies in national asylum systems commenced with the *M.S.S. v. Belgium and Greece* and *N.S. and M.E.* judgments of 2011. Multiple judicial proceedings were needed to finally reconcile the courts' respective views in 2017.[2506]

With regard to the detention of asylum seekers, more divergences were identified in the courts' jurisprudence.[2507] Their views differed in particular when the principle of proportionality and the necessity requirement were invoked.[2508] However, as has been concluded in chapter 5, overall, either the case-law of the ECtHR and the CJ on immigration detention is coherent or the Luxembourg Court pushed the Member States to provide for more extensive protection under the EU law than is required under the ECHR. *Ipso facto,* Article 52(3) of the EU Charter seems to find its best reflection in the CJ's jurisprudence on detention intertwined with asylum, Dublin and return proceedings.

A similar conclusion may be reached in regard to the case-law concerning the right to an effective remedy,[2509] albeit not in its entirety. As shown in

2503 Ibid., 29-30. Cf. CJ, case C-348/16 *Sacko* (2017), para 39, where the court stated with regard to Article 47 of the EU Charter that 'the first and second paragraphs of that article correspond to Article 6(1) and Article 13 of the' ECHR.

2504 CJ (GC), case C-163/17 *Jawo* (2019).

2505 For more see Chapter 4, Title II, points 3 and 5.

2506 ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011); CJ (GC), joined cases C-411/10 and C-493/10 *N.S. and M.E.* (2011). For more see Chapter 4, Title II, point 5, and Title III, point 2.1. See also Chapter 6, Title III, point 2.

2507 See Chapter 5, Title VIII.

2508 For more see Chapter 5, Title III.

2509 However, the relation between Article 47(1) of the EU Charter and Article 52(3) of the EU Charter is unclear. Despite this, the CJ reiterates that the interpretation of Article 47(1) of the EU Charter must ensure 'a level of protection which does not disregard that guaranteed by Article 13 of the ECHR, as interpreted by the European Court of Human Rights' [CJ, case C-175/17 *X* (2018), para 35].

chapter 6, the procedural protection in asylum-related proceedings is broader under the CJ's jurisprudence as regards the scrutiny that is required on appeal. The Luxembourg Court demands judicial remedies and it delivers a clearer and more consistent standard concerning the scope and intensity of the examination that is expected in asylum, Dublin or return proceedings.[2510] Nevertheless, the ECtHR provides asylum seekers with stronger protection under the requirement of an automatic suspensive effect, in particular in relation to subsequent applications and further appeals.[2511]

Importantly, although the standards concerning the rights of asylum seekers arising from the courts' jurisprudence diverge to some extent, they are almost all capable of being reconciled on a national level. The differing approaches established by the Strasbourg and Luxembourg Courts are mostly not of such nature as to be mutually exclusive. In fact, none of the more protective rules arising from the CJ's asylum case-law may be found to be in contradiction with the ECHR. When lesser protection has been provided by the Luxembourg Court, national authorities can apply the higher standard stemming from the ECtHR's jurisprudence. However, it seems that in the *Jawo* and following rulings, the Luxembourg Court wandered too far away from the case-law of the Strasbourg Court when it introduced the 'extreme material poverty' criterion as a required threshold that must be attained to activate the protection against refoulement. In applying such a strict criterion national authorities risk breaching Article 3 of the ECHR. Thus, the 'extreme material poverty' requirement should be understood–against the wording of the *Jawo* ruling, but in accordance with the ECtHR's case-law–only as guidance that a removal leading someone to suffer 'extreme material poverty' is, in particular, prohibited.[2512]

It has also been observed that the jurisprudence of the two European asylum courts may be in some respects complementary. In fact, sometimes, it is only when the standards established by the ECtHR and the CJ are applied jointly that asylum seekers' rights are sufficiently protected. This is advisable in particular when the case-law of one court is incomprehensive or insufficient or does not address the crux of the problem. Then, the jurisprudence of the other court may be used to dispel doubts that have arisen. For instance, in the *J.N.* case, the Luxembourg Court did not address the pressing issue of whether an asylum seeker can be detained for security reasons when the

2510 For more see Chapter 6, Title III.

2511 For more see Chapter 6, Title IV, points 2.3(b) and 3.

2512 CJ (GC), case C-163/17 *Jawo* (2019). For more see Chapter 4, Title II, point 5.

return proceedings have not been initiated yet. Meanwhile, pursuant to the Strasbourg Court's case-law, such deprivation of liberty can be compatible with Article 5(1)(f) of the ECHR only as long as it is ordered to prevent effecting an unauthorized entry into the country.[2513] With regard to asylum proceedings concerning persons fearing removal due to their sexual orientation, the ECtHR has never pronounced itself on the use of projective personality tests. However, the CJ gave a clear–negative–response to those practices in the *F* case.[2514]

To summarize, the Strasbourg and Luxembourg Courts not only 'strive to achieve convergence'[2515] in the area of asylum, but–to a significant extent–they have already accomplished this goal. The remaining divergences result mostly from the fact that EU law may provide for more extensive protection of human rights than the protection arising from the ECHR. The latter Convention constitutes a minimum level of protection required in the EU, and the CJ occasionally–and rightly–found it insufficient. However, in some cases, the Luxembourg Court provided for a lesser protection of asylum seekers' rights than the ECtHR in its jurisprudence. Not all those divergences can be easily reconciled on a national level.

III. Seeking Convergence

It is clear from the analysis conducted in chapters 4-6 that the Strasbourg and Luxembourg Courts sought the convergence of their asylum case-law. The ECtHR and CJ are clearly mindful of their jurisprudence. They refer to each other's case-law, mostly in order to emphasize the consistency of their views. They refrain from initiating and engaging in open conflicts.[2516] In some cases where the jurisprudence of the second European asylum court was not mentioned, such reference might not be needed[2517] or it was implicit. The high level of compliance of the courts' views on human rights of asylum seekers in the areas of protection, detention and remedies, confirms that even when the Strasbourg and Luxembourg Courts chose to remain silent on each

2513 CJ (GC), case C-601/15 PPU *J.N.* (2016). For more see Chapter 5, Title IV, point 4.

2514 CJ, case C-473/16 *F* (2018), paras 47-71.

2515 Lenaerts (2018), 34.

2516 See also, for the views of the ECtHR's and CJ's judges, Morano-Foadi (2015), 122-125.

2517 See e.g. CJ, case C-19/08 *Petrosian and Others* (2009). See also Krommendijk (2015), 827, referring to CJ (GC), case C-394/12 *Abdullahi* (2013) that was considered to concern factual matters rather than human rights, thus the ECHR and ECtHR's case-law was not examined.

other's case-law, they were still well aware of its existence and tended to follow it where possible and necessary.[2518]

In this subchapter, a closer look is taken at some methods that the European asylum courts have used to gain convergence of their views in the area of asylum. First, direct references, both to the ECtHR's and CJ's jurisprudence and the ECHR and the EU Charter, are comprehensively examined. Second, some examples of indirect and implicit references are given. Lastly, it is shown how the courts tried to avoid open conflicts between their asylum case-law. For those purposes, 191 asylum judgments of the Strasbourg Court given on the merits were scrutinized in comparison with 102 asylum rulings delivered by the Luxembourg Court, but decisions and orders of both courts were also taken into account where needed.

1. Direct References

Direct references to the case-law of the other court are the most transparent and tangible way of conducting judicial dialogue. The ECtHR and the CJ started mentioning each other's jurisprudence before they began discussing the human rights of asylum seekers. Hence, when their 'asylum' dialogue commenced twelve years ago, the practice of using direct references to the other court's case-law was already established in both courts. The Luxembourg Court chose to invoke the judgment of the Strasbourg Court in one of its first asylum rulings, the *Elgafaji* case.[2519] The CJ's asylum case-law was noticed by the ECtHR two years later, in 2011, in the *M.S.S. v. Belgium and Greece* and *Auad v. Bulgaria* judgments.[2520] Further references followed in both European asylum courts, albeit not as numerously as might have been expected.

Below, the direct mentions of the other court's jurisprudence that have been identified are examined, first in regard to the ECtHR's asylum judgments (1.1), next as regards the CJ's preliminary rulings. The latter analysis covers references both to the ECHR and to the case-law of the Strasbourg Court, as in some cases the Luxembourg Court alluded only to the Convention, in others merely to the respective jurisprudence; no systematic approach has been

2518 It may be difficult or even impossible to rely on the case-law that is inconsistent or not easily comprehensible, as shown in particular in Chapter 6, Title III, point 3, and Title IV, point 1.

2519 CJ (GC), case C-465/07 ***Elgafaji*** (2009), paras 27, 44, referring to ECtHR, *NA. v. the United Kingdom*, no. 25904/07 (2008).

2520 ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), §86; ECtHR, *Auad v. Bulgaria*, no. 46390/10 (2011), §§49–51, 128. However, see also ECtHR, *NA. v. the United Kingdom*, no. 25904/07 (2008), §52, where the ECtHR noticed that the preliminary questions in case C-465/07 ***Elgafaji*** had been asked.

identified in this regard (1.2). Lastly, the courts' approach to the EU Charter is briefly looked into. It is often claimed that the CJ increasingly relies on the EU Charter and its own case-law rather than refers to the ECHR and the ECtHR's jurisprudence.[2521] Moreover, it is suggested that the EU Charter may be gaining a greater recognition before the Strasbourg Court.[2522] Thus, the cross-references to the EU Charter in both courts' asylum jurisprudence needed to be examined (1.3).

1.1 The ECtHR on the CJ

The Strasbourg Court referred to the jurisprudence of the Luxembourg Court concerning the CEAS and the Return Directive rather sparsely. Among its 191 asylum judgments given on the merits, the CJ's case-law was mentioned in only twenty-two cases (11.5%).[2523] Almost all references occurred after the Luxembourg Court gained full jurisdiction in asylum matters (2009). However, already in the *NA. v. the United Kingdom* judgment of 2008, the ECtHR noticed that the preliminary reference in the *Elgafaji* case had been lodged (but it was not decided yet).[2524] The mentions identified predominantly concerned the CJ's asylum jurisprudence, with one exception. In the case of *Abdolkhani and Karimnia v. Turkey,* the Strasbourg Court stated that the organization that the applicants had joined was excluded 'from the list of individuals, groups and entities involved in terrorist acts, in accordance with the judgment of the European Court of Justice dated 4 December 2008 in Case T-284/08'.[2525]

Of those twenty-one direct references to the CJ's asylum case-law, seventeen were made in judgments concerning the EU Member States.[2526] In four cases, Switzerland was the responding state. The *Tarakhel v. Switzerland* judgment concerned the operation of the Dublin system and bore consequences

2521 See e.g. Douglas-Scott (2015), 42-43; Krommendijk (2015), 813, 818, 823, 833; Rosas (2015), 14-15; Groussot, Arold Lorenz and Petursson (2016), 14-16; Molnár (2019), 455-456. See also, for possible reasons for the decreasing number of cross-references to the ECHR, de Búrca (2013), 175-178.

2522 See e.g. Lock (2015), 213-214; Lenaerts (2018), 23, 33-34.

2523 Cases where the CJ's jurisprudence was referred to only in the parties' submissions or third party interventions were not counted here [see e.g. ECtHR, *Abdi v. the United Kingdom,* no. 27770/08 (2013), §64; ECtHR, *Suso Musa v. Malta*, no. 42337/12 (2013), §86; ECtHR, *H.A. and Others v. Greece,* no. 19951/16 (2019), §160].

2524 ECtHR, *NA. v. the United Kingdom*, no. 25904/07 (2008), §52, mentioning the preliminary reference made in CJ (GC), case C-465/07 *Elgafaji* (2009). For more see Chapter 4, Title II, point 3.

2525 ECtHR, *Abdolkhani and Karimnia v. Turkey,* no. 30471/08 (2009), §50.

2526 14.6 % out of 116 asylum judgments given on the merits in regard to the EU Member States that were examined in this study.

for the EU Member States.[2527] In the remaining three cases, there was no such clear connection with the EU. The jurisprudence of the Luxembourg Court was invoked in the *A.* and *A.A. v. Switzerland* cases, which pertained to removals to states where the applicants were at risk of ill-treatment due to their religion, and in the *B and C v. Switzerland* case, which concerned the refoulement of a homosexual asylum seeker.[2528] In the *A.* case, the reference to the *Y and Z* ruling of the CJ was used to differentiate between the circumstances of those cases.[2529] Contrariwise, in the case of *B and C*, the ECtHR highlighted that it 'takes the view, consistent with (...) the caselaw of the CJEU', i.e. with the *X, Y and Z* ruling.[2530] Both the *Y and Z* and the *X, Y and Z* judgments pertained to the interpretation of the 2004 Qualification Directive, which was not applicable to Switzerland. However, in practice, EU asylum and migration law affects the respective Swiss legislation and jurisprudence.[2531] That may explain the Strasbourg Court's readiness to mention or rely on the CJ's case-law in asylum judgments concerning Switzerland (and the lack of such references in cases regarding other non-EU states).

Only in ten judgments did the ECtHR decide to incorporate the case-law of the Luxembourg Court in the operative part of the judgment.[2532] Those references were made for three purposes: to explain the EU law applicable in a case, to indicate the consistency of the views of the two courts or to show the divergence in this regard.

As the CEAS and the Return Directive influence national asylum and migration laws and policies that are scrutinized by the Strasbourg Court, the latter court takes the EU law—and its interpretation provided by the CJ—into account where needed.[2533] Thus, the ECtHR occasionally avails itself of

2527 ECtHR (GC), *Tarakhel v. Switzerland*, no. 29217/12 (2014). For more see Chapter 4, Title II, point 5, and Chapter 6, Title III, point 2.

2528 ECtHR, *A. v. Switzerland*, no. 60342/16 (2017), §24; ECtHR, *A.A. v. Switzerland*, no. 32218/17 (2019), §23 [for more see Chapter IV, Title II, point 1]; ECtHR, *B and C v. Switzerland*, nos. 889/19 and 43987/16 (2020), §35 [for more see Chapter IV, Title II, point 2].

2529 ECtHR, *A. v. Switzerland*, no. 60342/16 (2017), §44, referring to CJ (GC), joined cases C-71/11 and C-99/11 *Y and Z* (2012).

2530 ECtHR, *B and C v. Switzerland*, nos. 889/19 and 43987/16 (2020), §59, alluding to CJ, joined cases C-199/12, C-200/12 and C-201/12 *X, Y and Z* (2013).

2531 See e.g. Chetail and Bauloz (2013), 177.

2532 In twelve cases the CJ's case-law was mentioned only in the 'relevant law' part of the judgment, see e.g. ECtHR, *I.M. v. France*, no. 9152/09 (2012), §§86-88, mentioning CJ, case C-69/10 *Samba Diouf* (2011); ECtHR (GC), *Paposhvili v. Belgium*, no. 41738/10 (2016), §§120-122, referring to CJ (GC), case C-542/13 *M'Bodj* (2014) and CJ (GC), case C-562/13 *Abdida* (2014).

2533 See also concurring opinion of judge O'Leary delivered in ECtHR (GC), *J.K. and Others v. Sweden*, no. 59166/12 (2016), §6, stating with regard to 'the nature and scope of the

the preliminary rulings to explain the rules applicable under the EU law. For instance, in the case of *Thimothawes v. Belgium,* the Strasbourg Court referred to the *Kadzoev* judgment to clarify the legal bases for the different periods of the applicant's detention: the first one was effected under the 2003 Reception Directive, the second one under the Return Directive.[2534] In the case of *N.D. and N.T. v. Spain*, the Grand Chamber explained the rules stemming from the Return Directive and 2011 Qualification Directive by mentioning two cases decided by the Luxembourg Court, *Affum* and *M and Others*.[2535]

The ECtHR also sought endorsement in the CJ's jurisprudence.[2536] In the case of *J.N. v. the United Kingdom*, the Strasbourg Court pointed out that under Article 5(1)(f) of the ECHR, deportation proceedings with which the detention was intertwined must be in progress and prosecuted with due diligence. Next, it clearly stated that the Luxembourg Court had made 'similar points' in respect to Article 15 of the Return Directive and Article 9(1) of the 2013 Reception Directive.[2537] Similarly, in the case of *B and C v. Switzerland,* the ECtHR embraced the consistency of its views with the CJ's *X, Y and Z* ruling.[2538] In the case of *J.K. and Others v. Sweden,* the Strasbourg Court reiterated that 'as far as the individual circumstances are concerned, the burden of proof should in principle lie on the applicants, who must submit, as soon as possible, all evidence relating to their individual circumstances that is needed to substantiate their application for international protection'. In the court's view, '(t)his requirement is also expressed both in the UNHCR documents (...) and in Article 4 § 1 of the EU Qualification Directive, as well as in the subsequent

relevant provisions of national law and the EU law provisions which serve as their source or background' that '(i)t is not for this Court to interpret them but it must understand them. Without this information, particularly in the field of immigration and asylum law, the Court is provided with an insufficient overview of the relevant legal framework with which domestic authorities and courts are working and the interrelationship between its component parts'. Cf. Krommendijk (2015), 813, mentioning 'the frustration of some judges of the Court of Justice that the EU context is not always sufficiently taken into account by the ECtHR'.

2534 ECtHR, *Thimothawes v. Belgium,* no. 39061/11 (2017), §69, referring to CJ (GC), case C-357/09 PPU *Kadzoev* (2009). For more see Chapter 5, Title IV, point 3.

2535 ECtHR (GC), *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15 (2020), §§182-183, referring to CJ (GC), case C-47/15 *Affum* (2016) and CJ (GC), joined cases C-391/16, C-77/17 and C-78/17 *M and Others* (2019).

2536 See also ECtHR (GC), *M.N. and Others v. Belgium*, no. 3599/18, dec. (2020), §124.

2537 ECtHR, *J.N. v. the United Kingdom*, no. 37289/12 (2016), §82, mentioning CJ (GC), case C-357/09 PPU *Kadzoev* (2009) and CJ (GC), case C-601/15 PPU *J.N.* (2016). See also, similarly, ECtHR, *Auad v. Bulgaria*, no. 46390/10 (2011), §128, and ECtHR, *Amie and Others v. Bulgaria*, no. 58149/08 (2013), §72. For more see Chapter 5, Title IV, point 3.

2538 ECtHR, *B and C v. Switzerland*, nos. 889/19 and 43987/16 (2020), §§35, 59, mentioning CJ, joined cases C-199/12, C-200/12 and C-201/12 *X, Y and Z* (2013).

case-law of the CJEU'.[2539] Meanwhile, in the case of *A. v. Switzerland*, the *Y and Z* ruling was given attention in order to show the difference between the factual circumstances of those cases, and thus to demonstrate that there was no conflict between the courts' views.[2540]

While in some cases the coherence of the courts' jurisprudence was emphasized, in others (albeit rarer), the ECtHR cited the CJ's case-law to show the inconsistency of their views. In the case of *Tarakhel v. Switzerland,* the Strasbourg Court juxtaposed the *N.S. and M.E.* ruling with its own judgment given in the case of *M.S.S. v. Belgium and Greece*. The court stated that it was 'clear from the M.S.S. judgment that the presumption that a State participating in the "Dublin" system will respect the fundamental rights laid down by the Convention is not irrebuttable'. Next, it recalled that the Luxembourg Court also found this presumption refutable, but only in particular circumstances: in the case of systemic flaws in the national asylum procedure and reception conditions for asylum seekers. In the following paragraph, though, the ECtHR explained that '(t)he source of the risk does nothing to alter the level of protection guaranteed by the Convention or the Convention obligations of the State ordering the person's removal', indicating–indirectly–that the views of the two courts in this regard differ.[2541]

Only in one case did the Strasbourg Court admit plainly that there was an actual dispute between the two courts. In the *Sufi and Elmi v. the United Kingdom* case, the ECtHR was encouraged by the parties to comment on the *Elgafaji* ruling, where the CJ had insisted that there was a difference between the content of Article 15(c) of the Qualification Directive and Article 3 of the ECHR.[2542] The Strasbourg Court stated that

> (t)he jurisdiction of this Court is limited to the interpretation of the Convention and it would not, therefore, be appropriate for it to express any views on the ambit or scope of article 15(c) of the Qualification Direction. However, based on the ECJ's interpretation in *Elgafaji*, the Court is not persuaded that Article 3 of the Convention, as interpreted in NA, does not offer comparable protection to that afforded under the Directive. In

2539 ECtHR (GC), *J.K. and Others v. Sweden,* no. 59166/12 (2016), §96, referring to CJ, case C-277/11 *M.M.* (2012) and CJ, joined cases C-199/12, C-200/12 and C-201/12 *X, Y and Z* (2013). See also, similarly, ECtHR (GC), *F.G. v. Sweden,* no. 43611/11 (2016), §§124-127, mentioning CJ (GC), joined cases C-148/13, C-149/13 and C-150/13 *A, B and C* (2014).

2540 ECtHR, *A. v. Switzerland*, no. 60342/16 (2017), §44, referring to CJ (GC), joined cases C-71/11 and C-99/11 *Y and Z* (2012). For more see Chapter 4, Title II, point 1.

2541 ECtHR (GC), *Tarakhel v. Switzerland,* no. 29217/12 (2014), §§103-104, referring to ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011) and CJ (GC), joined cases C-411/10 and C-493/10 *N.S. and M.E.* (2011).

2542 CJ (GC), case C-465/07 *Elgafaji* (2009), para 28.

> particular, it notes that the threshold set by both provisions may, in exceptional circumstances, be attained in consequence of a situation of general violence of such intensity that any person being returned to the region in question would be at risk simply on account of their presence there.[2543]

Thus, the ECtHR made it clear that the European asylum courts disagree on the relation between Article 3 of the ECHR and Article 15(c) of the 2004 Qualification Directive.

The CJ's jurisprudence is also referred to in separate opinions. Occasionally judges criticize the case-law of both courts,[2544] but most often, the rulings of the Luxembourg Court are invoked in order to strengthen the opposition against the judgment given by the majority.[2545] In the partly dissenting opinion attached to the *Tarakhel v. Switzerland* case, the judges emphasized that '(t)he principles established by European Union law cannot be disregarded' and mentioned the CJ's *N.S. and M.E.* ruling. Meanwhile, the majority decided to rely on the United Kingdom Supreme Court's judgment that rejected the 'systemic deficiencies' criterion established by the Luxembourg Court.[2546] Moreover, in the dissenting opinion given in the *F.G. v. Sweden* case, judges Zupančič, Power-Forde and Lemmens held that the Chamber implicitly accepted the 'discretion' requirement applied by the national authorities. Meanwhile, in the *Y and Z* ruling the CJ concluded that the fact that the asylum seeker could avoid persecution by refraining from certain religious practices 'is, in principle, irrelevant'. The dissenting judges stressed that the views of the Strasbourg and Luxembourg Courts in this regard should be the same.[2547]

2543 ECtHR, *Sufi and Elmi v. the United Kingdom,* nos. 8319/07 and 11449/07 (2011), §226. See also ECtHR, *S.H.H. v. the United Kingdom,* no. 60367/10 (2013), §35. For more see Chapter 4, Title II, point 3.

2544 See e.g. dissenting opinion of judge Pinto de Albuquerque in ECtHR (GC), *S.J. v. Belgium,* no. 70055/10 (2015), §§4-5.

2545 See e.g. partly dissenting opinion of judge Bianku, joined by judge Vučinić, in ECtHR (GC), *Ilias and Ahmed v. Hungary,* no. 47287/15 (2019), mentioning CJ, case C-528/15 *Al Chodor and Others* (2017), para 40; partly dissenting opinion of Judge Koskelo in ECtHR (GC), *N.D. and N.T. v. Spain,* nos. 8675/15 and 8697/15 (2020), §30, referring to CJ (GC), case C-47/15 *Affum* (2016) and CJ (GC), case C-444/17 *Arib and Others* (2019).

2546 Partly dissenting opinion of judges Casadevall, Berro-Lefèvre and Jäderblom in ECtHR (GC), *Tarakhel v. Switzerland,* no. 29217/12 (2014). See also these Chapter and Title, point 3.2.

2547 Dissenting opinion of judges Zupančič, Power-Forde and Lemmens in ECtHR, *F.G. v. Sweden,* no. 43611/11 (2014), referring to CJ (GC), joined cases C-71/11 and C-99/11 *Y and Z* (2012). For the discretion requirement applied to homosexual returnees, see dissenting opinion of judge Power-Forde in ECtHR, *M.E. v. Sweden,* no. 71398/12 (2014), mentioning CJ, joined cases C-199/12, C-200/12 and C-201/12 *X, Y and Z* (2013). For more see Chapter 4, Title II, points 1 and 2.

Judges reach out to the CJ's jurisprudence in concurring opinions as well. There are different reasons prompting such referrals. They may be used to strengthen the reasoning given in the judgment, as in the *M.A. and Others v. Lithuania* case,[2548] or—on the contrary—weaken it, as in the case of *F.G. v. Sweden* where the choice of the preliminary rulings made by the majority was criticized.[2549] Moreover, the cross-references may be availed of to encourage a change in the ECtHR's case-law. For instance, in the case of *Abdullahi Elmi and Aweys Abubakar v. Malta*, judge Pinto de Albuquerque advocated for the review of the *Saadi v. the United Kingdom* judgment. He pointed out that the applicability of the requirement of necessity to immigration detention was widely accepted, including in the jurisprudence of the Luxembourg Court. Thus, 'the Grand Chamber's interpretation of Article 5(1)(f) of the Convention must be reviewed for the sake of bringing coherence to the Court's messy case-law and aligning it with international human-rights and refugee law. The Court cannot remain deaf to the worldwide call that Saadi must go'.[2550]

To sum up, in its asylum case-law, the Strasbourg Court does mention the jurisprudence of the Luxembourg Court, albeit sparingly. Only twenty-two cases were identified where such direct reference was made. In merely ten judgments did the ECtHR decide to incorporate the CJ's case-law into the operative part. This seems regrettable, taking into account that as many as 116 of the examined judgments concerned EU Member States. The asylum jurisprudence of the Luxembourg Court was in fact mentioned only in cases pertaining to the EU Member States and Switzerland. Those references were predominantly made in order to highlight the consistency of the views of the two courts (rather than to show the divergence). The CJ's case-law is also used to support the arguments of the dissenting or concurring judges.

2548 Concurring opinion of judge Pinto de Albuquerque in ECtHR, *M.A. and Others v. Lithuania*, no. 59793/17 (2018), §§20, 24, referring to *inter alia* CJ (GC), case C-181/16 *Gnandi* (2018).

2549 Partly concurring, partly dissenting opinion of Judge Jäderblom, joined in respect of part 1 by Judge Spano, in ECtHR (GC), *F.G. v. Sweden*, no. 43611/11 (2016).

2550 Concurring opinion of judge Pinto de Albuquerque in ECtHR, *Abdullahi Elmi and Aweys Abubakar v. Malta*, nos. 25794/13 and 28151/13 (2016), §§22, 33. Interestingly, judge Lemmens argued in his concurring opinion given in ECtHR, *Thimothawes v. Belgium*, no. 39061/11 (2017), §§5-7, that the ECtHR's post-*Saadi* jurisprudence that demanded necessity when vulnerable foreigners were detained, achieved the same goal as the requirement of necessity arising from the EU law and CJ's case-law [CJ, case C-534/11 *Arslan* (2013) and CJ (GC), case C-601/15 PPU *J.N.* (2016)]. For more on the necessity of detention, see Chapter 4, Title III.

1.2 The CJ on the ECHR and ECtHR

As early as in the *Elgafaji* ruling, the Luxembourg Court acknowledged that the observance of Article 3 of the ECHR must be ensured within the EU. The ECtHR's case-law has to be taken into account when the scope of that right is interpreted.[2551] In the *Abdida* case, the CJ emphasized that in accordance with Article 52(3) of the EU Charter the jurisprudence of the Strasbourg Court 'must be taken into account in interpreting Article 19(2) of the Charter'.[2552] The same conclusion was reached later on in regard to Articles 4 and 47 of the EU Charter.[2553] Interestingly, no such direct acknowledgement appeared in the preliminary rulings regarding immigration detention. However, it is undisputable that Article 6 of the EU Charter and Article 5 of the ECHR provide for corresponding rights.[2554] Moreover, the ECtHR's case-law was in fact invoked by the CJ in several cases regarding detention of asylum seekers.[2555]

Among 102 asylum judgments, examined for the purposes of this study, the ECHR or the ECtHR's case-law was inscribed into thirty cases (29.4%).[2556] In fifteen rulings, the Luxembourg Court gave some attention to both the ECHR and the jurisprudence of the Strasbourg Court. However, in thirteen cases only the ECHR was mentioned and in two cases the CJ referred only to the ECtHR's case-law.[2557]

The Luxembourg Court invoked the ECHR alone in three main scenarios. Firstly, such references occurred in the 'international law' parts of the

2551 CJ (GC), case C-465/07 *Elgafaji* (2009), para 28.

2552 CJ (GC), case C-562/13 *Abdida* (2014), para 47. It follows from this judgment that the case-law of the Strasbourg Court concerning Article 13 of the ECHR must be also taken into account (see para 52). See also CJ, case C-239/14 *Tall* (2015), para 54.

2553 See e.g. CJ, case C-578/16 PPU *C.K. and Others* (2017), para 68 (Article 4 of the EU Charter); CJ, case C-348/16 *Sacko* (2017), para 39 (Article 47 of the EU Charter). See also CJ, case C-175/17 *X* (2018), paras 35-36; CJ (GC), case C-353/16 *MP* (2018), paras 37-40; CJ (GC), case C-163/17 *Jawo* (2019), para 91.

2554 See e.g. CJ, case C-18/16 *K.* (2017), para 50, stating that '(a)ccount must (…) be taken of Article 5(1) of the ECHR for the purpose of interpreting Article 6 of the Charter'.

2555 See e.g. CJ, case C-528/15 *Al Chodor and Others* (2017), paras 37-38; CJ (GC), case C-601/15 PPU *J.N.* (2016), paras 77-81; CJ, case C-18/16 *K.* (2017), paras 50-52; CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), para 264.

2556 Cases where the ECHR or the ECtHR's case-law occurred only in the description of the dispute in the main proceedings or in the questions referred for a preliminary ruling, were not counted. For the overview of the references to international human rights law instruments and case-law that were identified in the CJ's rulings regarding the Return Directive, see also Molnár (2019), 445-449.

2557 CJ, case C-61/11 PPU *El Dridi* (2011), para 43; CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 264-265.

judgments when the national court alluded to the ECHR in its request[2558] or when the equivalent of the ECHR provision provided for in the EU Charter was given some attention in the judgment[2559]. Secondly, the ECHR was mentioned when Article 9(1) of the 2011 Qualification Directive was interpreted. This provision directly refers to Article 15(2) of the ECHR. Thus, the Convention was alluded to in several cases to underline that only a particularly serious act can constitute an 'act of persecution' within the meaning of the 1951 Refugee Convention and the secondary asylum law.[2560] Lastly, occasionally, the CJ pointed out that the ECHR must be complied with. In the cases of *Achughbabian* and Celaj, the court emphasized that the imposition of penal sanctions on returnees 'is subject to full observance of fundamental rights, particularly those guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms'.[2561] In the *M.A. and Others* ruling, the court recalled that a state that notified its intention to withdraw from the EU is still bound by the 1951 Refugee Convention, the 1967 Protocol thereto and Article 3 of the ECHR.[2562]

The references to the ECtHR's case-law occurred in seventeen asylum rulings. The Luxembourg Court mentioned and relied on the judgments and decisions of the second European asylum court in diverse factual and legal contexts.

Firstly, the CJ willingly reached for the jurisprudence of the Strasbourg Court to support its findings and dispel doubts regarding the interpretation of Article 15 of the 2004 and 2011 Qualification Directives. In the *Elgafaji* case, where the relationship between Article 15(c) of the 2004 Qualification Directive and Article 3 of the ECHR was elucidated, the Luxembourg Court felt obliged to confirm that its interpretation was 'fully compatible with the ECHR, including the case-law of the European Court of Human Rights relating to Article 3

2558 CJ (GC), joined cases C-57/09 and C-101/09 *B and D* (2010), paras 6, 67, 112, where the question concerning the ECHR was finally not answered. See also CJ (GC), joined cases C-297/17, C-318/17, C-319/17 and C-438/17 *Ibrahim and Others* (2019), paras 3, 45, 85, 89-90.

2559 CJ, case C-473/16 *F* (2018), paras 3, 49-50, 71, where Article 8 of the ECHR was mentioned in the 'international law' part of the judgment, but in the operative part only Article 7 of the EU Charter was given attention.

2560 CJ (GC), joined cases C-71/11 and C-99/11 *Y and Z* (2012), paras 53, 56-57, 61; CJ, joined cases C-199/12, C-200/12 and C-201/12 *X, Y and Z* (2013), paras 51, 54, 57; CJ, case C-472/13 *Shepherd* (2015), para 25; CJ, case C-56/17 *Fathi* (2018), para 93; CJ, case C-238/19 *EZ* (2020), para 22.

2561 CJ (GC), case C-329/11 *Achughbabian* (2011), para 49; CJ, case C-290/14 *Celaj* (2015), para 32. See also CJ, case C-806/18 *JZ* (2020), para 41.

2562 CJ, case C-661/17 *M.A. and Others* (2019), paras 81-85. See also, in regard to Article 8 of the ECHR, CJ, case C-720/17 *Bilali* (2019), para 62.

of the ECHR'.[2563] In the *M'Bodj* case, the jurisprudence of the Strasbourg Court was invoked in order to explain why persons who may suffer inhuman or degrading treatment upon return due to their illness are in general not eligible for a subsidiary protection. The CJ stressed that under Article 3 of the ECHR, removals of ill foreigners are precluded in very exceptional circumstances, but granting them a leave to reside is not required.[2564] Accordingly, most ill foreigners are excluded from the scope of Article 15(b) of the directive, despite the fact that this provision, 'in essence, corresponds to Article 3 of the ECHR'.[2565] However, in the *Abdida* ruling, the Luxembourg Court, again relying on the ECtHR's case-law, decided that in exceptional circumstances states cannot proceed with a removal of an ill foreigner as it would violate the principle of non-refoulement, which has to be respected in return proceedings.[2566] Subsequently, when the Strasbourg Court mitigated its strict approach to the protection against refoulement of ill returnees, the CJ acknowledged this development and followed suit.[2567]

Secondly, the ECtHR's jurisprudence is also mentioned in the most important preliminary rulings concerning the Dublin II and III Regulations. In the case of *N.S. and M.E.*, the Luxembourg Court invoked the *M.S.S. v. Belgium and Greece* judgment to support its conclusion that transfers are precluded when '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'. It stressed that the abovementioned case had concerned 'a situation similar to those at issue in the cases in the main proceedings', and that '(t)he 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'. Moreover, the CJ—on the basis of the sources used by the Strasbourg Court in

2563 CJ (GC), case C-465/07 *Elgafaji* (2009), paras 28, 44, referring to ECtHR, *NA. v. the United Kingdom*, no. 25904/07 (2008). For more see Chapter 4, Title II, point 3.

2564 CJ (GC), case C-542/13 *M'Bodj* (2014), paras 39-40, referring to ECtHR (GC), *N. v. the United Kingdom*, no. 26565/05 (2008). For more see Chapter 4, Title II, point 4. See also CJ (GC), case C-562/13 *Abdida* (2014), para 47; CJ (GC), case C-353/16 MP (2018), paras 46, 51.

2565 CJ (GC), case C-465/07 *Elgafaji* (2009), para 28; CJ (GC), case C-542/13 *M'Bodj* (2014), para 38. See also CJ (GC), case C-353/16 MP (2018), paras 36-37.

2566 CJ (GC), case C-562/13 *Abdida* (2014), paras 47-48; CJ (GC), case C-353/16 *MP* (2018), paras 38-44. For more see Chapter 4, Title II, point 4.

2567 CJ (GC), case C-353/16 *MP* (2018), paras 38-41, referring to ECtHR, *S.H.H. v. the United Kingdom*, no. 60367/10 (2013) and ECtHR (GC), *Paposhvili v. Belgium*, no. 41738/10 (2016).

the M.S.S. case—rejected the submissions of some governments that they lacked the instruments necessary to assess compliance with fundamental rights by the Member State.[2568] Later on, in the *C.K. and Others* ruling, the Luxembourg Court departed from the 'systemic deficiencies' requirement, implicitly aligning its case-law with the *Tarakhel v. Switzerland* judgment.[2569] In the *C.K. and Others* case, the CJ summarized as well the ECtHR's approach to removals of ill foreigners and concluded that 'those points of principle are also relevant in the context of the Dublin system'. In fact, the jurisprudence of the Strasbourg Court greatly inspired this preliminary ruling.[2570]

Thirdly, the Luxembourg Court mentioned the case-law of the Strasbourg Court to support its views concerning effective remedies.[2571] In the *Abdida* case, it went beyond the literal wording of the Return Directive in order to apply the standard arising from the ECHR. It recalled that in refoulement cases, under Article 13 in conjunction with Article 3 of the ECHR, the ECtHR requires a remedy with a suspensive effect. Thus, even though it is not directly demanded under the Return Directive, a remedy in return proceedings must entail a suspensive effect.[2572] In other cases, the CJ relied on the judgment given by the Strasbourg Court in the *A.M. v. the Netherlands* case, to confirm that a suspensory effect is not required when the national legislation offers further appeals in asylum proceedings.[2573]

Lastly, the ECtHR's jurisprudence has been also acknowledged in detention cases. In *Al Chodor and Others* ruling, the Luxembourg Court emphasized the similarity of the two courts' views that immigration detention should not

2568 CJ (GC), joined cases C-411/10 and C-493/10 ***N.S. and M.E.*** (2011), paras 82, 86, 88-91, referring to ECtHR (GC), *M.S.S. v. Belgium and Greece,* no. 30696/09 (2011). See also CJ (GC), case C-163/17 ***Jawo*** (2019), paras 91-92. For more see Chapter 4, Title II, point 5.

2569 ECtHR (GC), *Tarakhel v. Switzerland,* no. 29217/12 (2014). For more see Chapter IV, Title II, point 5, and Chapter 6, Title III, point 2.

2570 CJ, case C-578/16 PPU ***C.K. and Others*** (2017), paras 67-69 and 78-79, referring to ECtHR, *Karim v. Sweden,* no. 24171/05, dec. (2006); ECtHR, *Kochieva and Others v. Sweden,* no. 75203/12, dec. (2013); ECtHR (GC), *Paposhvili v. Belgium,* no. 41738/10 (2016). For more see Chapter 4, Title II, point 5.

2571 See also CJ, case C-348/16 ***Sacko*** (2017), paras 40, 47.

2572 CJ (GC), case C-562/13 ***Abdida*** (2014), paras 52-53, referring to ECtHR, *Gebremedhin [Gaberamadhien] v. France,* no. 25389/05 (2007); ECtHR (GC), *Hirsi Jamaa and Others v. Italy,* no. 27765/09 (2012). For more see Chapter 6, Title IV, point 2.1. Cf. CJ, case C-239/14 ***Tall*** (2015), paras 54-60, where the same ECtHR jurisprudence was invoked with the opposite outcome (no need for a remedy with suspensive effect in subsequent asylum proceedings). For more see Chapter 6, Title IV, point 2.3(b).

2573 CJ, case C-175/17 ***X*** (2018), para 36; CJ, case C-180/17 ***X and Y*** (2018), para 32, both referring to ECtHR, *A.M. v. the Netherlands,* no. 29094/09 (2016). For more see Chapter 6, Title IV, point 3.

be arbitrary.[2574] In the case of *El Dridi*, the CJ stated that the Return Directive, which regulates immigration detention, was 'intended to take account (...) of the case-law of the European Court of Human Rights (...)'.[2575] In the *FMS and Others* case, the Luxembourg Court examined national legislation wherein no maximum period of detention of asylum seekers was fixed. Referring to the *S.M.M. v. the United Kingdom* judgment of the Strasbourg Court, it concluded, by analogy, that such a solution was acceptable under Article 6 of the EU Charter and the 2013 Reception Directive 'provided that that Member State ensures that, first, the detention lasts only so long as the ground on which it was ordered continues to apply and, second, the administrative procedures linked with that ground are carried out diligently'.[2576] Interestingly, in the latter two cases, the CJ referred only to the ECtHR's jurisprudence, without any mention of the ECHR.

The *K.* and *J.N.* cases are particularly interesting, as the questions asked there were prompted by the *Nabil and Others v. Hungary* judgment of the Strasbourg Court.[2577] In the *K.* ruling, the Luxembourg Court concluded that the *Nabil* case was not applicable, but it invoked other ECtHR case-law. Relying on the cases of *Saadi v. the United Kingdom* and *Mahamed Jama v. Malta,* the CJ concluded that detention of asylum seekers is acceptable under the ECHR 'provided that such a measure is lawful and implemented in accordance with the objective of protecting the individual from arbitrariness'. In its opinion, the first subparagraph of Article 8(3)(a) and (b) of the 2013 Reception Directive– the validity of which was examined in the *K.* case–satisfies those requirements.[2578] In the *J.N.* ruling, the Luxembourg Court stressed that the Strasbourg Court in the *Nabil* judgment did 'not exclude the possibility of a Member State ordering - in such a way that the guarantees provided for by that provision are observed - the detention of a third-country national in respect of whom a return decision accompanied by an entry ban was adopted prior to the lodging of an application for international protection'. Moreover, the ECtHR stated there that the detention is still 'with a view to deportation' even though the

2574 CJ, case C-528/15 *Al Chodor and Others* (2017), paras 38-40, referring to ECtHR (GC), *Del Río Prada v. Spain,* no. 42750/09 (2013). For more see Chapter 5, Title II. See also CJ, case C-806/18 *JZ* (2020), para 41.

2575 CJ, case C-61/11 PPU *El Dridi* (2011), para 43, referring to ECtHR (GC), *Saadi v. the United Kingdom,* no. 13229/03 (2008).

2576 CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 264-265, mentioning ECtHR, *S.M.M. v. the United Kingdom,* no. 77450/12 (2017).

2577 ECtHR, *Nabil and Others v. Hungary*, no. 62116/12 (2015).

2578 CJ, case C-18/16 *K.* (2017), paras 51-53, referring to ECtHR (GC), *Saadi v. the United Kingdom,* no. 13229/03 (2008) and ECtHR, *Mahamed Jama v. Malta,* no. 10290/13 (2015). For more see Chapter 5, Title IV, point 1.

asylum application is pending, 'since an eventual rejection of that application may open the way to the enforcement of removal orders that have already been made'. Accordingly, as the CJ concluded, a procedure opened under the Return Directive 'must be resumed at the stage at which it was interrupted, as soon as the application for international protection which interrupted it has been rejected at first instance and, accordingly, action under that procedure is still "being taken" for the purposes of the second limb of Article 5(1)(f) ECHR'.[2579]

Despite the fact that the ECHR and the ECtHR's case-law was referred to in almost one third of the CJ's asylum cases and those mentions were availed of in diverse legal and factual contexts, it seems that the Luxembourg Court still does not use all of its potential in this regard. Analysis of the opinions and views of the AGs delivered in asylum cases shows that the number of such direct references could be greater. The AGs proved to be much bolder in invoking the ECHR and the ECtHR's jurisprudence than the CJ itself.[2580] Among eighty-nine asylum cases where the AGs delivered an opinion or a view,[2581] the ECHR was given some attention in fifty-eight cases and the case-law of the Strasbourg Court in fifty-six cases.[2582] In total, the ECHR or the ECtHR's jurisprudence was mentioned in sixty-two opinions or views (69.6% of 89 cases[2583]). It is impossible to ascertain in a definite manner why in some cases the Luxembourg Court followed the AG's opinion and directly relied on the ECHR or the case-law of the Strasbourg Court, and in others chose to omit it. However, it may be presumed that the provisions of the ECHR and judgments given by the ECtHR that had been remarked upon in the AGs' opinions and views were acknowledged and considered by the CJ even when they were not mentioned in the following rulings.[2584] This presumption is confirmed, for instance, by the *Y and Z* judgment, where the jurisprudence of the Strasbourg

2579 CJ (GC), case C-601/15 PPU *J.N.* (2016), paras 78-80, referring to ECtHR, *Nabil and Others v. Hungary*, no. 62116/12 (2015). For more see Chapter 5, Title IV, points 3 and 4.

2580 It is in fact a general trend, see e.g. Douglas-Scott (2006), 647; de Búrca (2013), 175; Krommendijk (2015), 818. See also Molnár (2019), 451-452, with regard to cases pertaining the Return Directive. The AGs are also bolder in following the ECtHR's case-law, see e.g. opinion of AG Bot delivered on 4 September 2014 in case C-562/13 *Abdida*, paras 108-118, with regard to the automaticity of a suspensive effect. For more see Chapter 6, Title IV, point 1.

2581 Out of 102 asylum judgments given by the CJ until the end of 2020, in 13 cases the AGs did not deliver neither a written opinion nor a view, see e.g. CJ, case C-19/08 *Petrosian and Others* (2009); CJ, case C-369/17 *Ahmed* (2018). The AGs' opinions delivered in cases where no judgment was given were also not counted (see e.g. opinion of AG Sharpson delivered on 31 January 2019 in case C-704/17 *D.H.*, EU:C:2019:85).

2582 The AGs—like the CJ—in some cases referred only to the ECHR or only to the ECtHR's case-law and in other cases decided to mention them both.

2583 60.7% of all 102 asylum judgments given by the CJ until the end of 2020.

2584 Cf. de Búrca (2013), 178, 180.

Court was not expressly noticed, but the interpretation of the notion of 'acts of persecution' given there resembled the AG's understanding that was based on the ECtHR's decision.[2585]

To sum up, the Luxembourg Court mentioned the ECHR and the case-law of the Strasbourg Court in thirty asylum preliminary rulings that pertained to protection against refoulement, immigration detention and effective remedies. Only in seventeen cases was the ECtHR's jurisprudence invoked. This is quite unexpected considering that it is well-established that under Article 52(3) of the EU Charter the case-law of the Strasbourg Court must be taken into account.[2586] The references were predominantly used to support the CJ's own views and highlight the consistency of the two courts' jurisprudence. Moreover, occasionally, the Luxembourg Court assumed the role of a guarantor of the rights arising from the ECHR, in particular when it expressly reminded the Member States that the Convention is binding and must be complied with.

1.3 The ECtHR and the CJ on the EU Charter

The Strasbourg Court, not the Luxembourg Court, was the first one to refer to the EU Charter in its case-law, even before the Charter gained legal force in 2009.[2587] Within its asylum jurisprudence, the first mentions of the EU Charter also occurred early on. In the case of *Saadi v. the United Kingdom* of 2008, concerning the pre-admittance detention of the asylum-seeking Iraqi national, the ECtHR pointed to Article 18 of the EU Charter (a right to asylum) in the part of the judgment titled 'Relevant international law documents'.[2588] Interestingly, Article 6 of the EU Charter, which provides for a right to liberty and security, was not mentioned in this judgment.

Despite those promising beginnings, the EU Charter is mostly absent from the Strasbourg Court's asylum case-law. Among 191 asylum judgments given on the merits analysed in this study, the EU Charter was referred to in

2585 See CJ (GC), joined cases C-71/11 and C-99/11 *Y and Z* (2012), para 67; opinion of AG Bot in joined cases C-71/11 and C-99/11 *Y and Z,* delivered on 19 April 2012, EU:C:2012:224, para 86; ECtHR, *Z. and T. v. the United Kingdom,* no. 27034/05, dec. (2006), §1. For more see Chapter 4, Title II, point 1.

2586 However, it seems too far-fetched to maintain that the CJ is generally reluctant to rely on the ECtHR's case-law, as was concluded by Velluti (2014), 94–95. See also Krommendijk (2015), 820–821, stating that the ECtHR's case-law 'is closely studied' by the CJ 'in cases that deal with the Area of Freedom, Security and Justice (AFSJ), especially asylum (…)'.

2587 Douglas-Scott (2006), 665, and Timmermans (2011), 154, referring to ECtHR (GC), *Christine Goodwin v. the United Kingdom,* no. 28957/95 (2002), §100. See also Rosas (2015), 13, pointing out that the CJ referred to the EU Charter for the first time in 2006.

2588 ECtHR (GC), *Saadi v. the United Kingdom*, no. 13229/03 (2008), §39.

only nine cases (4.7%).[2589] Most often the ECtHR mentioned Articles 18 (a right to asylum, six cases) and 19 (a prohibition of collective expulsions and the principle of non-refoulement, five cases). Article 24 of the EU Charter (the rights of the child) was briefly spoken of in three cases, Article 4 (a prohibition of torture or inhuman or degrading treatment or punishment) was given some attention in two cases and Article 47 (a right to an effective remedy and to a fair trial) was alluded to in one case.

In most of those cases, the EU Charter was only briefly mentioned in the 'relevant law' part of the judgment. In a mere three cases—all considered by the Grand Chamber—did it also gain some attention in the operative part. In the *Tarakhel v. Switzerland* judgment, which pertained to the transfer of an asylum-seeking family to Italy under the Dublin II Regulation, the EU Charter was alluded to only incidentally in the reasoning,[2590] but in two other cases, it was given more prominence.

In the case of *Hirsi Jamaa and Others v. Italy*, concerning the push-back to Libya, the Strasbourg Court referred to the principle of non-refoulement provided for in Article 33 of the 1951 Refugee Convention and Article 19 of the EU Charter. The court emphasized that none of the provisions of international law had justified the applicants' removal to Libya and that the principle of non-refoulement arising from the above-mentioned provisions had been applicable in their case. Taking that into consideration, the court found Article 3 of the ECHR to be violated by Italy.[2591]

In the case of *N.D. and N.T. v. Spain*, the responding state argued that Article 4 of the Protocol no. 4 was not applicable, because the applicants had not been removed from the Spanish territory, but only refused admission therein. Relying *inter alia* on the secondary EU law as well as Articles 4, 18 and 19 of the EU Charter, the Grand Chamber concluded that the applicants were in fact removed within the meaning of Article 4 of the Protocol no. 4. The latter provision was found to be applicable, albeit not violated.[2592] It is interesting to note that Article 19(1) of the EU Charter, which provides for the prohibition of collective expulsions as does Article 4 of the Protocol no. 4, was not given any attention in the court's reasoning concerning the merits of the complaint.

2589 Only judgments where the court directly mentioned the EU Charter were counted. Cases where the EU Charter was referred to only in the parties' submissions, third party interventions, the documents or judgments invoked by the ECtHR were not taken into account.

2590 ECtHR (GC), *Tarakhel v. Switzerland*, no. 29217/12 (2014), §103. For more see Chapter IV, Title II, point 5 and Chapter 6, Title III, point 2.

2591 ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012), §§134-134. For more see Chapter 4, Title III, point 2.1.

2592 ECtHR (GC), *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15 (2020), §§177, 182-183.

The EU Charter is also occasionally taken into consideration in separate opinions.[2593] For instance, in the above-mentioned case of *N.D. and N.T. v. Spain*, judge Koskelo recalled that 'the Convention–unlike, for example, the European Union (EU) Charter of Fundamental Rights (see Article 18 of the latter)–does not include provisions concerning the right to asylum or international protection'. She also predicted that: 'Not least in the light of Article 52(3) of the Charter, the present judgment may cause unnecessary disruption with regard to the EU legal framework currently in place in these matters. The orderly management of the influx of migrants and asylum-seekers, which in all likelihood will continue to be a difficult challenge, is not necessarily assisted by this.'[2594] With regard to the detention of asylum seekers, the well-known partly dissenting opinion given in the case of *Saadi v. the United Kingdom* must be mentioned. The minority referred there to Article 18 of the EU Charter and the secondary asylum law stating that asylum seekers cannot be detained for the sole reason of seeking protection. The judges concluded that '(t)he crux of the matter here is whether it is permissible today for the European Convention on Human Rights to provide a lower level of protection than that which is recognised and accepted in the other organisations'[2595] (such as the EU).

The scarcity of references to the EU Charter in the ECtHR's asylum case-law hardly warrants the drawing of any conclusions in this regard. However, some primary observations can be given. First, the Grand Chamber may be seen as more inclined to mention and rely on the EU Charter than are other formations of the court.[2596] Second, the Strasbourg Court seems to be more encouraged to allude to those provisions of the EU Charter that do not have a direct counterpart in the ECHR. Third, unsurprisingly, the respective references occurred only in cases pertaining to the EU Member States and Switzerland.

2593 See e.g. concurring opinion of judge Pinto de Albuquerque in ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012).

2594 Partly dissenting opinion of judge Koskelo in ECtHR (GC), *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15 (2020), §§14 and 37.

2595 Partly dissenting opinion of judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä in ECtHR (GC), *Saadi v. the United Kingdom*, no. 13229/03 (2008). For more see Chapter 5, Titles III and IV, point 1. See also partly dissenting opinion of judge Bianku, joined by judge Vučinić, in ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019). For more see Chapter 5, Title IV, point 2.

2596 Five out of nine judgments where the EU Charter was referred to were given by the Grand Chamber. Moreover, the identified mentions of the EU Charter in separate opinions all occurred in cases adjudicated on by the Grand Chamber. However, in other cases decided by the Grand Chamber references to the EU Charter were lacking or occurred only in parties' submissions, third party interventions, documents or judgments invoked by the court.

Meanwhile, among 102 asylum preliminary rulings, the EU Charter was mentioned in sixty-nine judgments (67.6%). In some cases, the CJ alluded to the EU Charter only in general, by stating that the secondary asylum law must be interpreted with respect to 'the fundamental rights and the principles recognised in particular by the Charter'.[2597] In others, particular provisions of the EU Charter were looked into. The Luxembourg Court most often invoked Articles 47 (twenty-eight cases, 27.4%), 18 (seventeen cases, 16.6%), 4 (sixteen cases, 15.6%), 19(2) (fourteen cases, 13.7%), 1 (ten cases, 9.8%), 6 (seven cases, 6.8%), 7 (seven cases, 6.8%) and 41 (six cases, 5.8%) of the EU Charter. Article 4 of the EU Charter gained attention in the refoulement context for the first time in the landmark *N.S. and M.E.* ruling, while Article 19(2), which is its *lex specialis,* was referred to only three years later in the operative part of the *M'Bodj* and *Abdida* judgments.[2598] Article 47 was already remarked upon in the *Samba Diouf* case.[2599] No reference to Article 6 occurred in the early preliminary rulings concerning immigration detention. Only in the *Mahdi* judgment was it mentioned by the court.[2600]

In twenty-five preliminary rulings, the CJ relied on both the EU Charter and the ECHR/ECtHR's case-law. Only in five cases was the Convention or the jurisprudence of the Strasbourg Court referred to without any mention of the EU Charter: in the *Elgafaji* judgment, which concerned the relation between Article 3 of the ECHR and the secondary asylum law;[2601] in the *El Dridi* case, where the impact of the ECHR on the Return Directive was emphasized;[2602] and in three rulings where the Luxembourg Court felt urged to remind the Member States that they must comply with the ECHR.[2603]

In forty-four judgments the CJ invoked only the EU Charter.[2604] Predominantly, it relied on the provisions of the EU Charter that do not have a

2597 CJ (GC), joined cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* (2010), para 54. See also CJ (GC), case C-31/09 *Bolbol* (2010), para 38; CJ (GC), joined cases C-443/14 and C-444/14 *Alo* and *Osso* (2016), para 29.

2598 CJ (GC), joined cases C-411/10 and C-493/10 *N.S. and M.E.* (2011), paras 86, 94, 106; CJ (GC), case C-542/13 *M'Bodj* (2014), para 38; CJ (GC), case C-562/13 *Abdida* (2014), paras 46-50.

2599 CJ (GC), case C-69/10 *Samba Diouf* (2011), para 49.

2600 CJ, case C-146/14 PPU *Mahdi* (2014), para 52.

2601 CJ (GC), case C-465/07 *Elgafaji* (2009), paras 28, 44.

2602 CJ, case C-61/11 PPU *El Dridi* (2011), para 43.

2603 CJ (GC), case C-329/11 *Achughbabian* (2011), para 49; CJ, case C-290/14 *Celaj* (2015), para 32; CJ, case C-806/18 *JZ* (2020), para 41.

2604 However, in some cases where it seems that only the EU Charter was noticed, the reference to the ECHR was in fact hidden. For more see these Chapter and Title, point 2. See also Rosas (2015), 15, stating, in general, that such lone referrals occur in particular when the interpretation of fundamental rights that the CJ decided on does not fall 'short of the minimum arguably required by the ECHR'.

straightforward relation with the ECHR.[2605] Articles 1 and 24, pertaining to human dignity and the rights of the child, as well as Articles 18 and 41, providing for a right to asylum and a right to good administration, do not have counterparts in the ECHR.[2606] Article 47(1) is based on Article 13 of the ECHR, but it is not indicated as having the same meaning or scope as this provision.[2607] Article 19(2) is deemed to incorporate 'the relevant case-law from the European Court of Human Rights regarding Article 3 of the ECHR',[2608] as the principle of non-refoulement was derived from the text of the ECHR rather than directly inscribed into it.[2609] References to Articles 4, 6, or 7 of the EU Charter, which correspond to the rights stemming from Articles 3, 5 and 8 of the ECHR, were rare in the beginning of the CJ's asylum jurisprudence, but that has changed more recently.

To sum up, the EU Charter has quickly gained a prominent role in the asylum case-law of the Luxembourg Court.[2610] It was alluded to in some way in two thirds of the court's judgments concerning the CEAS and the Return Directive. It was mentioned almost two and half times as often as the ECHR.[2611] In some cases, the CJ distinctly preferred to rely on the EU Charter, rather than invoke the ECHR and the ECtHR's jurisprudence.[2612]

1.4 Comparison

The analysis of the courts' asylum judgments confirmed clearly that the ECtHR and the CJ refer to each other's case-law. However, taking into account the

2605 See also, in general, Groussot, Arold Lorenz and Petursson (2016), 16, indicating that the lack of the corresponding rights in the ECHR as well as the conflicts between the ECHR and the secondary asylum law may be the reasons for the CJ's lone referrals to the EU Charter.

2606 However, the 'inherent dignity of all human beings' is mentioned in the preamble to the Protocol no. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, 3 May 2002, ETS no. 187, ratified by 44 States (Status 8 January 2021), entered into force 1 July 2003.

2607 See Article 52(3) of the EU Charter. Cf. CJ, case C-348/16 *Sacko* (2017), para 39. See also Article 47(2) and (3) of the EU Charter, which has the same meaning as Article 6(1) of the ECHR, but a wider scope [see 'Explanations Relating to the Charter of Fundamental Rights' (2007), 34].

2608 'Explanations Relating to the Charter of Fundamental Rights' (2007), 24.

2609 However, 'Explanations Relating to the Charter of Fundamental Rights' (2007), 34, clearly state that Article 19(2) corresponds to Article 3 of the ECHR as interpreted by the ECtHR.

2610 Cf. Costello (2015) *The Human Rights...,* 206, where she opined that CJ (GC), joined cases C-148/13, C-149/13 and C-150/13 *A, B and C* (2014) 'is one of the few cases where the impact of the Charter is palpable'.

2611 Twenty-eight mentions of the ECHR against sixty-nine mentions of the EU Charter.

2612 See also Velluti (2014), 94-95.

similarity of the issues pertaining to asylum seekers examined by the two courts and the scope of the accomplished convergence of their jurisprudence, the surprising conclusion is that the number of those direct references was in fact low.[2613] Only twenty-two cases were identified where the Strasbourg Court decided to mention the case-law of the Luxembourg Court (11.5%). The ECHR or the ECtHR's jurisprudence was inscribed into thirty asylum rulings of the CJ (29.4%). Meanwhile, the AGs gave attention to the Convention and/or the case-law of the Strasbourg Court in sixty-two opinions or views delivered in asylum cases. That shows that the number of such cross-references in the asylum preliminary rulings could be greater.

The Luxembourg Court referred to the ECHR and the ECtHR's jurisprudence more frequently than the Strasbourg Court mentioned the CJ's case-law[2614] (29.4% against 11.5%). However, the ECtHR's judgments and decisions were mentioned only in seventeen asylum preliminary rulings (16.6% of 102 cases). Comparing that with the number of cross-references in the case-law of the Strasbourg Court concerning the EU Member States (14.6% of 116 cases) shows the difference between the courts in this regard is not as significant.

Unsurprisingly, the Luxembourg Court invoked the EU Charter more willingly than the ECHR and the ECtHR's jurisprudence. The EU Charter was mentioned almost two and half times as often as the ECHR in the asylum preliminary rulings. Contrariwise, the EU Charter remained rather unnoticed by the Strasbourg Court.

The identified direct references were made predominantly in order to confirm or emphasize the consistency of the views of the two courts. The European asylum courts seem to consider mentions of the congruent case-law of the other court a suitable tool to strengthen their own standpoint. The references were chosen and their scope was adequately adjusted with this goal in mind. This selectivity enabled the two courts to not only bolster their consonant voice, but also avoid open conflicts.[2615]

Overall, it must be concluded that the use of direct references to the asylum case-law of the ECtHR and the CJ was more 'eclectic' than 'systematic'.[2616]

2613 See also, in general, Frese and Olsen (2019), 446, 457, stating that within the whole jurisprudence of both courts cross-references having 'some legal substance' had been made by the ECtHR and CJ themselves in the period of 2010–2016 in less than 1% of cases (however, *en passant* mentions were not counted by Frese and Olsen, contrary to the study at hand). They concluded that the judicial dialogue between the Strasbourg and Luxembourg Courts reflected in the use of direct references was 'surprisingly sparse'.

2614 See also, in general, Douglas-Scott (2006), 644.

2615 For more see these Chapter and Title, point 3.1.

2616 See, in general, de Witte (2011), 24-25.

No transparent method seems to be applied in this regard.[2617] It is difficult to comprehend why in some asylum cases such explicit mentions occurred, while in others they were lacking. Moreover, in some judgments, decisions and orders indirect and implicit references were employed, as explained in more detail below.

2. Indirect and Implicit References

Judicial dialogue is not confined to direct references to the other court's case-law. The ECtHR and the CJ also discussed the human rights of asylum seekers in a less conspicuous manner, by employing indirect or implicit references. Some examples of those practices that were found within the asylum jurisprudence of the Strasbourg and Luxembourg Courts are provided below.

Disguised references to the ECtHR's case-law were identified in multiple preliminary rulings. For instance, in the case of *Ibrahim and Others*, the jurisprudence of the Strasbourg Court was not mentioned, but the CJ relied on the specific paragraphs of the *Jawo* ruling where the reference to the *M.S.S. v. Belgium and Greece* judgment had been made.[2618] Similarly, in the *Al Chodor and Others* case, the Luxembourg Court alluded to the *Saadi v. the United Kingdom* judgment only indirectly, through the reference to its own ruling given in the *J.N.* case.[2619] Moreover, in the *Amayry* judgment, the CJ gave attention to the *Lanigan* case, where it had relied heavily on the ECtHR's interpretation of Article 5(1)(f) of the ECHR.[2620] Thus, indirect references were used in cases where the case-law of the Strasbourg Court was not noticed at all *(Ibrahim and Others)* as well as in cases where even the ECHR was ignored *(Amayry)*. In other cases, both direct and indirect references were employed *(Al Chodor and Others)*.

2617 See e.g., in general, Douglas-Scott (2006), 651-652, 655-660; Halleskov Storgaard (2015), 238-240; Krommendijk (2015), 816-817; Groussot, Arold Lorenz and Petursson (2016), 12-14.

2618 CJ (GC), joined cases C-297/17, C-318/17, C-319/17 and C-438/17 *Ibrahim and Others* (2019), paras 89-90, referring to CJ (GC), case C-163/17 *Jawo* (2019), paras 91-92, that mentioned ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011). For more see Chapter 4, Title II, point 5.

2619 CJ, case C-528/15 *Al Chodor and Others* (2017), para 39, referring to CJ (GC), case C-601/15 PPU *J.N.* (2016), para 81, mentioning ECtHR (GC), *Saadi v. the United Kingdom*, no. 13229/03 (2008).

2620 CJ, case C-60/16 *Amayry* (2017), paras 44-45, referring to CJ (GC), case C-237/15 PPU *Lanigan*, (2015), paras 58-60, that relied on the ECtHR's case-law invoked in para 57. For more see Chapter 5, Title IV, point 3. See also CJ (GC), case C-490/16 *A.S.* (2017), para 41, referring to CJ, case C-578/16 PPU *C.K. and Others* (2017), where the jurisprudence of the Strasbourg Court was given a lot of attention.

The ECtHR indirectly referred to the CJ's case-law, as well. For instance, in the decision issued in the case of *Hussein Diirshi and Others v. the Netherlands and Italy,* the Strasbourg Court suggested that a 'systemic failure where it concerns providing support or facilities catering for asylum seekers' would prevent a Dublin transfer.[2621] The *N.S. and M.E.* ruling of the Luxembourg Court, which introduced the 'systemic flaws' criterion and most probably inspired the *Hussein Diirshi* reasoning,[2622] was not mentioned there. However, the ECtHR referred to its own decision made in the case of *Mohammed Hussein v. the Netherlands and Italy,* where the *N.S. and M.E.* case was extensively cited.[2623]

Each court's general preference for citing its own jurisprudence rather than relying on external sources is surely reflected in the above-mentioned cases.[2624] However, in other asylum judgments, the ECtHR and the CJ directly mentioned the case-law of the other court even though they could have relied on their own respective cases.[2625] No transparent method seems to be applied in this regard.

They may also be other reasons prompting the European asylum courts to mention the respective other court's jurisprudence only indirectly. For instance, they may want to avoid controversy. The case-law of the Luxembourg Court concerning undesirable asylum seekers serves as a good example in this regard. Overall, it is convergent with the respective jurisprudence of the Strasbourg Court, but it lacks direct references to the ECHR. Instead, in the *M and Others* ruling, the CJ mentioned its own case of *Aranyosi and Căldăraru* wherein the absolute character of Article 3 of the ECHR stemming from the ECtHR's case-law was clearly invoked. Arguably, the Luxembourg

2621 See e.g. ECtHR, *Hussein Diirshi and Others v. the Netherlands and Italy,* nos. 2314/10 etc., dec. (2013), §138. See also §§100-102, where CJ, case C-648/11 *MA and Others* (2013), pertaining the application of the Dublin II Regulation to unaccompanied minors, was referred to. For more see Chapter 4, Title II, point 5.

2622 See also Vedsted-Hansen (2016) 'Reception Conditions…', 331-338, 344-345.

2623 ECtHR, *Mohammed Hussein and Others v. the Netherlands and Italy,* no. 27725/10, dec. (2013), §28, referring to CJ (GC), joined cases C-411/10 and C-493/10 *N.S. and M.E.* (2011).

2624 The CJ is seen as particularly keen to refer to its own case-law, see e.g. Krommendijk (2015), 829-830; Molnár (2019), 456. See also Douglas-Scott (2015), 42, where she stated in general that 'where the ECHR and Strasbourg case law are employed, this will only be in cases where there is no existing authority from the CJEU on a particular issue'.

2625 See e.g. ECtHR, *J.N. v. the United Kingdom*, no. 37289/12 (2016), §82, where only ECtHR, *Auad v. Bulgaria,* no. 46390/10 (2011), §128, could have been invoked, but the court decided to mention two CJ cases; CJ, case C-806/18 *JZ* (2020), para 41, where CJ, case C-528/15 *Al Chodor and Others* (2017), para 38, could have been referred to, but the court invoked ECtHR (GC), *Del Río Prada v. Spain,* no. 42750/09 (2013).

Court did not want to rely directly on this jurisprudence as it has been questioned by the Member States.[2626]

The CJ may also be reluctant to directly mention Article 6 of the ECHR in asylum cases,[2627] as the Strasbourg Court obstinately refused to apply it when entry, stay and removal of foreigners are being considered.[2628] Thus, in the *Torubarov* ruling, concerning remedies in asylum proceedings, neither the ECHR nor the ECtHR's case-law was mentioned, but the CJ invoked the *Toma* case where it had relied on the standards established by the Strasbourg Court under Article 6 of the ECHR.[2629] This way, Article 6 of the ECHR, as defined in the respective case-law of the ECtHR, was applied to asylum proceedings conducted in the Member States. Hence, a more extensive procedural protection of asylum seekers has been guaranteed under the EU law than under the ECHR.

The mutual inspiration and influence between the European asylum courts may be even more hidden. In some asylum cases, the reference to the other court's jurisprudence was implicit. For instance, in the above-mentioned *M and Others* ruling, the CJ distinctly drew from the ECtHR's case-law when it stated that Articles 4 and 19(2) of the EU Charter 'prohibit in absolute terms torture and inhuman or degrading punishment or treatment irrespective of the conduct of the person concerned'.[2630] Such wording mirrors the firm stance of the Strasbourg Court expressed in multiple judgments and decisions.[2631] Also, formulations used in the *Y and Z* ruling suggest that the Luxembourg Court might have been inspired by the ECtHR's decision issued in the *Z. and T. v. the United Kingdom* case, even though that case was not mentioned in the judgment.[2632]

2626 CJ (GC), joined cases C-391/16, C-77/17 and C-78/17 *M and Others* (2019), para 94, mentioning CJ, joined cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* (2016), paras 86-88. For more see Chapter 4, Title III, point 3.

2627 Cf. CJ, case C-348/16 *Sacko* (2017), para 40. See also opinion of AG Mengozzi delivered on 15 June 2017 in case C-181/16 *Gnandi*, EU:C:2017:467, paras 66-67, where he claimed that the ECtHR's case-law regarding Article 13 in conjunction with Article 3 of the ECHR was not applicable in regard to remedies against decisions rejecting an application for international protection. It might have prompted the exclusion of the ECHR and the ECtHR's case-law from the reasoning given by the CJ in the *Gnandi* case.

2628 See e.g. ECtHR (GC), *Maaouia v. France*, no. 39652/98 (2000), §40. For more see Chapter 6, Title I, point 1.

2629 CJ (GC), case C-556/17 *Torubarov* (2019), para 57, referring to CJ, case C-205/15 *Toma* (2016), para 43. For more see Chapter 6, Title III, point 1.

2630 CJ (GC), joined cases C-391/16, C-77/17 and C-78/17 *M and Others* (2019), para 94.

2631 See e.g. ECtHR (GC), *Chahal v. the United Kingdom*, no. 22414/93 (1996), §80.

2632 CJ (GC), joined cases C-71/11 and C-99/11 *Y and Z* (2012), paras 61, 67; ECtHR, *Z. and T. v. the United Kingdom*, no. 27034/05, dec. (2006), §1. For more see Chapter 4, Title II,

To sum up, the two European asylum courts refer to each other's case-law not only directly, but also indirectly and implicitly.[2633] Several reasons prompt the ECtHR and CJ to engage in such less conspicuous dialogue. They may prefer to rely on their own jurisprudence or be reluctant to expressly mention judgments, orders or decisions of the other court that are questioned in the states. They may also abstain from direct references to case-law that is considered not applicable to asylum cases by one court, when the other aims at providing more extensive protection in this regard.

3. Avoiding Open Conflicts

The Strasbourg and Luxembourg Courts seek convergence in their jurisprudence, but rather 'as a matter of principle' than at all times.[2634] Some divergences in their case-law occasionally occur. However, the ECtHR and CJ tend to abstain from being in open conflict.[2635] Within the asylum jurisprudence of the two courts scrutinized in this study, only in one case, *Sufi and Elmi v. the United Kingdom,* was the existence of a dispute between the European asylum courts plainly admitted.[2636] In the other cases, the Strasbourg and Luxembourg Courts avoided disclosing that their views were not fully convergent. They used selective cross-references (3.1) or other ways of concealing conflicts (3.2). In this section, the most conspicuous methods of avoiding open conflicts that have been identified in the asylum case-law of the two courts are looked into.

3.1 Selective References

The Strasbourg and Luxembourg Courts carefully selected the cases they referred to and cited, keeping in mind the convergence that was sought. In order to abstain from open conflicts with the other court's case-law, both have predominantly chosen judgments, decisions or orders (or particular parts of them) that were (or were supposed to be) consistent with their own

point 1. See also CJ, case C-402/19 *LM* (2020), para 41, which seems to be affected by the ECtHR's standpoint that the rights arising from the ECHR must be 'practical and effective, not theoretical and illusory' [ECtHR (GC), *Mamatkulov and Askarov v. Turkey,* nos. 46827/99 and 46951/99 (2005), §121]. For more see Chapter 6, Title IV, point 2.1.

2633 See also Krommendijk (2015), 830.

2634 Lenaerts (2018), 34.

2635 See e.g. Douglas-Scott (2006), 664; de Witte (2011), 25; Lock (2015), 176, 216; Krommendijk (2015), 820.

2636 ECtHR, *Sufi and Elmi v. the United Kingdom,* nos. 8319/07 and 11449/07 (2011), §226, with reference to CJ (GC), case C-465/07 *Elgafaji* (2009), para 28. For more see Chapter 4, Title II, point 3.

views.[2637] Cases that did not disclose such coherence were–more or less intentionally–ignored.[2638] Some particularly distinguishable examples of such practices are given below.

In the *Al Chodor and Others* ruling, the CJ cherry-picked the judgment that was the most suitable for its purposes and omitted cases that did not fit into its interpretation of the secondary asylum law. On the one hand, the Luxembourg Court alluded to the *Del Río Prada v. Spain* judgment of the ECtHR to invoke the criteria determining the sufficient quality of law on detention.[2639] This choice was quite surprising as the *Del Río Prada* case did not concern immigration detention, but the application of Article 5(1)(a) of the ECHR (an arrest or detention after the conviction). However, some commentators argued that this selection might have been aimed at reconciling the standards between the two courts and leaving the limitations of Article 5(1)(f) of the ECHR behind.[2640] On the other hand, the CJ decided not to discuss the jurisprudence of the Strasbourg Court invoked by the referring court. In the *Kruslin v. France* judgment, the settled case-law had been considered a sufficient legal basis for detention.[2641] In the *Al Chodor* case, the Luxembourg Court applied a more restrictive interpretation of Article 6 of the EU Charter and Article 5 of the ECHR–it required 'a binding provision of general application'.[2642]

Once more showing a selective approach, the CJ relied on the ECtHR's *A.M. v. the Netherlands* judgment in the *X* and *X and Y* rulings in order to strengthen its view that further appeals in asylum proceedings do not require a suspensive effect.[2643] However, the Strasbourg Court's views in this regard are not uniform and settled. In some exceptional cases, it held–in opposition to the case of *A.M. v. the Netherlands* (thus, against the CJ's case-law as well)–that Article 13 of the ECHR was violated, exclusively because a further appeal in asylum proceedings had no automatic suspensive effect.[2644] The lack of

2637 For more see these Chapter and Title, points 1.1 and 1.2.

2638 See also Douglas-Scott (2015), 43, stating in general that 'truncating or excluding the discussion of the ECHR also may aid the CJEU in avoiding tricky questions concerning the compatibility of EU law with the ECHR'.

2639 CJ, case C-528/15 *Al Chodor and Others* (2017), para 38, referring to ECtHR (GC), *Del Río Prada v. Spain*, no. 42750/09 (2013), §125. For more, see Chapter 5, Title II. See also CJ, case C-806/18 *JZ* (2020), para 41.

2640 Vavoula (2019), 1059.

2641 ECtHR, *Kruslin v. France*, no. 11801/85 (1990), §29.

2642 CJ, case C-528/15 *Al Chodor and Others* (2017), paras 43, 47.

2643 CJ, case C-175/17 *X* (2018), para 36; CJ, case C-180/17 *X and Y* (2018), para 32, both referring to ECtHR, *A.M. v. the Netherlands*, no. 29094/09 (2016), §§70-71. For more see Chapter 6, Title IV, point 3.

2644 See e.g. ECtHR, *Labsi v. Slovakia*, no. 33809/08 (2012), §§138-140; ECtHR, *Diallo v. the Czech Republic*, no. 20493/0 (2011), §§77, 83, 85.

consistency within the ECtHR's case-law was not mentioned in the *X* and *X and Y* cases. This was the only way that the convergence of the views of the two courts could have been suggested.

Similarly, in the case of *Tall*, the Luxembourg Court overlooked the jurisprudence that could conflict with its conclusions, especially the cases that concerned asylum seekers who repeatedly sought protection in the Contracting States.[2645] Instead, it mentioned the *Gebremedhin [Gaberamadhien] v. France* and *Hirsi Jamaa and Others v. Italy* judgments, which pertained respectively to first-time and prospective asylum seekers. Next, the CJ noticed that the dispute in the main proceedings concerns a decision not to further examine a subsequent asylum application. The enforcement of this decision 'cannot, as such, lead to that national's removal'. Hence, the court concluded that the requirement of automatic suspensive effect arising from Article 13 of the ECHR does not apply in subsequent asylum proceedings.[2646] However, if the case-law of the Strasbourg Court pertaining to subsequent asylum proceedings had been taken into account, the Luxembourg Court would not be able to reach such a definitive conclusion.

The *C.K. and Others* case is also an interesting example of selective cross-references to the ECtHR's jurisprudence. As it concerned a Dublin transfer of an ill foreigner, the *Paposhvili v. Belgium* judgment was adequately mentioned.[2647] Next, with regard to the precautions to be taken before such a transfer could be enforced, the CJ again reached out to the case-law of the Strasbourg Court.[2648] However, no reference was made in this ruling to the landmark judgments of the ECtHR concerning Dublin transfers, i.e. *M.S.S. v. Belgium and Greece* and *Tarakhel v. Switzerland*. This omission is particularly astonishing taking into account the common understanding that with the *C.K. and Others* ruling the jurisprudence of the Luxembourg Court was finally aligned with the Dublin case-law of the Strasbourg Court, in particular with the *Tarakhel* case.[2649] It seems, however, that those cases were ignored

2645 See e.g. ECtHR, *Labsi v. Slovakia*, no. 33809/08 (2012), §§138-140; ECtHR, *Mohammed v. Austria*, no. 2283/12 (2013), §§76-81, 85.

2646 CJ, case C-239/14 *Tall* (2015), paras 54-60, referring to ECtHR, *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05 (2007); ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, no. 27765/09 (2012). For more see Chapter 6, Title IV, point 2.3(b).

2647 CJ, case C-578/16 PPU *C.K. and Others* (2017), para 68, referring to ECtHR (GC), *Paposhvili v. Belgium*, no. 41738/10 (2016).

2648 CJ, case C-578/16 PPU *C.K. and Others* (2017), paras 68, 69 and 78, 79, referring to *inter alia* ECtHR, *Karim v. Sweden*, no. 24171/05, dec. (2006); ECtHR, *Kochieva and Others v. Sweden*, no. 75203/12, dec. (2013).

2649 See e.g. Rizcallah (2017); Marin (2017), 146; Lenaerts (2017), 833-834; Callewaert (2018), 1703-1704; Favilli (2018), 90; Sadowski (2019), 49.

intentionally. On the one hand, the *M.S.S.* judgment was heavily relied on by the CJ when it established the problematic criterion of systemic deficiencies in national asylum procedure and reception conditions[2650] that was abandoned in the *C.K. and Others* ruling. Invoking the *M.S.S.* case again in the latter judgment would require admitting that it was previously misinterpreted by the Luxembourg Court. On the other hand, despite its unquestionable significance, the *Tarakhel* case[2651] is in fact not referred to in any of the numerous Dublin cases adjudicated on by the CJ. The Luxembourg Court seems to consider this judgment, and in particular the ECtHR's insistence on the obligation to obtain individual guarantees before a Dublin transfer is enforced, especially problematic, as it potentially conflicts with the principle of mutual trust that is highlighted in the EU.[2652]

A forbearing from mentioning troublesome jurisprudence is also noticeable in the reasoning given in the *X, Y and Z* case, where the CJ omitted Article 3 of the ECHR, arguably to avoid comparisons with the respective case-law of the Strasbourg Court that was–especially at that time–considered to diverge from the approach of the Luxembourg Court to the 'discretion' requirement.[2653] Moreover, in the *FMS and Others* case, the CJ did not address the ECtHR's *Ilias and Ahmed v. Hungary* judgment, despite it being invoked by the referring court. It found that a stay in the Röszke transit zone must be considered a 'detention' under the secondary EU law, even though the Strasbourg Court reached the opposite conclusion in the above-mentioned case.[2654]

The ECtHR also employs selective cross-references. For instance, in the case of *Thimothawes v. Belgium,* it only mentioned parts of the *Kadzoev* ruling that explain the difference between the detention of asylum seekers and of returnees.[2655] The CJ's jurisprudence concerning the requirement of necessity was not noticed, even though the case at hand pertained to the detention of the ill applicant. The Strasbourg Court applies the necessity requirement under Article 5(1)(f) of the ECHR exceptionally, in a limited manner, when

2650 CJ (GC), joined cases C-411/10 and C-493/10 *N.S. and M.E.* (2011), paras 88-94.

2651 ECtHR (GC), *Tarakhel v. Switzerland*, no. 29217/12 (2014).

2652 For more see Vicini (2015), 70-71.

2653 CJ, joined cases C-199/12, C-200/12 and C-201/12 *X, Y and Z* (2013). For more see Chapter 4, Title II, point 2.

2654 CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), para 71; ECtHR (GC), *Ilias and Ahmed v. Hungary*, no. 47287/15 (2019), §249. For more see Chapter 5, Title IV, point 2. Cf. CJ (GC), joint cases C-924/19 PPU and C-925/19 PPU *FMS and Others* (2020), paras 264-265, mentioning ECtHR, *S.M.M. v. the United Kingdom*, no. 77450/12 (2017).

2655 ECtHR, *Thimothawes v. Belgium*, no. 39061/11 (2017), §69, referring to CJ (GC), case C-357/09 PPU *Kadzoev* (2009), For more see Chapter 5, Title IV, point 3.

vulnerable foreigners are deprived of liberty. Despite this, the respective case-law of the Luxembourg Court was not invoked, probably because, under the EU law, the principle of proportionality and the requirement of necessity are the rule, rather than the exception.[2656] Arguably for the same reasons, the *Mahdi* ruling was addressed neither in the 'relevant law' nor in the operative part of the *Khlaifia and Others v. Italy* judgment, even though it was highlighted by the third party intervenors.[2657]

In some cases, the European asylum courts clearly did not want to engage in a discussion on conflicting matters, so they adjusted the respective citations so as not to raise questions about the coherency of their views.[2658] For instance, in the *S.H.H. v. the United Kingdom* case, the ECtHR clearly did not want to continue a dispute about the relationship between Article 3 of the ECHR and Article 15(c) of the 2004 Qualification Directive that had started with the cases of *Elgafaji* and *Sufi and Elmi v. the United Kingdom*.[2659] Excerpts from the *Elgafaji* ruling were provided in the 'relevant law' part of the *S.H.H.* judgment, albeit not the controversial ones that indicate the difference between the above-mentioned provisions. Instead, the Strasbourg Court cited the CJ's conclusion that its interpretation was 'fully compatible with the ECHR, including the case-law of the European Court of Human Rights relating to Article 3 of the ECHR'.[2660]

Using selective references may sometimes be the only way to showcase the convergence of the two courts' views (even if it is only partial). However, avoiding discussion on the jurisprudence of the other court that is incompliant with conclusions reached in a case at hand in fact weakens the reasoning of the judgment. It gives the national authorities leeway to freely interpret the conflicting case-law of the two courts and to choose the standpoint that seems more fit from the perspective of the domestic asylum and migration policy, which is not always human rights-oriented.

2656 For more see Chapter 5, Title III.

2657 ECtHR (GC), *Khlaifia and Others v. Italy*, no. 16483/12 (2016), §§42-45, 85, referring to multiple CJ rulings, but not to CJ, case C-146/14 PPU *Mahdi* (2014).

2658 See also CJ (GC), joined cases C-411/10 and C-493/10 *N.S. and M.E.* (2011), para 112, where the CJ referred to ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011), indicating all the violations found by the Strasbourg Court but the violation by Belgium of Article 13 in conjunction with Article 3 of the ECHR. The right to an effective remedy was not guaranteed under the Dublin II Regulation that was applied both in the *M.S.S.* and *N.S. and M.E.* cases.

2659 CJ (GC), case C-465/07 *Elgafaji* (2009), para 28; ECtHR, *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07 (2011), §226. For more see Chapter 4, Title II, point 3.

2660 ECtHR, *S.H.H. v. the United Kingdom*, no. 60367/10 (2013), §35.

3.2 Other Methods

Using selective references is not the only method of avoiding open conflicts between courts that was identified in the asylum jurisprudence of the ECtHR and the CJ. The courts sought convergence by all means (albeit not always with success), even if it meant adjusting the circumstances of the case or applying the most restrictive interpretation of the case-law of the other court. Moreover, the critique of the other court's views was occasionally disguised and very discreet. Some examples of such practices are described below.

In the *J.N.* ruling, the Luxembourg Court adjusted the circumstances of the case so as to find convergence with the jurisprudence of the Strasbourg Court. Pursuant to the domestic case-law applicable in the *J.N.* case, return decisions lapsed with the initiation of asylum proceedings. The CJ decided that that was not acceptable from the EU perspective. Only concluding that the return decision was still in force enabled finding that point (e) of the first subparagraph of Article 8(3) of the 2013 Reception Directive was in compliance with Article 5(1)(f) of the ECHR. The more problematic questions on the coherence of the secondary asylum law with the ECHR remained unanswered.[2661]

In the case of *N.S. and M.E.*, the Luxembourg Court relied on the *M.S.S. v. Belgium and Greece* judgment.[2662] However, in order to protect the principle of mutual trust in the EU, it applied the most restrictive interpretation of this case, which led to the introduction of the 'systemic flaws' criterion.[2663] In the *Tarakhel v. Switzerland* judgment, the ECtHR made clear that the CJ misunderstood the *M.S.S.* case and invalidated the requirement of systemic deficiencies.[2664] Thus, even though the Luxembourg Court distinctly sought convergence with the Strasbourg Court in the *N.S. and M.E.* ruling, it failed to find it. The CJ did not manage—against Article 52(3) of the EU Charter—to construe the meaning and scope of Article 4 of the EU Charter so that it would be the same as the meaning and scope of Article 3 of the ECHR. It tightened the scope of protection against refoulement too much in comparison with the respective ECtHR jurisprudence. Although the Luxembourg Court aligned its views on 'systemic flaws' with the *Tarakhel* case later on,[2665] it again applied the

2661 CJ (GC), case C-601/15 PPU *J.N.* (2016). For more see Chapter 5, Title IV, point 4.

2662 CJ (GC), joined cases C-411/10 and C-493/10 *N.S. and M.E.* (2011), paras 88-90, referring to ECtHR (GC), *M.S.S. v. Belgium and Greece*, no. 30696/09 (2011).

2663 See also Maiani and Migliorini (2020), 38,

2664 ECtHR (GC), *Tarakhel v. Switzerland*, no. 29217/12 (2014), para 104. For more see Chapter 4, Title II, point 5, and Chapter 6, Title III, point 2.

2665 See CJ, case C-578/16 PPU *C.K. and Others* (2017). For more see Chapter 4, Title II, point 5, and Chapter 6, Title III, point 2.

restrictive interpretation of the *M.S.S.* judgment in the *Jawo* ruling.[2666] It introduced the 'extreme material poverty' criterion, which seems to be tainted with similar flaws to the 'systemic deficiencies' requirement.

In the above-mentioned *Tarakhel* case, the Strasbourg Court first summarized the approach of the two courts to the presumption that states participating in the Dublin system observe human rights of asylum seekers. Both the *M.S.S.* and the *N.S. and M.E.* judgments were invoked. Then, the ECtHR stated

> (i)n the case of "Dublin" returns, the presumption that a Contracting State which is also the "receiving" country will comply with Article 3 of the Convention can therefore validly be rebutted where "substantial grounds have been shown for believing" that the person whose return is being ordered faces a "real risk" of being subjected to treatment contrary to that provision in the receiving country.
>
> The source of the risk does nothing to alter the level of protection guaranteed by the Convention or the Convention obligations of the State ordering the person's removal. It does not exempt that State from carrying out a thorough and individualised examination of the situation of the person concerned and from suspending enforcement of the removal order should the risk of inhuman or degrading treatment be established.
>
> The Court also notes that this approach was followed by the United Kingdom Supreme Court in its judgment of 19 February 2014 (...).[2667]

Thus, the Strasbourg Court–very discreetly–rejected the 'systemic deficiencies' criterion arising from the *N.S. and M.E.* ruling. However, it did not directly state that the CJ's conclusions, which were supposed to be based on the *M.S.S.* case, were incorrect.[2668] Instead, it provided its own interpretation in this regard and relied on the United Kingdom Supreme Court's ruling. Meanwhile, that judgment is commonly considered to clearly reject the 'systemic deficiencies' criterion established in the *N.S. and M.E.* case.[2669]

2666 CJ (GC), case C-163/17 *Jawo* (2019). See also CJ (GC), joined cases C-297/17, C-318/17, C-319/17 and C-438/17 *Ibrahim and Others* (2019); CJ, joined cases C-540/17 and C-541/17 *Hamed and Omar*, order (2019). For more see Chapter 4, Title II, point 5.

2667 ECtHR (GC), *Tarakhel v. Switzerland*, no. 29217/12 (2014), §§103-104. For more see Chapter IV, Title II, point 5, and Chapter 6, Title III, point 2.

2668 Cf. Vedsted-Hansen (2016) 'Reception Conditions...', 349, claiming that the ECtHR pointed 'to the distinction between the two courts', *inter alia* when it had stated: 'For its part, the Court of Justice of the European Union has ruled (...)' [ECtHR (GC), *Tarakhel v. Switzerland*, no. 29217/12 (2014), §103].

2669 See e.g. Costello and Mouzourakis (2014), 408; Morgades-Gil (2015), 445.

It seems that in practice the above-mentioned cases produced more questions than gave answers. Camouflaging the fact that some divergence of views between the two European asylum courts exists did not make it disappear. The conflicts persisted, despite not being visible at first sight.

IV. Needing Convergence

Accomplishing the convergence of their case-law seems to be a well-thought and necessary goal for the ECtHR and the CJ.[2670] Sharing congruent views on human rights protection in Europe bolsters the authority of both courts, diminishes the possibility of their being criticized and increases the scope of compliance with the respective judgments, decisions and orders.[2671] Legal certainty is enhanced.[2672] Contrariwise, judicial conflicts may undermine the courts' status and the legitimacy of their jurisprudence. Moreover, seeking convergence between the Strasbourg and Luxembourg Courts is seen as a way to improve human rights protection in Europe. Only clear and consistent standards may be expected to be fully followed on a national level. Lack of coherence weakens human rights, as domestic authorities tend to choose the less demanding approach where possible.[2673]

Both the ECtHR and the CJ needed to bolster their authority in asylum matters. Asylum and immigration are traditionally seen as very closely intertwined with territorial sovereignty. States were and are unwilling to give away their powers in this regard. Thus, it took years before the Luxembourg Court was given full jurisdiction in asylum matters, and it is still relatively new in this area.[2674] The Strasbourg Court has been deciding on the human rights of asylum seekers for the last thirty years, but some of its asylum judgments have been openly opposed by the Contracting States.[2675] Moreover, when its asylum jurisprudence began to flourish, the ECtHR was criticized for overstepping its jurisdiction and becoming a fourth-instance court, against the

2670 See e.g. CJ, case C-18/16 *K.* (2017), para 50 (emphasis added), stating that 'Article 52(3) of the Charter seeks to ensure the *necessary* consistency between the rights contained in it and the corresponding rights guaranteed by the ECHR (...)'.

2671 See e.g. Douglas-Scott (2006), 653-654; Scheeck (2011), 175; Timmermans (2011), 153-155; Lock (2015), 215-216; Lenaerts (2018), 34.

2672 See e.g. Lock (2015), 170.

2673 See e.g. Timmermans (2011), 155; Morano-Foadi (2015), 116, 120; Lenaerts (2018), 23, 34.

2674 For more see Chapter 2, Title IV, point 2.1.

2675 See e.g. Chapter 4, Title III, point 3.

principle of subsidiarity.[2676] Speaking with consonant voices surely strengthened both courts' position in the area of asylum. With the growth of their authority, their asylum workload steadily increased.[2677] Asylum seekers, as well as domestic courts and tribunals handling asylum matters, put more and more trust in the ECtHR and the CJ. Both courts began to be perceived, in practice and in the literature, as the European asylum courts.[2678]

Thanks to the Strasbourg and Luxembourg Courts, more human rights-oriented standards concerning asylum seekers have been enforced around Europe. They encouraged, or even pushed, each other to reinforce and expand the human rights protection of asylum seekers. To name some examples, the CJ, in the *Abdida* case, went beyond the literal wording of the Return Directive in order to apply the higher standard arising from the ECHR as regards a suspensive effect of a remedy.[2679] In the case of *C.K. and Others*, the Luxembourg Court aligned its case-law with the *Tarakhel v. Switzerland* judgment, in which the ECtHR rejected the 'systemic deficiencies' criterion established in the *N.S. and M.E.* ruling that tightened the protection against refoulement too much.[2680] The influence of the CJ's jurisprudence on the Strasbourg Court was also palpable. Its firm approach to the discretion requirement expressed in the *X, Y and Z* ruling convinced the ECtHR to finally admit that that asylum seekers should not be expected to conceal their sexual orientation after a removal.[2681] The Luxembourg Court's insistence that immigration detention must be necessary also arguably affects the respective standpoint of the Strasbourg Court as the latter court increasingly applies the necessity requirement in its case-law concerning Article 5(1)(f) of the ECHR (however, still more as an exception than a rule).[2682] Overall, it must be concluded, to paraphrase Douglas-Scott,[2683] that the story of human rights of asylum seekers in Europe is largely the story of interaction between the ECtHR and the CJ.

2676 See e.g. Bossuyt (2020), 318-321. Cf. Myjer (2013), 421-425.

2677 For more see Chapter 2, Title III, point 2.2, and Title IV, point 2.3.

2678 See e.g. Gilbert (2004), 983; Taylor (2014) 'The CJEU…', 77; Bossuyt (2012), 203; de Baere (2013), 107; Drywood (2014), 1095; Lambert (2014), 206; Velluti (2014), 77; Costello (2015) *The Human Rights…*, 174.

2679 CJ (GC), case C-562/13 *Abdida* (2014), paras 52-53. For more see Chapter 6, Title IV, point 2.1.

2680 CJ (GC), joined cases C-411/10 and C-493/10 *N.S. and M.E.* (2011), para 86; ECtHR (GC), *Tarakhel v. Switzerland*, no. 29217/12 (2014), §§103-104; CJ, case C-578/16 PPU *C.K. and Others* (2017), paras 73-74. For more see Chapter 4, Title II, point 5.

2681 CJ, joined cases C-199/12, C-200/12 and C-201/12 *X, Y and Z* (2013), para 76; ECtHR, *I.K. v. Switzerland*, no. 21417/17, dec. (2017), §24; ECtHR, *B and C v. Switzerland*, nos. 889/19 and 43987/16 (2020), §57.

2682 For more see Chapter 5, Title III.

2683 Douglas-Scott (2006), 630.

However, the convergence of the courts' case-law should not be seen as an ultimate goal,[2684] as it may have downsides as well. It may preclude or limit the development of human rights standards, in particular when judges are discouraged from applying a more extensive protection in order to remain consistent with the jurisprudence of the other court. It may also encourage the lowering of standards to gain coherence.[2685] Moreover, in focussing too much on the needed convergence, the courts are tempted to highlight only the consistency of their views and to avoid discussing the case-law of the other court that is discrepant. In consequence, the divergences in the courts' jurisprudence that do transpire must be resolved on a national level, prompting differing interpretations of human rights standards between domestic authorities and states. The goal of having a convergent approach to human rights of asylum seekers throughout Europe is then even more difficult to accomplish.

The twelve years of ongoing dialogue between the Strasbourg and Luxembourg Courts on the human rights of asylum seekers generated case-law that is predominantly coherent. The convergence of the respective jurisprudence was distinctly sought by the courts and most often found. The two courts referred to each other's jurisprudence directly, indirectly or impliedly, as well as abstained from initiating and engaging in open conflicts. The mutual influence was tangible. Some divergences did occur and some are still persisting, but the differing standards are mostly not mutually exclusive. Both the authority of the courts in the area of asylum and the scope of the human rights protection of asylum seekers have been enhanced over the last twelve years. The jurisprudential exchange of views and cooperation with regard to asylum matters proved to be beneficial for the ECtHR and the CJ as well as for the most concerned persons: asylum seekers themselves.

Nevertheless, in the area of asylum an even closer cooperation is necessary. In Europe, measures that are more and more restrictive and questionable from the human rights perspective are being exercised towards foreigners in general and asylum seekers in particular. With regard to asylum and immigration, the balance between state sovereignty and individual human rights seems to be increasingly difficult to strike. In response,[2686] the Strasbourg and Luxembourg Courts must vigorously work together to protect and strengthen the human rights of asylum seekers in Europe. They should continue their judicial dialogue, but they must express their views clearly and exhaustingly.

2684 See also Lock (2015), 178, stating that '(t)he normative claim that there should be no divergence between the two European Courts' case laws is (…) flawed'.

2685 Such levelling down was feared for instance in regard to the necessity requirement, see e.g. Costello (2012) 'Human Rights…', 301.

2686 See also Frese and Olsen (2019), 456–457.

Direct references to each other's case-law should be employed rather than indirect or implied ones; divergences should be openly discussed and explained. Both courts should 'strive to achieve convergence'[2687] not only between one another, but first of all internally. The coherency of their views should be sought to level up the human rights protection of asylum seekers, not to lessen it. More extensive standards should be boldly applied where needed. Only then would the ECtHR and the CJ fully deserve to be called the European asylum courts.

2687 Lenaerts (2018), 34.

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SEEKING CONVERGE

Since 2009 two courts have been shaping human rights of asylum seekers in Europe: the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR). Side by side, the courts examined who is protected from refoulement, when and how asylum seekers can be detained and what remedies they should have access to. Did they seek convergence in their asylum case-law or paid no attention to each other's jurisprudence? Did they establish a coherent standard of the asylum seekers' protection in Europe? Judicial dialogue between the ECtHR and CJEU in the area of asylum is at the heart of this study. The book offers also a comprehensive overview of the asylum case-law of the two courts and identifies the main convergences and divergences in their approach to protection against refoulement, immigration detention and effective remedies.

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