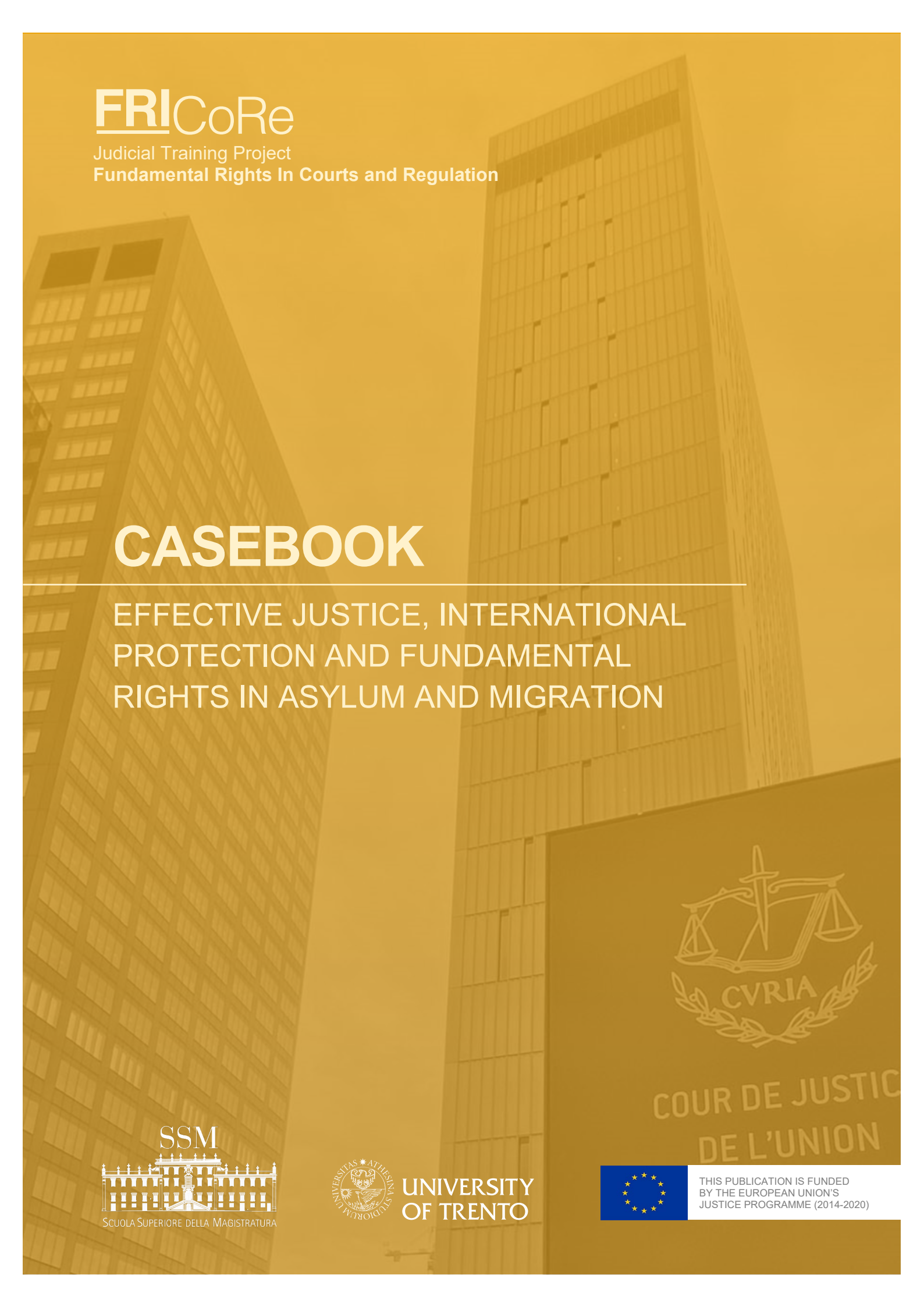
FRICoRe

Judicial Training Project

Fundamental Rights In Courts and Regulation

CASEBOOK

EFFECTIVE JUSTICE, INTERNATIONAL PROTECTION AND FUNDAMENTAL RIGHTS IN ASYLUM AND MIGRATION



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Introduction: A Brief Guide to the Casebook

Cross-project methodology

The FRICoRe Casebook on *Effective Justice, International Protection and Fundamental Rights in Asylum and Migration* builds upon and complements the ReJus Casebook on *Effective Justice in Asylum and Immigration*, released in 2018 and available online (https://www.rejus.eu/content/materials). Compared with the ReJus one, the FRICoRe analysis focuses on a few selected issues that have raised much attention in recent dialogue between the Court of Justice and national courts, starting with the legality of detention in the course of asylum proceedings, the extent of the right to an effective remedy in international protection, and the scope of national security as legitimate ground for denial of refugee status. A first overview on the impact of the current pandemic on effective protection of asylum seekers and immigrants is also provided in the last chapter. Due references to the ReJus Casebook are available when appropriate.

This casebook's methodology builds upon the collaborative venture developed in previous projects of judicial training and, more recently, in the ReJus project. The core element of its methodology concerns the active dialogue established between **academics and judges of various European countries** on the role of the Charter and that of its Article 47, here particularly developed in the field of immigration and asylum law. In continuity with previous projects, including ReJus, this collaboration combines rigorous methodologies with judicial practices, and provides the trainers with the sort of rich comparative material that should always characterize transnational trainings. Training includes not only the transfer of knowledge, but also the creation of a learning community composed of different professional skills. Like in previous experiences, this casebook is due to evolve both in content and in method over time, with additional suggestions arising from its use in training events.

We firmly believe that transnational training of judges should be based on a rigorous analysis of **judicial dialogue** between national and European courts and, when existing, among national courts. In the field of international protection, this dialogue is due to involve or at least to impact on decisions taken by competent national administrative authorities. Indeed, in the CJEU's view, the right to an effective remedy and Article 47 CFR may imply that administrative bodies no longer have discretionary power as to the decision to grant or refuse the protection sought in the light of the same grounds as those that were submitted to a court or tribunal, finding that the applicant must be granted such protection; otherwise Article 46(3) of Directive 2013/32, read in conjunction with Article 47 of the Charter, as well as Articles 13 and 18 of Directive 2011/95, would be deprived of all their practical effect. In these circumstances, decisions subject to judicial review may be set aside and, eventually, replaced by courts in order to ensure effective protection of asylum seekers (*T. v. Bevandorlasi es Menekultugyi Hivatal*, C-556/17).

Moving from the perspective of judicial dialogue, we investigate the full life cycle of a case, from its birth with the preliminary reference to its impact in different Member States. We examine the ascendant phase and analyse how the preliminary reference is made, and whether and how it is reframed by the Advocate General and the Court. We then analyse the judgments and distinguish them according to the chosen degree of detail when they provide guidance both to the referring court and to the other courts that have to apply the judgments in the various Member States.

Indeed, judicial dialogue develops both vertically and horizontally, at both national and supranational levels. Preliminary references represent the main driver of this dialogue. Linked with preliminary references procedures, horizontal interaction among national courts takes place when the principles identified by the CJEU are applied in pertinent cases, mostly in the same and sometimes in connected fields. Also depending on the type of reference enacted, the guidance

provided by the CJEU may consist in specific rules or in general principles to be applied. Very frequently the latter may consist in the principle of effectiveness or that of equivalence, due to be balanced against the principle of national procedural autonomy.

Diverging approaches may be provoked by the same CJEU judgment and a national vertical dialogue may emerge, involving constitutional courts, higher courts and first instance courts.

The horizontal dimension of this dialogue may be observed only indirectly when, starting from the same decision of the Court of Justice, possibly different outcomes are examined in different Member States. In this respect, for example, the casebook examines the different impact of both the CJEU's and the ECtHR's jurisprudence on national case law as regards the extent to which 'systemic deficiencies' and 'individual violations' of Article 4 Charter can act as limitations to Dublin transfer to ensure that the transfer takes place in conditions enabling appropriate and sufficient protection of the person's state of health (*C.K. and others*, C-578/16 PPU). Furthermore, the casebook also examines the scope of the right to be heard in asylum proceedings depending on the different intersection between the administrative and the judicial phase at national level (recently, *Addis v. Bundesrepublik Deutschland* (2020, C-517/17)) and the impact of the CJEU's ruling in the mentioned *T.* case, referred by a Hungarian court, upon Dutch case law.

Comparing different stories, taking into account national specificities, enables national courts to better anticipate the impact of EU law on the adjudication of national cases, even in jurisdictions that are different from that of the referring court. This is why the **comparative perspective** provided by this casebook may clarify the impact of the judgment or of a cluster of judgments addressing the same issue (for example, the scope of the right to be heard in return proceedings) on the case law of Member States different from that of the referring court. In some cases, the impact can be examined through judgments expressly referring to the CJEU's decisions; in other cases, the casebook suggests interpretative tools to address issues discussed in national case law through the lens of the CJEU's decision. The **impact analysis** is very important for judges other than the referring one. Their effort to interpret and adapt the judgment to their national legal context is often underestimated. While formally the CJEU judgments are binding on Member State courts, their application requires a careful analysis of which substantive and procedural rules may be affected by the judgment, in particular the application of Article 47 of the Charter and the principle of effectiveness.

Based on the methodology adopted in ReJus and now in FRICoRe, the analysis does not only focus on single CJEU judgments but also on **clusters of judgments** around common issues. Often, CJEU judgments touch on many questions depending upon how the preliminary references are framed, and it might be more effective to choose a subset of complementary issues and examine them in sequence across several cases, rather than to focus on a single judgment. This approach may add a bit of complexity, but it reflects the problem-solving approach, rather than the conventional doctrinal perspective. The internal coordination of chapters ensures the possibility of reconstructing the judgment across different chapters.

The casebook is complemented by a database (https://www.fricore.eu/content/database-index) that endorses the methodological approach of judicial dialogue, giving continuity to the one established in the ReJus project and integrating the whole set of materials therein developed. It is organized around EU judgments and their impact on national legal systems. Two series of national judgments are examined in the database: those directly concerning cases brought before the CJEU within a preliminary reference procedure, and those that apply or take into consideration CJEU case law when addressing national cases outside of a referral procedure. Hence, the database is specific, and it reflects the idea that judicial dialogue is a pillar of EU law.

We would like to encourage in training courses organized by national schools both the use of the casebook and that of the database, which is subject to constant updating during the course of the project, thanks to contributions coming both from the Schools of the Judiciary and from the workshops' participants.

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Executive Summary

This casebook analyses CJEU case law related to the fundamental rights of third-country nationals legally or illegally staying on the territory of a Member State. It is more precisely focused on the right of the former to effective justice in the meaning of Article 47 CFR to the extent that EU law is applicable to them. It is then centred on the principles that emerge from CJEU preliminary rulings and judicial dialogue with other courts, such as the European Court of Human Rights and national courts, to guarantee access to justice for foreign nationals. Issues raised by the application at the national level of EU law on asylum and migration, as enshrined in the *Return Directive*, the *Family Reunification Directive*, the *Qualification*, *Procedures* and *Reception Conditions Directives* and the *Dublin III Regulation*, are exposed, as well as the ways to resolve them in a manner compatible with the CJEU's requirements. Since most of those requirements have already been analysed and summarized in the *ReJus Casebook on Asylum and Immigration (https://www.rejus.eu/content/materials)* released in 2018, the present casebook will only explore the most recent (2018-2020) questions referred to the Court. Given this time restriction and the cases published by the Court during this period, the following pages are focused only on some of the challenges posed by Article 47 CFR with Member States' jurisdiction on the entry, stay and removal of third-country nationals.

This casebook is divided into three parts. The first two parts are devoted to general issues that Member States are generally confronted with in the field of immigration and international protection. **Part One** is thus devoted to the right to effective justice of third-country nationals in the event of detention, removal, expulsion or Dublin transfer. **Part Two** analyses the right to effective justice of asylum seekers and foreign nationals to whom national authorities have granted international protection – as refugees in the meaning of the 1951 Geneva Convention or as beneficiaries of subsidiary protection in the meaning of the Qualification Directive. **Part Three** offers an insight into two of the Member States' major concerns of recent years regarding foreign nationals' rights and States' vital interests: the protection of national security and of public policy and the protection of public health.

Part One is made up of two chapters.

The first chapter is devoted to third-country nationals' rights under Article 47 CFR in the event of detention. The detention of foreign nationals is lawful only if due conditions occur as laid down by EU law, in particular in Chapter IV of the *Return Directive* (hereinafter RD), Article 26 of the *Procedures Directive* (hereinafter PD) and Article 8 of the *Reception Conditions Directive* (hereinafter RCD). During the period under observation, the CJEU issued a landmark case on this question, which defines the power of national courts' to rule on the lawfulness of detention and to provide for measures apt for effective protection, even though national law does not confer such a jurisdiction on domestic courts. This chapter also explores the definition of 'detention', the conditions of its lawfulness, and the application of the proportionality test to measure the maximum length of detention.

The second chapter elaborates on foreign nationals' rights in the event of collective expulsion, return and Dublin proceedings. It relies on CJEU case law regarding the right to be heard in collective expulsion cases and return proceedings, the suspensive effect of an appeal in return proceedings, and extending judicial review in Dublin transfers.

Part Two, which is devoted to the right to effective justice in asylum proceedings, is divided into two chapters (chapters 3-4).

The **third chapter** clarifies the personal scope of the *Reception Conditions Directive*, which is a necessary previous step for national courts to assess the lawfulness of proceedings regarding third-

country nationals wishing to apply for international protection. During the period under observation, the CJEU considerably broadened the personal scope of the *RCD*, obliging national courts to assess the lawfulness of a third-country national's detention under this text, rather than under the *Return Directive*, as soon as the former states his/her intention to apply for international protection, even though he/she does so in front of an authority that is not competent to register such a claim.

The **fourth chapter** is focused on the right to an effective remedy and the right to be heard of asylum seekers.

Firstly, it exposes the conditions under which an application for international protection can be declared inadmissible at the administrative stage, without conducting a personal interview with the applicant. This possibility exists only if the appeal procedure allows the applicant to set out in person all of his/her arguments and if national courts have the power to take those arguments into account to alter the decision of inadmissibility.

Secondly, it analyses CJEU case law on time limits and the suspensory effect of an appeal against a decision of inadmissibility. *On the first point*, this development explains that Article 46 PD, read in light of Article 47 CFR, does not preclude national legislation from setting a 10 day time limit to lodge an appeal against a decision declaring inadmissible a subsequent application for international protection. *On the second point*, it recalls that when a Member State offers a second level of jurisdiction to applicants for international protection whose application has been rejected, EU law does not require States to confer on that remedy an automatic suspensory effect, even in the case where the person concerned invokes a serious risk of infringement of the principle of non-refoulement.

Thirdly, this chapter answers the question of the sufficient interest of the beneficiary of subsidiary protection to lodge an appeal against a decision which recognized him/her as a refugee in the meaning of the 1951 Geneva Convention. The CJEU indeed held that such a sufficient interest exists in so far as under the applicable national legislation, the rights and benefits afforded by each international protection status are not genuinely identical.

Lastly, the second chapter of this casebook unravels the powers of national courts or tribunals to vary administrative decisions on the grant of international protection, and to substitute their decisions for those made by administrative bodies when those powers are not expressly conferred on them by the national legislation. It also analyses CJEU case law related to the power of national courts to disapply national legislation which is contrary to the right of applicants for international protection to effective justice.

Part Three of the casebook presents the challenges raised in the field of EU law of asylum and migration by threats to national security and public health issues.

The **fifth chapter of the casebook** analyses how national security and public policy issues are connected with the right of third-country nationals to effective justice.

Firstly, it relies on CJEU case law to define the concept of public policy and how it can allow Member States to reject an application for entry and residence under the *Family Reunification Directive*. It also exposes the obligations of national authorities, in light of Article 47 CFR, when they refuse to issue a visa because another Member State objected to the issuing of this visa on public policy grounds.

Secondly, this chapter explains the consequences of the refusal or withdrawal of refugee status on grounds of national security, public order or danger to the community of the host Member State, and national courts' obligation as to the evidence that can be taken into account in such cases.

The **last chapter** addresses the question on how the current pandemic interferes with third-country nationals' rights to access to justice. It thus exposes the EU Commission's recommendation and guidelines, and States' practices regarding the closure of external and internal borders and the restrictions thereof.

Main Questions Addressed

This casebook analyses case law concerning the following questions:

PART I – EFFECTIVE JUSTICE AND IMMIGRANTS' RIGHTS IN THE EVENT OF DETENTION, REMOVAL, EXPULSION OR DUBLIN TRANSFER OF MIGRANTS

- **Does Article 47 CFR require national courts to rule on the legality of detention and provide for measures apt for effective protection even though the applicable national law does not provide for them?**
- **Are third-country nationals held in transit zones at States' borders in 'detention' within the meaning of the Reception Conditions and Return Directives?**
- **How does the proportionality test and the lack of cooperation of a third-country national affect the length of his/her detention?**
- **Is detention allowed on the ground of a third-country national's inability to provide for his/her needs?**
- **What is the impact of Article 47, read in conjunction with the right to a legal remedy as enshrined in Article 13 of the Return Directive, upon return proceedings?**
- **Does a judicial appeal in asylum adjudication have an automatic suspensive effect on the whole return procedure in the framework of a domestic combined asylum and return procedure?**
- **What is the extent of national courts' powers to reject a Dublin transfer in cases of insufficient medical care in the Member State of transfer?**

PART II – EFFECTIVE JUSTICE AND THE RIGHT TO INTERNATIONAL PROTECTION

- **In the light of Article 47, are national courts allowed to declare an application for international protection inadmissible without conducting a personal interview with the applicant?**
- **Is a time limit of 10 days to bring an action against a decision of inadmissibility acceptable under the Procedures Directive read in the light of Article 47 CFR and the principle of effective judicial protection?**
- **When Member States offer a second level of jurisdiction to applicants for international protection whose application has been rejected, are those States required by EU law to give an automatic suspensive effect to such proceedings?**
- **Does the right to an effective remedy require national courts to admit appeals against a decision granting a legal status similar, but not identical, to another one?**

- **Does Article 47 confer on national courts and tribunals the power to vary administrative decisions on the grant of international protection?**

- **In the light of Article 47 CFR, must national courts and tribunals disapply national laws that require them to issue a ruling in a period of time too short to ensure an effective examination of the case?**

PART III – ASYLUM AND MIGRATION IN TIMES OF CRISIS

- **Do national authorities have to assess that a third-country national poses a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society to refuse or withdraw his/her residence permit?**

- **In the light of Article 47 CFR, what are the powers of national courts when an appeal is lodged against a decision that refused a Schengen visa on the ground of an objection raised by another Schengen Member State?**

- **How should national security interests of Member States be balanced with the rights a third-country national is entitled to once recognized as a refugee?**

Legislative Map

Primary law

Article 78 TFEU
Article 79 TFEU
Article 4 CFR
Article 47 CFR
Article 52 CFR

Secondary legislation

Directive 2003/86/EC of 22 September 2003 on the right to family reunification (*hereinafter 'Reunification Directive'*).

Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (*hereinafter 'Return Directive' or 'RD'*).

Directive 2011/95/EU of 13 December 2011 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) (*hereinafter 'Qualification Directive' or 'QD'*).

Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (*hereinafter 'Procedures Directive' or 'PD'*).

Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (*hereinafter 'Reception Conditions Directive' or 'RCD'*).

Regulation (EU) 604/2013 of 26 June 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 (recast) (*hereinafter 'Dublin III Regulation'*).

Part I – Effective Justice and Immigrants' Rights in the Event of Detention, Removal, Expulsion or Dublin Transfer of Migrants

The so-called 'migrant crisis' in the years 2015-2016 generated a lot of political, normative and judicial reactions at the Member State and European levels, mostly to deal with the problem of sharing the 'burden' of migrants' arrivals at EU external borders. Almost all Member States failed to apply the EU decisions derogating from the Dublin mechanism[1] and imposing on them the relocation, on their territory, of a quota of third-country nationals. Instead, they adopted, at least for some of them, new laws and practices of detention, removal and expulsion. Several questions were thus referred to the CJEU on those different aspects, giving to the CJEU the opportunity to outline the role of national courts, notably on the ground of Article 47 CFR, to protect migrants' rights in the event of detention (Chapter 1), removal, expulsion or Dublin transfer (Chapter 2).

More broadly, the Court had the opportunity to recall in this context that in the light of Article 47 CFR, read in conjunction with the principle of primacy of EU law, "where it is impossible for it to interpret national legislation in compliance with the requirements of EU law, any national court, acting in the exercise of its jurisdiction, has, as a body of a Member State, the obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case before it"[2].

[1] See Council Decision 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.
[2] See CJEU, Judgment of 14 May 2020, C-924/19 PPU and C-925/19 PPU, analysed below, para. 139.

1. Effective Justice and Detention

Short overview of EU law

According to Article 15(1) Return Directive (hereinafter RD), which concerns third-country nationals in general, the detention of a third-country national who is the subject of return procedures is possible "unless other sufficient but less coercive measures can be applied effectively", in order to prepare the return and/or carry out the removal process, in particular when "a) there is a risk of absconding or; b) the third-country national concerned avoids or hampers the preparation of return or the removal process".

Regarding migrants applying for international protection, Article 8(2) Reception Conditions Directive (hereinafter RCD) provides that "when it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively". It then lists six reasons that allow States to detain applicants for international protection: *verification of nationality or identity; determination of the elements on which the application for international protection is based; determination of the applicant's right to enter the territory; application of a return procedure under the RD; for national security and/or public order reasons; application of the Dublin Regulation.*

As to Article 9 of the same text, it sets up a list of guarantees for detained applicants: *the detention shall be as short as possible, it shall be ordered in writing by judicial or administrative authorities, in which case a speedy judicial review must exist, detention shall be reviewed by judicial authority at reasonable intervals of time, and free legal assistance has to be provided for by national authorities under some circumstances.*
Article 43 Procedures Directive (hereinafter PD) guarantees the right to an effective remedy to applicants for international protection.

These articles raise numerous issues regarding the definition of detention, the conditions of its legality, and the procedural safeguards for detained migrants and asylum seekers. However, relying on the most recent developments in CJEU case law and on the goal of the FRICoRe project, this section mainly focuses on the issue of national courts' powers to guarantee the right to effective justice of third-country nationals in the event of detention. Firstly, it analyses the implications of Article 47 CFR as to national courts' jurisdiction to rule on the legality of detention and to draw the consequences of unlawful detention (I.1.1). Given the CJEU's conclusion that national courts do have such powers, this chapter then addresses the definition of detention and the conditions of its lawfulness (I.1.2).

Questions addressed in this chapter:

- **Does Article 47 CFR require national courts to rule on the legality of detention and provide for measures apt for effective protection even though the applicable national law does not provide for them?**
- **Are third-country nationals held in transit zones at States' borders in 'detention' within the meaning of the Reception Conditions and Return Directives?**
- **How does the proportionality test and the lack of cooperation of a third-country national affect the length of his/her detention?**
- **Is detention allowed on the ground of a third-country national's inability to provide for his/her needs?**

1.1 – National courts' jurisdiction regarding the lawfulness of detention and the consequences of unlawful detention

Relevant CJEU cases

- CJEU, Judgment of 5 June 2014, *M.*, C-146/14 PPU
- CJEU, Judgment [GC] of 14 May 2020, *FMS, FNZ, SA, SA Junior*, C-924/19 PPU, C-925/19 PPU

Short overview of relevant CJEU jurisprudence

As to the national courts' jurisdiction regarding the lawfulness of detention and the consequences of unlawful detention, the CJEU already found in its leading case *Mahdi*[3] that the judicial review of a decision that extends an initial period of detention must permit the judicial authority to decide this on a case-by-case basis. Judges must have full jurisdiction on the merits of whether the detention of the third-country national concerned should be extended, whether detention may be replaced with a less coercive measure or whether the person should be released. The judicial authority must have the power to take into account not only the facts and the elements adduced by the administrative authority but also any other facts, evidence and observation submitted by the person concerned.

In its recent *FMS* case, which makes several references to *M.*, the CJEU had the opportunity to detail and complete the scope of national courts' jurisdiction required by Article 47 CFR in the event of detention of third-country nationals.

Main question addressed

- **Does Article 47 CFR require national courts to rule on the legality of detention and provide for measures apt for effective protection even though the applicable national law does not provide for them?**

The CJEU ruled in its *FMS, FNZ, SA, SA Junior* (2020, C-924/19 PPU & C-925/19 PPU)[4] case that the primacy of EU law and Article 47 of the Charter require, in the absence of national provision, that a national court: 1) declares it has jurisdiction to rule on the legality of detention and permit that court to release the persons concerned immediately if it considers that such detention constitutes detention contrary to EU law; 2) has the possibility to grant interim relief pending its final decision; 3) declares that it has jurisdiction to hear and determine the action seeking to guarantee the right to receive either a financial allowance enabling that applicant to house himself or herself, or housing in kind.

In that case, neither the administrative decision that ordered the applicants in the main proceedings to be placed in the sector of the transit zone reserved for asylum seekers, nor the administrative decision ordering that they be placed in the sector of that transit zone reserved for third-country nationals whose applications for asylum have been rejected, could form the subject matter of a judicial review. There was indeed no national provision providing for such a review.

[3] See ReJus Casebook, pp. 147 sq.
[4] CJEU, Judgment [GC] of 14 May 2020, *FMS, FNZ, SA, SA Junior*, C-924/19 PPU, C-925/19 PPU.

Facts

FMS and FNZ, who are adult Afghan nationals, are a married couple. On 5 February 2019, they applied for asylum to the asylum authority in the Röszke transit zone (Hungary).

In support of their application, FMS and FNZ declared that, around three years earlier, they had, for political reasons, left Afghanistan for Turkey. They also claimed that they passed through Bulgaria and Serbia before entering Hungary, that they had not sought asylum in another country and that they had not been ill-treated or subject to any serious harm within the meaning of Article 15 of Directive 2011/95 in those countries.

On the same day, the asylum authority designated the Röszke transit zone as the place of residence of FMS and FNZ.

By administrative decision of 25 April 2019, the asylum authority rejected the application for asylum made by FMS and FNZ, without examining its substance, as inadmissible on the basis of Article 51(2)(f) of the Law on the Right of Asylum, on the ground that the applicants had arrived in Hungary via a safe third country. By that same decision, the asylum authority ordered that they be removed to Serbia.

FMS and FNZ brought an action against that decision before the Budapest Administrative and Labour Court, which dismissed it by decision of 14 May 2019, without examining the substance of their application for asylum.

By decision of 17 May 2019, the aliens policing authority at first instance ordered FMS and FNZ to reside in the sector of the Röszke transit zone reserved for third-country nationals whose applications for asylum have been rejected. On the same day, the aliens policing authority at first instance contacted the policy body competent for removal to Serbia so that it might take the necessary steps for FMS and FNZ to be readmitted to Serbia.

On 23 May 2019, the competent police body informed the aliens policing authority at first instance that Serbia had decided not to readmit FMS and FNZ to its territory on the ground that, as they had not entered Hungarian territory illegally from Serbian territory, the conditions for the application of Article 3(1) of the agreement on readmission concluded between the Union and Serbia were not satisfied.

It is apparent from the order for reference in Case C-924/19 PPU that subsequently, although Serbia did not readmit FMS and FNZ to its territory, the asylum authority refused to examine the substance of their application for asylum, on the ground that, under Article 51/A of the Law on the Right of Asylum, examination of the application for asylum is pursued, in the event of refusal to readmit to the territory of a third country, only if the decision whereby that application was rejected as inadmissible is based on the concept of 'safe country of origin' or that of 'safe third country'.

By decisions of 3 and 6 June 2019, the aliens policing authority at first instance amended the return decision contained in the asylum authority's decision of 25 April 2019 as regards the country of destination and ordered that FMS and FNZ be removed under escort to Afghanistan.

FMS and FNZ lodged an objection to those amending decisions before the asylum authority, acting as a migration supervision authority. By orders of 28 June 2019, their objection was rejected; no

appeal lies against those orders, in accordance with Article 65(3 ter) of the Law on entry and residence of third-country nationals.

FMS and FNZ brought an action before the referring court, requesting it to annul those orders and to order the asylum authority to conduct a fresh procedure, claiming, first of all, that those orders constitute return decisions which must be amenable to a judicial action and, next, that those return decisions are illegal. FMS and FNZ claimed that the asylum authority ought to have examined the substance of their application for asylum since they had not been readmitted to the territory of Serbia and since Article 51(2)(f) of the Law on the Right of Asylum introduces a new concept of 'safe country of transit', which is contrary to EU law[5].

In addition, FMS and FNZ brought an administration action for failure to act before the referring court against the aliens policing authority at first instance, seeking a declaration that that authority failed to fulfil its obligations by not assigning them accommodation outside the Röszke transit zone.

SA and his infant child, SA Junior, who are Iranian nationals, were in the same situation as FMS and FNZ, in so far as they were held in the Röszke transit zone for the same reasons, on the same grounds and in the same conditions.

Preliminary questions referred to the Court

This led the referring State to ask whether EU law, and in particular Article 47 of the Charter, must be interpreted as meaning that, when the detention of an applicant for international protection or a third-country national illegally staying on the territory of a Member State is manifestly contrary to the rules of EU law, a court of a Member State may, by way of interim relief, require the competent national authority to assign to the illegally detained person accommodation which is not a place of detention.

Reasoning of the Court

The Court first recalled that, according to its well-established case law, Articles 9 RCD and 15 RD, as well as Article 47 of the Charter, have direct effect (para. 288-289).

It added that national legislation which does not guarantee any judicial review of the lawfulness of a detention undermines the essential content of the right to effective judicial protection, guaranteed in Article 47 of the Charter (para. 290). It follows that, in the absence of national provisions to this end, a national court should declare that it has jurisdiction to examine the lawfulness of the detention, to decide if the detention was and remains valid, an alternative measure if detention does not seem or no longer seems necessary or proportionate or, if this is not the case or if the detention is unlawful, to order the release of the person concerned (para. 293).

Lastly, the Court judged that, since material reception conditions of asylum seekers include the grant of a financial allowance or the grant of housing in kind, and Article 26 RCD requires that an appeal must be available against decisions relating to the granting of material reception conditions, an asylum seeker may rely, before the court with jurisdiction under national law, on his or her right to receive either a financial allowance enabling that applicant to house himself or herself, or housing in kind, as that court has, under EU law, the possibility to grant interim relief pending its final decision (para. 298). This, however, concerns only applicants for international protection: as to

[5] On this point, see below, Chapter 2.

third-country nationals whose applications for asylum have been rejected, the Court only has jurisdiction to order his or her immediate release if the detention is found to be unlawful (para. 300).

Elements of judicial dialogue

To define the jurisdiction of national courts as to the consequences of unlawful detention, the Court relied heavily on its *M.* case[6], in which it already ruled that Article 15 RD had direct effect and that national courts must be able to substitute their own decision for that of the administrative authority that ordered a detention, and to order either an alternative measure to detention or the release of the person concerned. It also relied on *Factortame* and *Krizan* to assert national courts' jurisdiction 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 European Union law. However, it is the first time that the Court has gone so far as the jurisdiction of national courts to grant interim relief to guarantee an asylum seekers' right to housing.

1.2. Definition and lawfulness of detention

Relevant CJEU and ECtHR jurisprudence

- CJEU, Judgment [GC] of 14 May 2020, *FMS, FNZ, SA, SA Junior*, C-924/19 PPU, C-925/19 PPU
- ECtHR, Judgment of 14 March 2017, *I. and A. v. Hungary*, No. 47287/15
- ECtHR, Judgment [GC] of 21 November 2019, *L. and A. v. Hungary*, No. 47287/15

Short overview of the CJEU and ECtHR jurisprudence

Given national courts' powers to guarantee the right of third-country nationals to effective justice, to rule on the legality of detention and to provide for measures apt for effective protection even though the applicable national law does not provide for them, it is particularly important for those national courts to have a well-established definition of 'detention' to rely on, to know precisely the conditions for a detention to be lawful.

The definition of 'detention' is all the more important in view of the fact that the two European courts diverged on the qualification of 'detention' regarding the very same applicants and transit zones. Indeed, in its *I. and A.* case, the Grand Chamber of the ECtHR found that applicants for international protection are not 'detained' when they have the legal possibility to leave the zone. The CJEU – which agreed on this point with the ECtHR chamber that first heard the *I. and A.* case – came to a different finding. However, those different findings are explained by the slightly different legal situations of the applicants at the moment when their case was heard. This judicial dialogue between the two courts led the CJEU to highlight the crucial importance for national courts to determine *when* they assess whether a third-country national is detained or not.

As to the condition of lawfulness, the CJEU also gave guidelines in its *FMS* case to national courts concerning, on the one hand, the application of the proportionality test to the issue of the maximum length of detention and, on the other hand, the reasons that can authorize national authorities to hold a third-country national in detention.

[6] For an extensive analysis of this case, see ReJus Casebook, pp. 147 sq.

Main question addressed

- **Are third-country nationals held in transit zones at States' borders in 'detention' within the meaning of the Reception Conditions and Return Directives?**

According to the CJEU in *FMS, FNZ, SA, SA* Junior (2020, C-924/19 PPU & C-925/19 PPU)[7], 'detention' means "the confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement". That definition is the same whatever the status of the migrant detained (third-country nationals subject to return proceedings or asylum seekers). It can apply, under some conditions, to migrants held in transit zones at State borders.

The *Return Directive* does not give a definition of 'detention'. However, it is defined by Article 2(h) of the *Reception Conditions Directive*, according to which detention is:

> "the confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement".

In *FMS, FNZ, SA, and SA Junior*, ruled on 14 May 2020, concerning asylum seekers held in a transit zone at the Serbian-Hungarian border, the Grand Chamber of the CJEU decided that detention, as mentioned in Article 15 RD, has to be defined in the same way and applies only to migrants who did not choose to stay in such transit zone but who are held there by national authorities.

Preliminary questions referred to the Court

As to the definition of detention, the referring court asked the CJEU whether:

- *Article 2(h) of [Directive 2013/33], applicable pursuant to Article 26 of [Directive 2013/32], read in the light of Article 6 and Article 52(3) of the Charter, [must] be interpreted as meaning that accommodation in a transit zone in circumstances such as those in the main proceedings (a zone which an applicant cannot lawfully leave on a voluntary basis regardless of his destination) for a period exceeding the four-week period referred to in Article 43 of [Directive 2013/32] constitutes detention* (Question 3b, para. 79);

- *Recitals 17 and 24 and Article 16 of [Directive 2008/115], read in the light of Article 6 and Article 52(3) of the Charter, [must] be interpreted as meaning that accommodation in a transit zone in circumstances such as those in the main proceedings (a zone which an applicant cannot lawfully leave on a voluntary basis regardless of his destination) constitutes deprivation of liberty for the purposes of those provisions* (Question 4a, para. 79).

Reasoning of the Court

As to the definition of detention at stake in this case, the court reasoned in two steps:

1. The concept of detention (para. 216-225)

[7] CJEU, Judgment [GC] of 14 May 2020, *FMS, FNZ, SA, SA Junior*, C-924/19 PPU, C-925/19 PPU.

As regards the concept of 'detention', within the meaning of Directive 2013/33, the Court emphasized first that, in accordance with Article 2(h) of that directive, the concept extends to any confinement of an applicant for international protection by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement.

Thus, the concept of detention assumes a deprivation, and not a mere restriction, of freedom of movement, which is characterized by the fact that the person concerned is isolated from the rest of the population in a particular place.

According to the court, such an interpretation is confirmed by the origins of Article 2(h) of the directive, which is based on the Recommendation of the Committee of Ministers of the Council of Europe on measures of detention of asylum seekers, of 16 April 2003, and on the UNHCR Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers of 26 February 1999. That recommendation defines measures of detention of asylum seekers as "any confinement of asylum seekers within a narrowly bounded or restricted location, where they are deprived of liberty", while making clear that "persons who are subject to restriction on domicile or residence are not generally considered to be subject to detention measures". Moreover, the UNHCR Guidelines define the detention of asylum seekers as "the deprivation of liberty or confinement in a closed place which an asylum seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities" and that "[the distinction] between deprivation of liberty (detention) and lesser restrictions on movement is one of 'degree or intensity and not one of nature or substance"'.
The Court also relied on the context of Article 2(h) of Directive 2013/33. This context reveals that detention must be understood as referring to a coercive measure of last resort which is not satisfied by limiting the movement of an applicant for international protection. Thus, Article 8(2) of the directive provides that a detention measure may be ordered only if other less coercive alternative measures cannot be applied effectively. Under Article 8(4) of that directive, moreover, Member States are to ensure that they lay down in national law the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place. This last alternative to detention must be taken to refer to the restrictions on the freedom of movement of the applicant for international protection which are authorized by Article 7 of Directive 2013/33, it being understood that, in accordance with that article, such restrictions may not affect the unalienable sphere of private life and are to allow the person concerned sufficient scope for guaranteeing access to all benefits under that directive.

The Court thus rules that, according to the wording, origins and context of Article 2(h) RCD, the detention of an applicant for international protection constitutes a coercive measure that deprives that applicant of his or her freedom of movement and isolates him or her from the rest of the population, by requiring him or her to remain permanently within a restricted and closed perimeter.

It also considered that the same definition was to be applied to detention for the purposes of Directive 2008/115, as there is nothing to support the view that the EU legislature intended to give the concept of 'detention', in the context of Directive 2008/115, a different meaning from that which it has in the context of Directive 2013/33. It follows, then, that the 'detention' of a third-country national who is illegally staying on the territory of a Member State, within the meaning of Directive 2008/115, constitutes a coercive measure of the same nature as that defined in Article 2(h) of Directive 2013/33 and described in paragraph 223 of this judgment.

2. Application of the concept to the facts of the case (para. 226-231)

The Court then applied its reasoning to the facts of the case and found that the national authorities *detained* the applicants in the transit zone of the airport.

It noted in particular that the applicants had been required, since the date on which they entered Hungarian territory, to stay permanently in the transit zone, which was surrounded by a high fence and barbed wire. According to the referring court, the applicants were housed in containers with a floor area of not more than 13 m². They could not, without permission, receive visits from persons from outside that zone and their movements within the zone were limited and monitored by the members of the law enforcement services permanently present in the zone and its immediate vicinity.

The Court emphasized that the argument raised by the national government whereby the applicants were free to leave the Röszke transit zone to travel to Serbia could not call into question the assessment that the placing of those applicants in that transit zone cannot be distinguished from a regime of detention. This is so because it explicitly followed from the orders for reference – and it was not disputed by the national government – that any entry by the applicants into Serbia would be considered illegal by that third country and that, consequently, the applicants would be exposed to penalties there. Accordingly, and in particular for that reason, the applicants could not be considered to have an effective possibility of leaving the transit zone. Moreover, by leaving Hungarian territory the applicants would risk losing any chance of obtaining refugee status in Hungary, since according to national law, the applicants can submit a new application for asylum only in one of the two transit zones of Röszke and Tompa (Hungary). In addition, it is apparent from the same law that national authorities may decide to close an international protection procedure if the applicant leaves one of those two zones, a decision that cannot be contested in a contentious administrative procedure.

Conclusion of the Court

The Court concluded from the foregoing considerations that Directives 2008/115 and 2013/33 must be interpreted as meaning that the obligation imposed on a third-country national to remain permanently in a transit zone the perimeter of which is restricted and closed, within which that national's movements are limited and monitored, and which he or she cannot legally leave voluntarily, in any direction whatsoever, appears to be a deprivation of liberty, characterized by 'detention' within the meaning of those directives.

Therefore, when such a detention can be identified, national courts have the power, in order to guarantee to detained third-country nationals their right to effective justice as enshrined in Article 47 CFR, to rule on the lawfulness of this detention (see above) and to draw the consequences of its unlawfulness (see below).

Elements of judicial dialogue

To give a comprehensive definition of the concept of detention, relevant for the application of both the Reception Conditions and the Return Directives, the CJEU mostly relied on its case law relating to interpretation of EU law, which requires that account be taken not only of its wording, but also of its context, the objectives pursued by the rules of which it is part and, where appropriate, its origins[8].

[8] CJEU, Judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers*, C-263/18, EU:C:2019:1111, paragraph 38 and the case law cited.

However, it also mentioned the decision *I. and A. v. Hungary* ruled by the Grand Chamber of the ECtHR in late 2019[9]. This is a very important point, since this case concerned the very same applicants, in the same transit zone. However, it led the ECtHR to a different legal qualification of the situation of the applicants.

Indeed, the ECtHR Grand Chamber held that "in the absence of a direct threat to the applicants' life or health (…) the discontinuation of the applicants' asylum proceedings in Hungary was a legal issue which did not affect their physical liberty to move out of the transit zone by walking into Serbian territory". Thus, "the risk of the applicants' forfeiting the examination of their asylum claims in Hungary and their fears about insufficient access to asylum procedures in Serbia (…) did not render the applicants' possibility of leaving the transit zone in the direction of Serbia merely theoretical". The Grand Chamber therefore concluded that the applicants were not 'detained' by the Hungarian authorities (para. 248).

On the contrary, the ECtHR Chamber found in 2017[10] that the applicants' confinement to the transit zone "constituted a *de facto* deprivation of liberty". To get to this conclusion, the Chamber relied on the same findings as the CJEU in 2020, i.e., "the fact that the applicants were placed in a guarded compound which could not be accessed from the outside and which they could not leave towards Hungary, nor towards Serbia without forfeiting their asylum claims and running the risk of refoulement" (see para. 196 of the Grand Chamber decision).

To understand those two different findings – 'detention' according to the CJEU, non- detention according to the Grand Chamber of the ECtHR – it is important to underline, as pointed out by the referring court (para. 71 of the CJEU decision), that the applicants were in slightly different situations when the two courts issued their judgments. Indeed, when the ECtHR Grand Chamber issued its decision, the applicants had "entered the Röszke transit zone of their own initiative", since they "did not cross the border from Serbia because of a direct and immediate danger for their life or health in that country" (*I. and A.*, para. 222-223). On the contrary, when the CJEU issued its ruling, the applicants had been transferred to another sector of the transit zone, "reserved for third-country nationals whose applications for asylum have been rejected". Thus, "they did not enter that sector voluntarily or from Serbia, but from the sector of that transit zone reserved for asylum seekers" (*FMS and others*, para. 72-73).

Main question addressed

How does the proportionality test and the lack of cooperation of a third-country national affect the length of his/her detention?

According to the CJEU in its *FMS and others* case (2020, C-924/19 PPU & C-925/19 PPU)[11], Article 15(1) and (4) to (6) of Directive 2008/115 precludes legislation of a Member State which, on the one hand, does not provide that the detention of an illegally staying third-country national must be automatically considered unlawful at the end of a maximum period of 18 months and, on the other hand, does not ensure that that detention is necessary and proportionate, i.e., maintained only for as long as removal arrangements are in progress and executed with due diligence. Conversely, it judged that Article 9 of Directive 2013/33 does not require Member States to set a maximum period for continuing detention, provided that their national law guarantees that the detention lasts only so long as the ground on which it was ordered continues to apply and that the administrative procedures linked with that ground, which can be delayed by the third-country national's lack of cooperation, are carried out diligently. However, Article 43 of Directive 2013/32,

[9] ECtHR [GC], Judgment of 21 November 2019, *I. and A. v. Hungary*, No. 47287/15.
[10] ECtHR, Judgment of 14 March 2017, *I. and A. v. Hungary*, No. 47287/15.
[11] CJEU, Judgment [GC] of 14 May 2020, *FMS, FNZ, SA, SA Junior*, C-924/19 PPU, C-925/19 PPU.

related to border procedures, must be interpreted as not authorizing the detention of an applicant for international protection in a transit zone for a period of more than four weeks.

It has to be recalled that in the FMS case the asylum authority designated a transit zone as the place of residence of the applicants on 5 February 2019, where they remained for more than three months. Indeed, by an administrative decision of 25 April 2019, the asylum authority rejected the application for asylum made by FMS and FNZ. In consequence, by decision of 17 May 2019, the aliens policing authority ordered FMS and FNZ to reside in the sector of the transit zone reserved for third-country nationals whose applications for asylum have been rejected. At the time of the CJEU decision, they were still held in detention in this zone.

Preliminary questions referred to the Court

As to the maximum length of detention[12], the referring court therefore asked in substance:

- whether Article 43 of Directive 2013/32, according to which border procedures cannot exceed four weeks, must be interpreted as precluding the detention of an applicant for international protection in a transit zone for more than four weeks, even in the event of arrivals of a large number of applicants;

- whether Articles 8 and 9 of Directive 2013/33 and Article 15 of Directive 2008/115 must be interpreted as precluding the precise duration of the detention from being indeterminate

Reasoning of the Court

- *Concerning the maximum length of detention under Article 43(1) RCD (border procedures):*

The Court recalled in the first place (para. 235) that Article 43(1) of Directive 2013/32 gives Member States the possibility to provide, at their borders or in their transit zones, for specific procedures in order to decide on the admissibility, under Article 33 of that directive, of an application for international protection made at such locations or on the substance of that application in one of the cases provided for in Article 31(8) of that directive, provided that those procedures comply with the basic principles and fundamental guarantees set out in Chapter II of that directive. Under Article 43(2) of Directive 2013/32, those specific procedures must be carried out within a reasonable time, it being understood that if a decision rejecting the application for international protection has not been taken within a period of four weeks, the Member State concerned must grant the applicant entry to its territory and the application must be dealt with after that four-week period in accordance with the normal procedure. During this period, the applicant can lawfully be placed in detention by the State's authorities (para. 239).

Where arrivals of large numbers of applicants for international protection make it impossible to apply the specific procedures put in place by the Member States, pursuant to Article 43(1) of that directive, at their borders or in transit zones, those procedures may continue to be applied where and for as long as the applicants for international protection concerned are accommodated normally at locations in proximity to those borders or transit zones. This 'normal accommodation' standard means that States are precluded from holding applicants in detention. Those conditions of normal accommodation of applicants for international protection are governed by Articles 17 and 18 of Directive 2013/33, under which any applicant for international protection is to be

[12] For other important aspects of this decision, see below.

entitled to a financial allowance enabling him or her to be accommodated or to housing in kind in a place other than a detention centre (para. 245).

- *Concerning the maximum length of detention under Articles 8 and 9 RCD and 15 RD:*

The Court recalled that Article 9(1) RCD provides that an applicant for international protection is to be detained only for as short a period as possible and only for so long as the ground for his or her detention is applicable, while the administrative procedures relevant to the ground for detention are to be executed with due diligence and delays in those procedures that cannot be attributed to that applicant are not to justify a continuation of detention.

It should be noted, however, that no provision of Directive 2013/33 sets a specific period beyond which Member States are required to put an end to the detention of applicants for international protection. Nevertheless, the Court underlined that the failure, in national legislation, to fix a maximum duration of the detention of an applicant for international protection respects his or her right to liberty, as enshrined in Article 6 of the Charter, only in so far as that applicant enjoys, as required by Article 9 of Directive 2013/33, effective procedural safeguards that allow his or her detention to be ended as soon as it ceases to be necessary or proportionate in the light of the objective which it pursues. In particular, when the detention of an applicant for international protection is not limited in time, the determining authority, within the meaning of Article 2(f) of Directive 2013/32, must act with appropriate due diligence.

The Court then ruled that Article 9 of Directive 2013/33 does not preclude legislation of a Member State which does not specify a period after which the detention of an applicant for international protection would be automatically considered unlawful, 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.

As to Directive 2008/115, the Court judged that it follows from Article 15(5) and (6) that each Member State is to set a limited period of detention, which may not exceed six months, and which may not be extended except for a limited period not exceeding a further 12 months and only in cases where, regardless of all the reasonable efforts of the national authorities, the removal operation is likely to last longer owing to a lack of cooperation by the third-country national concerned or delays in obtaining the necessary documents from third countries. As that maximum period can in no case be exceeded, the detained person must be released immediately as soon as the maximum detention period of 18 months is reached.

Main question addressed

- **Is detention allowed on the ground of a third-country national's inability to provide for his/her needs?**

In its *FMS, FNZ, SA, SA Junior case* (2020, C-924/19 PPU & C-925/19 PPU)[13], the CJEU ruled that Articles 8 and 9 RCD and 15 and 16 RD preclude asylum seekers or third-country nationals from being detained on the sole ground that he or she cannot provide for his or her needs.

According to the national law at stake in this case, "a third-country national may be allocated a mandatory place of residence in a collective accommodation structure or in a reception centre

[13] CJEU, Judgment [GC] of 14 May 2020, *FMS, FNZ, SA, SA Junior*, C-924/19 PPU, C-925/19 PPU.

where he or she is not in a position to provide for his or her needs, where he or she does not have either suitable accommodation, or adequate material resources or income, or an invitation from a person required to assume responsibility for him or her, or family members who might be required to provide for his or her maintenance".

Preliminary questions referred to the Court

This led the referring State to ask the Court whether Articles 8 and 9 of Directive 2013/33 and 15 of Directive 2008/115 must be interpreted as precluding an applicant for international protection or a third-country national being placed in detention on the sole ground that he or she cannot provide for his or her needs.

Reasoning of the Court

Regarding asylum seekers, the Court simply stated that considering the applicant's inability to provide for his or her needs as a valid ground for his or her detention would undermine the essential content of the material reception conditions that must be provided to the applicant during the examination of his or her application for international protection. It would therefore comply neither with the principles nor with the objective of Directive 2013/33.

As to third-country nationals, the Court recalled that it follows expressly from Article 15(1) RD that it is only where, in the light of an assessment of each specific situation, the enforcement of the return decision in the form of removal risks being compromised by the conduct of the person concerned that the Member States may deprive that person of his or her liberty and detain him or her. Therefore, the fact that the third-country national is the subject of a return decision and is not capable of providing for his or her needs is not sufficient reason to place him or her in detention on the basis of Article 15 RD.

1.3. Guidelines emerging from the analysis

The *FMS, FNZ, SA, SA Junior* case is one of the landmark cases of the CJEU in the field of detention of migrants. From its analysis, eight guidelines emerge, as to the definition, lawfulness and procedural safeguards of detention. This case is thus of major importance for national courts that are called by the CJEU, on the ground of Article 47 CFR and even in the absence of national legislation conferring such jurisdiction on them, to rule on the lawfulness of a detention and to order, if it is proved to be unlawful, the release of the person detained.

Thus, according to the principles applied in this case:

- **Detention means** the confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement.

- This definition is the same **whatever the status of the migrant** detained (third-country nationals subject to return proceedings or asylum seekers).

- Third-country nationals who are obliged by national authorities to remain permanently in a **transit zone**, the perimeter of which is restricted and closed, and which he/she cannot leave voluntarily, are held 'in detention' within the meaning of Directive 2008/115 and 2013/33.

- Under Directive 2008/115, detention of an illegally staying third-country national must be **automatically considered unlawful at the end of a maximum period of 18 months**. Moreover, third-country nationals cannot be detained on the sole ground that he/she cannot provide for his/her needs.

- Detention must be maintained only for **as long as removal arrangements are in progress and executed with due diligence**.

- There is **no maximum period for continuing detention under Directive 2013/32**, which only requires Member States to guarantee that the detention lasts only so long as the ground on which it was ordered continues to apply and administrative procedures are carried out diligently.

- Under Directive 2013/32, detention of an applicant for **international protection** in a **transit zone** cannot last for a period of more than **four weeks**.

- **Article 47 CFR** requires national courts to:
  - assert their **jurisdiction to rule on the legality** of detention;
  - **order the release** of third-country national unlawfully detained;
  - grant **interim relief** pending its final decision;
  - assert their jurisdiction to hear and **determine the action** seeking to guarantee the right to receive either a **financial allowance or housing in kind**.

2. Migrants' rights and collective expulsion, return and Dublin proceedings

Return and removal decisions generate mass litigations in EU Member States, often grounded upon potential violation of Article 3 ECHR – in the event of return to a State where the applicant would risk torture and/or inhuman and degrading treatment – and 8 ECHR – in the event of return to a State where the applicant has no family ties whatsoever.

However, in line with the objectives of the FRICoRe project, this chapter is focused on expulsion, return and Dublin proceedings in the light of the requirements of Article 47 CFR. It exposes the main issues raised by CJEU's most recent case law on the right to be heard in collective expulsion cases and return proceedings (I.2.1), on the suspensive effect of an appeal in return proceedings (I.2.2), and on judicial review in Dublin transfer, in particular when the applicant for asylum claims that there is a real and proven risk of inhuman or degrading treatment within the Member State where he or she is supposed to be transferred (I.2.3).

Questions addressed in this chapter:

- **What is the impact of Article 47, read in conjunction with the right to a legal remedy as enshrined in Article 13 of the Return Directive, upon return proceedings?**
- **Does a judicial appeal in asylum adjudication have an automatic suspensive effect on the whole return procedure in the framework of a domestic combined asylum and return procedure?**
- **What is the extent of national courts' powers to reject a Dublin transfer in cases of insufficient medical care in the Member State of transfer?**

2.1. Right to be heard in collective expulsion cases and return proceedings

Relevant CJEU case

- CJEU, Judgment [GC] of 14 May 2020, *FMS, FNZ, SA, SA Junior*, C-924/19 PPU, C-925/19 PPU

Short overview of EU law

The right to be heard before the issuing of a return (expulsion) decision may be of great importance due to the irrevocable consequences of the return decision – the removal of the migrant to the country of origin. Thus, it is important to check that the expulsion would not lead to violation of his/her fundamental rights. In order to avoid such violations, it is important that the competent national authorities offer the individual the possibility to be heard. This is necessary when the migrant has not been previously heard, or if a long time has passed since he/she was heard, in order to check if new elements or circumstances have intervened which may prevent the return.

The Return Directive (2008/115/EC) does not provide for an explicit right to be heard either in the administrative phase of return proceedings or during the judicial phase of these proceedings. The only procedural guarantee provided by the directive is a right to an effective legal remedy in Article 13.

Short overview of CJEU case law

A prolific judicial dialogue has developed between the CJEU and domestic courts from various Member States for the purpose of determining concrete safeguards for the right of returnees to be heard by administrative and judicial authorities during return proceedings.[14]

These rules can be summarized as follows. For a detailed analysis supported by extensive European and domestic jurisprudence see Chapter 2 of the 2018 ReJus Casebook on Effective Justice in Asylum and Immigration[15].

1. Article 41 Charter applies only to the EU institutions, bodies, offices, and agencies. However, the Member States are obliged to respect the rights of individuals to be heard by administrative authorities before they adopt a decision negatively affecting their rights, when acting within the scope of EU law, on the basis of the general principles of the rights of defence[16].
2. Member States are bound to respect the right to be heard even in the absence of an express EU or national legislation providing for it[17].
3. As a counterpart to the right to be heard, a third-country national is required to cooperate with the competent authorities and to provide them with all relevant information, in particular all information that might militate against a return decision being issued[18].
4. Member States can place restrictions on the rights of the defence. However, these restrictions do not constitute unfettered prerogatives. They must comply with the objectives of general interest pursued by the measure in question. Likewise, they must not involve, with regard to the objectives pursued, a disproportionate and intolerable interference infringing upon the very substance of the guaranteed rights[19].
5. In situations of combined decisions (e.g., ending legal stay and return decisions), the CJEU clarified that Member States are not obliged to hear the third-country national before the adoption of the return decision, as long as the individual has been effectively heard during the previous administrative procedure (e.g., asylum proceedings[20]). Mindful of the objective

[14] For an in-depth assessment of the judicial dialogue, see the analysis of judge Bostjan Zalar, 'Impact of Judicial Dialogue(s) on Development and Affirmation of the Right to Effective Legal Remedy from Articles 13 and 14 of the Return Directive', Chapter 13 in Madalina Moraru and others (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (Hart 2020).

[15] For a full list, see 2018 ReJus Casebook, section 2.5. Guidelines for judges emerging from the analysis, pp. 90 sq.

[16] See C-141/12 and C-372/12, *YS and Others*, EU:C:2014:2081, para. 61; C-166/13, *M.*, EU:C:2014:2336, para. 44; Case C-249/13, *K. B. v. Préfet des Pyrénées-Atlantiques*, ECLI:EU:C:2014:2431, para. 32-33.

[17] Case 301/87, *France v. Commission*, ECLI:EU:C:1990:67, para. 29; Boudjlida, para. 39.

[18] C-166/13, *M.*, EU:C:2014:2336; C-249/13, *K. B.*, ECLI:EU:C:2014:2431.

[19] Ibid.

[20] In *M.* a third-country national was heard during the asylum proceedings and while in public custody; the adoption of the first return decision was taken at the same time as the refusal of the residence permit, while the second return decision was adopted at the same time as the rejection of the asylum application, without informing the applicant that following the rejection of the asylum application, the return decision could be taken at the same time.

of the Return Directive, the Court held that the right to be heard should not be used to unduly prolong return procedures[21].

6. Finally, even if the right to be heard has been breached, it would render a return-related decision invalid *"only insofar as the outcome of the procedure would have been different if the right was respected"*[22]. In another case, the Court emphasized the impact a violation of the right to be heard would have on other administrative duties. National courts have to be aware that *"where the person concerned is not afforded the opportunity to be heard before the adoption of an initial decision […] compliance with the obligation to state reasons is all the more important because it constitutes the sole safeguard enabling the person concerned, at least after the adoption of that decision, to make effective use of the legal remedies available to him in order to challenge the lawfulness of that decision"*[23]. Depending on circumstances, the right to be heard can then be linked with the right to an effective remedy[24].

Main question addressed

- **What is the impact of Article 47, read in conjunction with the right to a legal remedy as enshrined in Article 13 of the Return Directive, upon return proceedings?**

In the *FMS, FNZ, SA, SA Junior case* (2020, C-924/19 PPU & C-925/19 PPU)[25], the CJEU ruled that Article 13 RD, read in the light of Article 47 CFR, must be interpreted as precluding legislation of a Member State under which the amendment by an administrative authority of the country of destination stated in an earlier return decision can be contested by the third-country national concerned only by means of an action brought before an administrative authority, without a subsequent judicial review of the decision of that authority being guaranteed. In such a situation, the principle of primacy of EU law and the right to effective judicial protection, guaranteed by Article 47 of the Charter of Fundamental Rights, must be interpreted as requiring the national court, dealing with an action contesting the legality, under EU law, of the return decision consisting in such an amendment of the country of destination, to declare that it has jurisdiction to hear that action.

Facts[26]

In addition to the issues regarding the legality of detention in the Röszke transit centre, which were already discussed in section I.1, these two joined cases also raised a salient issue regarding the interpretation of the right to a legal remedy under Article 13 of the Return Directive, read in light of Article 47 CFR. Unlike Article 46, Article 13 Return Directive does not guarantee a right to an effective remedy before a court or tribunal, but instead has endorsed the formulation of Article 13 ECHR: "competent judicial/administrative authority or another competent body composed of members who are impartial and who enjoy safeguards of independence".

[21] *Mukarubega*, para. 71.
[22] G&R C-383/13 PPU, EU:C:2013:533. National jurisprudence on the legal remedies against violation(s) of the right to be heard will be discussed in more detail under the section dedicated to Article 13 of the Return Directive.
[23] Case C-417/11 P, *Council v. B.*, ECLI:EU:C:2012:718, para. 51.
[24] C-181/16 *G.*, ECLI:EU:C:2018:465.
[25] CJEU, Judgment [GC] of 14 May 2020, *FMS, FNZ, SA, SA Junior*, C-924/19 PPU, C-925/19 PPU.
[26] This section discusses only the return part of the preliminary rulings; the legality of detention is discussed in Chapter 1.

The two cases concern the lack of access to court of the applicants to challenge the administrative decision amending the country of return from Serbia to Afghanistan and Iran respectively. They could challenge this decision only before the same asylum authority which rejected their claims and issued the return decisions. This rejection was final and not amenable to appeal before a court. Hungarian law provided only for a general power to review the legality of return decisions to the Public Prosecutor's Office and authorized only the latter to challenge such a decision, where appropriate, before a court (para. 111).

Therefore, the applicants brought an action before the referring court seeking to annul the amended return orders, as they argued these should be considered as new return decisions, due to the change of the country of return, and should thus be opened to judicial review according to Article 47 of the Charter.

Preliminary questions referred to the Court

The referring court asks, in essence, whether Article 13 of the Return Directive, read in the light of Article 47 of the Charter, must be interpreted as precluding the legislation of a Member State which, whilst it does provide for an appeal against the decision of the administrative authority amending the country of return indicated in the initial return decision, entrusts the hearing of the appeal to that same authority, with no possible judicial review solely at the initiative of the returnee (para. 109).

Reasoning of the Court

The Court started by analysing whether the challenged administrative decision that changed the country of return falls within the scope of the right to an effective legal remedy under Article 13 of the Return Directive. It found that the decision should be qualified as a return decision, and not as a removal order as the Hungarian government argued. The obligation to state the country of return is stipulated by Article 6 of the Return Directive as an essential component of a return decision. Therefore, when the competent national authority amends the country of destination stated in an earlier return decision, the Court found that "it makes an amendment to that return decision that is so substantial that that authority must be considered to have adopted a new return decision, within the meaning of Article 3(4) of Directive 2008/115".

On the basis of Article 5 of the directive, when the competent national authority is contemplating the adoption of a return decision, that authority must necessarily observe the principle of non-refoulement before the adoption of the amending return decision, in relation to the new country of return (see, to that effect, judgments of 11 December 2014, Boudjlida, C 249/13, EU:C:2014:2431, paragraph 49, and of 8 May 2018, K.A. and Others (Family reunification in Belgium), C 82/16, EU:C:2018:308, paragraph 103).

As regards effective access to a legal remedy, the Hungarian legislation did not confer an individual right to challenge the return decision before a court, whereas this right was conferred only on the Public Prosecutor's Office (para. 125). The CJEU found that the requirements of independence and impartiality that an authority must fulfil under Article 13 of the Return Directive are quite vague, and should be given more concrete meaning in light of Article 47 Charter standards (para. 127). In these circumstances, the CJEU held that while, according to Article 13(1) RD, Member States may provide in their legislation that return decisions may be contested before authorities other than judicial authorities, when exercising such an option they must nonetheless comply with Article 47 of the Charter, which requires that the decision of an authority that does not itself satisfy the conditions laid down in that article be subject to subsequent control by a judicial body that

must, in particular, have jurisdiction to consider all the relevant issues. Article 47 of the Charter requires the Member States to guarantee, at a certain stage of the proceedings, the possibility for the third-country national concerned to bring any dispute relating to a return decision adopted by an administrative authority before a court.

Therefore, that national legislation under which the addressee of an administrative return decision cannot challenge the regularity of that decision before at least one judicial body does not comply with the requirements of Article 13(1) of Directive 2008/115 and of Article 47 of the Charter para. 130).

The CJEU thus held that a change in the destination country of a return decision (expulsion) may have fatal consequences, and it relates to the essential element of a return decision, that is, the obligation to return. The Court openly refused the government's argument that the change is nothing more than a decision on removal which implemented a return decision (para. 120), and made clear that a change in the destination country amounts to a new return decision against which the applicant must have not just an effective legal remedy, but an effective judicial remedy. The national court should check if return would amount to refoulement (para. 116 and 118-119).

Elements of judicial dialogue

The vertical judicial dialogue between the Hungarian court and the CJEU is of both domestic and Europe-wide relevance. The CJEU clarifies that Article 47 of the EU Charter requires an interpretation of Article 13 of the Return Directive as conferring a right of returnees to have their appeals reviewed by a court, and not just by an administrative authority. The Commission proposal for the recast of the Return Directive incorporates this higher standard for the protection of the right to an effective judicial remedy.

Article 47 of the Charter is used by the CJEU to enhance the right to a legal remedy in the return procedure into a right to an effective judicial remedy. The standards of independence and impartiality seem to be fulfilled only when a court itself fulfilling the standards of independence and impartiality reviews the decisions of an administrative authority.

The standards of the right to an effective legal remedy provided by Article 13 RD have been raised by the CJEU on the basis of Article 47 EU Charter. Notably, the Grand Chamber judgment of the CJEU in the *FMS and others* case established that Article 47 of the Charter requires Member States to confer on returnees a right to a judicial review of the administrative return decision. Furthermore, the Court established that the court or tribunal seized of an action challenging the legality of a return decision amending the country of return must declare that it has jurisdiction to hear the appeal on the basis of the direct effect of Article 47 of the Charter. Some domestic courts have long followed the CJEU enhanced interpretation of Article 13 RD based on Article 47 Charter. In this regard, the **Austrian High Administrative Court** required the appeal authority to fulfil the higher standards of impartiality and independence set out by Article 47 of the Charter (Ro 2011/22/0097, 31 May 2011). In addition, the same court required the conferral of legal aid in the return procedure on the basis of Article 47 Charter, even if it is not explicitly foreseen by the European and/or national legislation (Ro 2015/21/0032, 3 September 2015).

As regards the judicially developed safeguards for the right to be heard during collective expulsions, the following emerges from the analysis of the ECtHR's case law on the basis of *K. v. Italy*[27] and *N.D. and N.T. v. Spain*[28]:

1. Article 4 of Protocol 4 ECHR guarantees the right to an individualized and genuine examination, which is respected when prior to the removal the individual is given the opportunity to put arguments against his/her expulsion to the competent authority on an individual basis; the right to an individual interview in all circumstances is not covered by the ECHR (no absolute right to be heard individually).

2. The removal does not amount to a collective expulsion when the absence of an individualized examination is the consequence of the culpable conduct of the individual concerned.

3. The right to an effective remedy against expulsion is guaranteed when the individual concerned has been given adequate information and opportunity to appeal against the refusal-of-entry order.

4. The right to be informed promptly, in a language which he/she understands, of the reasons for his/her arrest and of any charge against him/her is violated when: (a) the refusal-to-entry order does not provide any reference to the individual's detention or to legal or factual reasons for such measure; and (b) the order is not communicated promptly to the individual.

Impact on national case law in Member States other than the one of the court referring the preliminary question to the CJEU

Ireland (right to be heard in application for subsidiary protection)

In the case of *N.A.T. v. The Refugee Appeals Tribunal & ors.* [2018] IEHC 476 (7 August 2018), the High Courts of Ireland referred to Case C-560/14, *M. v. Minister for Justice and Equality*, 9 February 2017, when discussing the question of "whether in European Union law an applicant for subsidiary protection must be accorded an oral hearing of his/her application including the right to call or cross-examine witnesses when the application is made in circumstances where the Member State concerned operates two separate procedures one after the other for examining applications for refugee status and for subsidiary protection". In *M. v. Minister for Justice and Equality* the CJEU referred to its judgment in *Boudjlida* by analogy in stating that "[t]he right to be heard guarantees the applicant for subsidiary protection the opportunity to put forward effectively, in the course of the administrative procedure, his views regarding his application for subsidiary protection and grounds that may give the competent authority reason to refrain from adopting an unfavourable decision" (para. 31).

The references in the CJEU's judgment to *K.B.* and the right to be heard were repeated in the subsequent Irish case of *M.L. & ors. v. The Minister for Justice, Equality & the Attorney General Ireland* [2017] IEHC 570 (20 June 2017), which concerned the application by three applicants for judicial review of a decision refusing both asylum and subsidiary protection. All three applicants complained about Ireland's two-stage process in which applications were examined both as

[27] ECtHR [GC], Judgment of 15 December 2016, No. 16483/12.
[28] ECtHR [GC], Judgment of 13 February 2020, No. 8675/15 and 8697/15. See more in Chapter 2 of the 2018 ReJus Casebook on Effective Justice in Asylum and Immigration.

applications for refugee status and applications for subsidiary protection. In other EU states, this procedure is adopted as a single uniform procedure.

United Kingdom (content of the right to be heard)

In the case of *R (on the application of Masalskas) v. Secretary of State for the Home Department (Regulations 24AA and 29AA EEA Regs)* IJR [2015] UKUT 677 (IAC) the Upper Tribunal (Immigration and Asylum Chamber) of the UK dealt with the right to be heard under Article 47 of the Charter of Fundamental Rights. The court disagreed with the applicant's argument that the right to be heard would be improperly circumscribed by the delimitation of the prohibition to prevention of return. He argued that the right "must be understood to encompass not just the hearing itself but pre-hearing stages, including preparation of a case and oral conferencing with legal advisors" (para. 34). However, the court noted that "there is plainly no right" to be present in the UK before an actual hearing. Addressing the applicant's claims regarding Article 47 of the Charter the tribunal referred to a claim in its previous decision in *A., R (on the application of) v. Secretary of State for the Home Department (EEA/s 10 appeal rights: effect)* IJR [2015] UKUT 436 (IAC) that Article 47 is context-specific. This previous decision cited the CJEU's judgment in *K.B.*, specifically referring to its finding that fundamental rights are not "unfettered prerogatives" and may be restricted if such restrictions are proportionate and tolerable (i.e., they do not infringe upon the very substance of the right) and the measures restricting the right pursue an objective of general interest (para. 50). This point was also reiterated by the Extra Division, Inner House of the Scottish Court of Session in *W. v. Secretary of State for the Home Department* [2016] ScotCS CSIH_42 (10 June 2016). The tribunal went on in the *A.* case to note that the provisions of Directive 2004/38/EC ('the Citizens Directive') should be consulted when finding the correct balance in these cases. The directive is, according to the tribunal, "entirely compatible with Article 47 of the Charter", which does not require the "wholesale conferring of suspensive rights of appeal against any EEA decision" (para. 51). In noting the context-specific nature of Article 47, these same paragraphs of the *Ahmed* case were also relied on by the High Court of England and Wales in *X, R (on the application of) v. Secretary of State for the Home Department* [2016] EWHC 1997 (Admin) (29 July 2016).

Most recently in the UK, a different aspect of *K. B.* regarding the right to be heard was relied on in the Scottish case of *Petition to the Nobile Officium by RR against (First) Her Majesty's Advocate and (Second) LV* [2021] HCJAC 21 (18 March 2021). In discussing the right to be heard, the High Court of Justiciary in Scotland noted, on the basis of *K. B.* (para. 39), that where EU law stipulates a right to be heard, this has to be observed "even where applicable national legislation did not expressly provide for it" (para. 17).

France (right to be heard prior to the adoption of a return decision)

In this case (*Council of State, 5 June 2015, No. 375423*), an applicant asked an administrative court to annul the prefectoral decision of placement in administrative detention. The administrative court rejected this request. On appeal, the administrative court granted this request, recognizing that the decision had been taken in disregard of the right to be heard, as the applicant had not been given the opportunity to present his observations on the detention measure. According to this court, although the person concerned had been heard by the police after his delivery to the French authorities by the Swiss authorities, he had not then been specifically informed that he was likely to be placed in detention and had not been heard on this placement before the decision taken was notified to him. The administrative court of appeal based its decision solely on the fact that the person concerned had not been given the opportunity to present his observations specifically on the detention, whereas it had noted that the person concerned had been heard and had already been the subject of a prefectoral decision requiring him to leave French territory.

Following an appeal by the Minister of the Interior, the Council of State ruled that the administrative court of appeal had made an error in law. Indeed, if a third-country national was able to be heard on the irregularity of the stay or the prospect of removal, it is not necessary for the safeguarding of the rights of defence that he/she be invited to present specific observations on the obligation to leave the territory or on the decision of placement in detention. It is sufficient that the person concerned has been given the opportunity, at some point, to present his/her observations to ensure that the requirements of the right to be heard are met. The Council of State justified its interpretation on the basis of two decisions of the CJEU (CJEU, 5 November 2014, aff. C-166/13, *M.* and CJEU, 11 December 2014, aff. C-249/13, *K. B.* c/ préfet des Pyrénées-Atlantiques) which state that the right to be heard prior to the adoption of a return decision implies that the administrative authority must give the foreigner in an irregular situation the opportunity to present, in a useful and effective manner, his/her view on the irregularity of the stay and the reasons which might justify the authority's refraining from taking a return decision against him/her. However, it does not imply that the administration must give the person concerned the opportunity to present his/her observations specifically on the obligation to leave French territory or on the decision of placement in detention pending enforcement of the removal order, once he/she has been heard on the irregularity of the stay or the prospect of removal.

Thus, the Council of State ruled that the right of a foreigner to be heard prior to the adoption of a return decision does not imply that the administrative authority should give the person concerned the opportunity to present his/her observations in a specific manner on the decision of placement in detention.

Numerous other decisions of administrative courts of appeal have ruled, following the CJEU decision C-166/13 and C-249/13, that the right to be heard does not imply that the administration is obliged to give the person concerned the opportunity to present his/her observations specifically on the obligation to leave French territory, as long as he/she has been able to be heard in the context of the examination of his/her asylum application (for example see *CAA of Marseille, 4 December 2020, No. 20MA03119*; *CAA of Versailles, 29 April 2021, No. 20VE02158; CAA of Versailles, 16 June 2020, No. 19VE00580; CAA of Douai, 2 April 2019, No. 18DA02001*).

2.2. Suspensive effect of appeal in return proceedings

Relevant CJEU cases

- CJEU, Judgment of 18 December 2014, *A.*, C-562/13
- CJEU, Judgment of 17 December 2015, *T.*, C-239/14
- CJEU, Judgment of 19 June 2018, *G. v. Etat belge*, C-181/16
- ECtHR, Judgment of 17 November 2016, *V.M. et autres c. Belgique*, No. 60125/11

Short overview of EU law and relevant CJEU jurisprudence

Unlike Article 46 Recast Asylum Procedures Directive, Article 13 of the Return Directive (RD) does not establish a general automatic suspensive effect for the appeal of the administrative decision before a court. Instead, it leaves the choice to the Member States as to whether to provide for a suspensive effect automatically or by interim relief[29].

[29] The TCN concerned can request the suspension, and the court can review it and establish whether to grant it or not.

As regards the suspensive effect of an appeal against the return of irregularly staying third-country nationals, relevant standards have been developed by vertical judicial dialogue on the basis of Articles 19(2) and 47 of the Charter. A landmark CJEU judgment is the one delivered in the *A.* case.[30]

The CJEU found that the appeal against a return decision must be recognized as having a suspensive effect on the return procedure pending the final judgment if there is a serious risk of refoulement. The suspensive effect of an appeal is thus required directly on the basis of Articles 19(2) and 47 of the Charter, interpreted in conformity with Article 3 ECHR. The CJEU held that whenever:

> "there are substantial grounds for believing, he will be exposed to a real risk of ill-treatment contrary to Article 3 ECHR, the right to an effective remedy provided for in Article 13 ECHR requires that a remedy enabling suspension of enforcement of the measure authorising removal should, *ipso jure*, be available to the persons concerned (see, inter alia, European Court of Human Rights, judgments in *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, § 67, ECHR 2007-II, and *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 200, ECHR 2012). 53 It follows from the foregoing that Articles 5 and 13 of Directive 2008/115, taken in conjunction with Articles 19(2) and 47 of the 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."

Main question addressed

- **Does a judicial appeal in asylum adjudication have an automatic suspensive effect on the whole return procedure in the framework of a domestic combined asylum and return procedure?**

In *G. v. Etat belge, preliminary ruling* (2018, C-181/16)[31], the CJEU ruled that Directive 2008/115, read in conjunction with Council Directive 2005/85, and in the light of the principle of non-refoulement and the right to an effective remedy, enshrined in Article 18, Article 19(2) and Article 47 CFR, must be interpreted as not precluding the adoption of a return decision, under Article 6(1) of Directive 2008/115, in respect of a third-country national whose application for international protection has been rejected, before the conclusion of any appeal proceedings brought against that rejection, provided, *inter alia*, that the Member State concerned ensures that all the legal effects of the return decision are suspended pending the outcome of the appeal, that that applicant is entitled, during that period, to benefit from the rights arising under Directive 2013/33 laying down minimum standards for the reception of asylum seekers, and that he or she is entitled to rely on any change in circumstances that occurred after the adoption of the return decision.

In light of the increasing national legislations requiring the issue of the return decision together with the administrative rejection of the asylum claim, the following question spread in these jurisdictions: does an appeal lodged in asylum proceedings have a suspensive effect on the return procedure? Such merged or combined asylum and return procedures are allowed under Article 6(6) RD. While these procedures have the advantage of time efficiency, they complicate the establishment of who is to be considered an 'irregularly' staying third-country national, and whether the return procedure and the judicial phase of the asylum adjudication can run in parallel. A

[30] See para. 45.
[31] CJEU, Judgment of 19 June 2018, C-181/16.

preliminary reference was addressed by the **Belgian Conseil d'Etat**, asking the CJEU whether a return decision in the sense of Article 6 RD could be adopted immediately after the rejection of an asylum application, before the conclusion of the judicial appeal in asylum. The referring court was concerned that such procedures might infringe the right to an effective remedy and the obligation to respect the principle of non-refoulement required under both the EU Charter and the Return Directive.

Facts

The case referred by the Belgian Council of State (*Conseil d'Etat*) to the CJEU concerned a Togolese national, Mr G., who applied for international protection in Belgium. His application was rejected by the Commissioner General for Refugees and Stateless Persons ('the CGRA'), and 10 days later the Belgian Immigration Office ordered Mr G. to leave Belgian territory.

Mr G. appealed the rejection of his asylum claim before the Council for Alien Law Litigation ('the CALL'), requesting it to annul and suspend the order requiring him to leave the territory. The CALL dismissed both appeals, and Mr G. challenged these two judgments before the Council of State.

There were many *G.*-like cases in Belgium, and one of them gave rise to a complaint before the European Court of Human Rights (ECtHR) (V.M. and Others v. Belgium). In that case, the ECtHR held that forcing an asylum seeker to return to the country from which he has fled without having the merits of his case examined by a court constitutes an infringement of the safeguards guaranteed by Articles 3 and 13 ECHR concerning the availability and accessibility of legal remedies.

Preliminary questions referred to the Court

In the *G.* case, the Council of State set aside the CALL's judgment on the asylum claim and referred the case back to CALL for a new decision. In addition, the Council of State decided to stay the return proceedings and to refer the following question to the CJEU: does the principle of non-refoulement and the right to an effective remedy preclude the adoption of a return decision within the meaning of Directive 2008/115 in respect of an asylum seeker after the rejection of his/her application for international protection at first instance and therefore before the legal remedies available to him/her against that rejection have been exhausted?

Reasoning of the Court

The CJEU started its analysis by focusing on the scope of the Return Directive compared to the Asylum Procedures Directive (2005/85).

The case was first allocated to the Fourth Chamber of the CJEU, and later moved to the Grand Chamber since it raised the possibility of the Court reconsidering a previous judgment[32].

Contrary to the opinions offered by the Advocate General[33], the CJEU found that an applicant for international protection falls within the scope of the Return Directive as soon as their application for international protection has been rejected in the first instance by the responsible administrative

[32] CJEU, Judgment of 30 May 2013, *A.*, C-534/11.

[33] Advocate General Mengozzi (AG) delivered two opinions, one in 2017 and another in 2018, and in both he argued that Member States cannot issue a return decision to an applicant for international protection as long as he is authorized to remain in the EU. According to Article 46(5) of Directive 2013/32, an asylum seeker is authorized to remain "until the time limit within which to exercise their 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". He also clarified that Article 6(6) of the Return Directive does not apply to the facts of the case, since the TCN does not fall within the scope of the Return Directive, and therefore the Member States cannot initiate return proceedings against an asylum seeker. The AG warned that domestic practices such as the Belgian one, even if they suspend the enforcement of the return decision, ultimately create "a situation of uncertainty if not, sometimes, of legal opacity which may jeopardise not only the transparency but also the effectiveness of the return procedures".

authority, unless the Member State concerned decides to grant them the right to stay on the basis of an autonomous residence permit or authorization on humanitarian or other grounds for the duration of the appeal process. In this way, the Court recognizes the Member States' procedural autonomy to continue making use of the possibility of combining (joining) the rejection of an asylum application with a return decision, as provided for in Article 6(6) RD. The mere fact that the stay of the person concerned is formally deemed irregular at the moment their application for international protection has been rejected at first instance, and that a return decision is adopted either afterwards or simultaneously in a single administrative act, was held not to infringe the principle of non-refoulement or the right to an effective remedy.

Automatic Suspensive Effect of the Judicial Appeal in Asylum on the Return Procedure

At the same time, the CJEU reiterated that the implementation of the Return Directive must respect fundamental rights and legal principles, namely those enshrined in Chapter III of the Return Directive, which have to be interpreted in conformity with the EU Charter. In relation to a return decision issued against a first instance rejected asylum seeker, the Court required that the Member States must ensure "the full effectiveness of an appeal against a decision rejecting an application for international protection, in accordance with the principle of equality of arms, which means, inter alia, that all the effects of the return decision must be suspended during the period prescribed for bringing that appeal and, if such an appeal is brought, until resolution of the appeal" (para. 61).

The Court clarifies what the suspensive effect on the return decision means in these circumstances. Namely, first, the whole return procedure must be suspended, including the start of the period for voluntary departure under Article 7 of the Return Directive, and second, the person should not be placed in pre-removal detention, under Article 15 of the Return Directive, until there is a final decision in the judicial asylum appeal, or the appeal period has expired. Most importantly, while the CJEU allows the Member States to use the combined asylum and return procedure, it clarifies that the correct legal status of the person during the pending judicial appeal is that of an applicant for international protection until a final decision is adopted in relation to that application (para. 63). In other words, the person must fully benefit from the rights under the Reception Conditions Directive (2013/33). The asylum seeker is also entitled to a right to be informed of the safeguards provided by both return and asylum procedures (e.g., the Return Directive and the Asylum Procedures and Reception Conditions Directives), and to a remedy enabling automatic suspension of enforcement of the measure authorizing his or her removal (para. 58).

Furthermore, Member States must allow applicants *to rely on any change in circumstances occurred after the adoption of the return decision which may have a significant bearing on the assessment of their situation.* Lastly, Member States are required to ensure that the applicant is *informed in a transparent way* of the observance of those guarantees.

Although the *G.* judgment was delivered in relation to the previous Asylum Procedures Directive, the Court confirmed that its judgment applies also to asylum applications adopted under the current Recast Asylum Procedures Directive (C-269/18).

Article 47 (right to an effective legal remedy), in conjunction with **Article 18** (right to asylum) and **Article 19 (2)** (principle of non-refoulement) **of the Charter**, are used as grounds of **interpretation of the legal remedies set out by the Return Directive** (Article 13) **and the Asylum Procedures Directive** (Article 39) (para. 51-58). These articles have been interpreted as requiring an **automatic suspensive effect of the appeal against a return decision and more generally of all decisions to be taken or enforced in the framework of return procedures**, when there is a risk of violation of Article 18 CFR *which respects* Article 33 Geneva Convention, and

a risk of violation of Article 19 (2) CFR (para. 54 and 56). Neither Article 47 CFR, read in light of Article 18 and 19 (2) CFR, nor Article 13 of the Return Directive and Article 39 of the Procedures Directive require there to be two levels of jurisdiction. All that matters is that **there should be a remedy before a judicial body** (para. 57).

According to the CJEU, it follows that while a Member State can adopt a return decision following a negative decision on an asylum application, that **Member State is required to provide an effective remedy in accordance with the principle of equality of arms**, which means, in particular, that **all the effects of the return decision must be suspended during the period prescribed for lodging such an appeal and, if an appeal is lodged, until a decision is taken by the judicial body** (para. 61). To comply with their obligations, Member States must go **beyond simply refraining from enforcing the return decision**: it is **necessary that the period for voluntary departure does not start running as long as the person concerned is allowed to stay and that the person is not placed in detention pursuant to the Return Directive** (para. 62). Moreover, Member States must **inform the applicant, in a transparent manner, about his or her right to appeal against a negative decision and about the nature of this appeal** (para. 65).

Finally, the person concerned is to retain his status as an applicant for international protection until a final decision is adopted in relation to that application. Thus, that person **must benefit from the rights under the Reception Conditions Directive** (para. 63). In addition, Member States must allow applicants to **rely on any change in circumstances occurred after the adoption of the return decision which may have a significant bearing on the assessment of their situation** (para. 64).

Elements of judicial dialogue

The *G.* preliminary ruling had an impact also outside the referring jurisdiction. For instance, in the Netherlands, the Dutch Council of State held that there is no longer a valid ground to detain asylum seekers whose applications have been rejected in the border procedure in the first instance, because, in Dutch law, such detention is based upon a provision implementing the Return Directive. Therefore, these asylum seekers have to be granted entry to Dutch territory until the Dutch legislator creates a legal basis for detention for these asylum seekers in line with the Reception Conditions Directive.[34]

Impact on domestic and EU legislation

On 7 June 2019, the Justice and Home Affairs Council adopted a partial general approach on the Recast Return Directive, proposed by the European Commission in September 2018. Should the Recast Directive be approved in its current wording, Member States would be required to issue a return decision at the same time, or "together with or without undue delay after the adoption of a decision ending or refusing a legal stay of a TCN". The proposal expressly refers to the *G.* judgment and the suspensive effect of the judicial appeal in asylum adjudication on the enforcement of the return procedure.

Article 52/3 (1), subparagraph 1 and 2 of the Law of 15 December 1980 has been replaced by Article 32 of the Law of 21 November 1980 (came into force on 22 May 2018).

[34] Council of State, Judgment of 5 June 2019, ECLI:NL:RVS:2019:1710. For more details on the impact of the CJEU preliminary ruling in *G.* on the Dutch jurisprudence and legislation, see Galina Cornelisse, 'The Scope of the Return Directive: How much Space is Left for National Procedural Law on Irregular Migration?', Chapter 1 of Madalina Moraru et al, *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (Hart 2020).

The new version of Article 52/3 (1), subparagraph 1 provides that the Minister or his representative **shall issue** to the foreign national who is unlawfully present in the Kingdom of Belgium and who has applied for international protection an **order to leave Belgium** after the CALL has refused the application for international protection, has declared it inadmissible or has closed the review of that application, and **after the period prescribed for bringing an appeal has expired or, if such an appeal is brought, until resolution of the appeal**.

It follows from this that with regard to a **first application for international protection**, the issues at stake before the CJEU will **no longer occur**, since an order to leave Belgian territory shall only be issued after exhaustion of the appeal against that order.

However, the issues brought before the CJEU will **still be applicable** when a **subsequent application for international protection is filed** and where the CALL has declared it **not admissible** pursuant to Article 57/6, para. 3, al. 1, 5° of the Law of 15 December 1980. Indeed, the new version of Article 52/3 (1), subparagraph 2 provides that, in that case, an order to leave Belgium shall be issued immediately after the CGRA has declared this application not admissible. Moreover, the issues brought before the CJEU will **also and specially be applicable** when an **order to leave** Belgium has **already been issued before the filing of an application for international protection**. In that case, Article 53/2, para. 3 of the Law of 15 December 1980 provides that the Minister or his representative shall **suspend the execution of the order** to leave **during the examination of the application for international protection**. This provision implies that the (already existing) order to leave will be **reactivated after conclusion of the examination** of the application for international protection.

2.3. Extending judicial review in Dublin transfers

Relevant CJEU cases

- CJEU, Judgment of 16 February 2017, *C.K. and others*, C-578/16
- CJEU [GC], Judgment of 19 March 2019, *I. and others*, *C-297/17*, *C-318/17*, *C-319/17* and *C-438/17*

Short overview of EU law

The pre-conditions for Dublin transfers and the extent to which courts should review the human rights situation in the Member State found to be responsible according to the Dublin III Regulation for the processing of the asylum claim have been a continuous source of vertical and horizontal judicial dialogue in the EU. Although the Dublin III Regulation requires mutual recognition of domestic asylum-related decisions, and presumes that all Member States ensure the same level playing field of human rights compliance, a decade-long jurisprudence of the CJEU has shown that, in exceptional circumstances, national courts have to carry out a review of the human rights compliance of the Member State of transfer.

The Dublin III Regulation is based on the principle of mutual trust, whereby all Member States should be considered, in principle, as compliant with EU law and fundamental rights, and thus as safe third countries. This means that, in practice, the transfer of an applicant for international protection to the responsible Member State (determined according to the criteria set out in Chapter III) should be done without the in-merit examination of their claim. However, inter-state trust and the presumption of conformity with human rights is not absolute. Notably, Articles 4, 7, 24, 19(2)

and 47 of the Charter have been recognized by the CJEU to act as barriers to Dublin transfers in both systemic deficiencies and individual violations cases – even in cases when circumstances subsequent to the adoption of the transfer decision is decisive for the correct application of the Dublin Regulation[35]. A summary of the exceptional circumstances where a court is required to assess the human rights situations and suspend or postpone the Dublin transfer is to be found in the CJEU preliminary ruling delivered in *C.K. and others*.

Moreover, the Court recently recalled that "Article 27(3) of the Dublin III Regulation requires Member States to provide in their national law, first, that the appeal against a transfer decision confers on the applicant for international protection to whom that decision is addressed the right to remain in the Member State concerned pending the outcome of his or her appeal and, secondly, that the transfer is automatically suspended". Moreover, given that "the EU legislature did not intend that judicial protection enjoyed by applicants for international protection should be sacrificed to the requirement of expedition in the processing of their application", Member States are required to set up legal safeguards and to guarantee the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible, in accordance with Article 47 of the Charter[36]. In consequence, the exercise by the applicant of his or her right to appeal against a transfer decision made in respect of him or her cannot, as such, constitute a delay attributable to him or her within the meaning of Article 15(1) of Directive 2013/33[37].

Main question addressed

- **What is the extent of national courts' powers to reject a Dublin transfer in cases of insufficient medical care in the Member State of transfer?**

In *C.K. and others* (2017, C-578/16 PPU)[38], the CJEU ruled that, under Article 4 CFR, 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 Regulation No. 604/2013 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. It added notably that it is for the authorities of the Member State having to carry out the transfer and, if necessary, its courts to eliminate any serious doubts concerning the impact of the transfer on the state of health of the person concerned by taking the necessary precautions to ensure that the transfer takes place in conditions enabling appropriate and sufficient protection of that person's state of health.

[35] CJEU, Judgment of 15 April 2021, C-194/19, point 35: "Furthermore, the Court has held that, in the light (i) of the objective, referred to in recital 19 of the Dublin III Regulation, of guaranteeing, in accordance with Article 47 of the Charter, effective protection of the persons concerned, and (ii) of the objective of determining rapidly the Member State responsible for processing an application for international protection set out in recital 5 of that regulation, the applicant must have an effective and rapid remedy available to him or her which enables him or her to rely on circumstances subsequent to the adoption of the transfer decision, where the taking into account of those circumstances is decisive for the correct application of the regulation".

[36] CJEU, Judgment of 14 January 2021, C-322/19 and C-385/19, point 86-88.

[37] According to which "Member States shall ensure that applicants have access to the labour market no later than 9 months from the date when the application for international protection was lodged if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant".

[38] CJEU, Judgment of 16 February 2017, C-578/16 PPU.

Facts

C.K., a Syrian national, and H.F., an Egyptian, entered the territory of the European Union by means of a visa validly issued by the Republic of Croatia. After a short stay in that Member State, they crossed the Slovenian border equipped with false Greek identification. At that time, C.K. was pregnant. When the baby was born all three applied for asylum in the Republic of Slovenia and argued for the application of Article 17 of the Dublin III Regulation. The Ministry of the Interior, however, refused to examine the applications for asylum and ordered the transfer of the family to the Republic of Croatia based on the Dublin III Regulation (Article 12). They appealed against the transfer decision before the **Administrative Court**, which annulled that decision and referred the case back for re-examination by instructing the competent authorities to obtain an assurance from the Republic of Croatia that C.K., H.F. and their child would have access to adequate medical care in Croatia.

This case involved the three main courts with competences on the Dublin III Regulation – the **Administrative Court of Slovenia**, the **Supreme Court** and the **Constitutional Court** – for the purpose of deciding on whether the transfer to Croatia of a couple with a newborn baby, and where the mother suffered from depression and periodic suicidal tendencies, should be executed. The three courts decided differently on the matter.

The **Administrative Court** first required the Ministry of the Interior to provide assurances that the Croatian authorities would take all the necessary measures to ensure that the state of health of the applicants would not deteriorate. Subsequently, this court suspended the administrative decision to transfer the couple until a final decision on the merits was reached.

The **Supreme Court** followed the strict interpretation of the CJEU jurisprudence and Dublin III Regulation, accepting as legitimate grounds for refusing a Dublin transfer only the exceptional circumstances of 'systemic deficiencies' as set out in Article 3(2) Dublin III Regulation, and supported by the CJEU jurisprudence from the *N.S. and others* and *Abdullahi* cases.

The **Constitutional Court** acknowledged that, although the Dublin III Regulation is based on the principle of mutual trust, whereby all Member States count as safe third countries, the safety of the Member State can be challenged in two circumstances: 'systemic deficiencies' (which are not present in Croatia) and 'individual violations'. The **Constitutional Court** expressly referred to the *Tarakhel* judgment of the ECtHR as the legal ground for the 'individual violation of Article 3 ECHR' test in cases of Dublin transfers. In light of recital 32 of the Dublin III Regulation, which expressly states that "Member States are bound by their obligations under instruments of international law, including the relevant case law of the European Court of Human Rights", then Article 3(2) Dublin III Regulation is but one of the circumstances where transfer to another Member State is not permissible. The Court concluded that the principle of non-refoulement derives from Article 3 ECHR and would require in the specific case an examination of the applicant's state of health and personal situation in the Republic of Slovenia, and not only how her state of health would be in Croatia, as was decided by the Supreme Court. The **Constitutional Court** decided that the Supreme Court did not consider these circumstances, which are important in terms of respect of the principle of non-refoulement, and therefore it infringed the applicants' right to equal protection under Article 22 of the Constitution. It thus required the Supreme Court to re-assess the case in light of these constitutional requirements interpreted in light of Article 3 ECHR and the *Tarakhel* and *Soering* case law of the ECtHR.

Preliminary questions referred to the Court

Ultimately, after receiving a referral from the **Constitutional Court**, the **Supreme Court of Slovenia** decided to address a preliminary ruling to the CJEU, asking *inter alia* clarification on: 1) whether a Member State's decision to examine itself an application for international protection on the basis of Article 17(1) of Regulation No. 604/2013 comes within the scope of EU law; and 2) whether systemic flaws in the asylum procedure and in the reception conditions for asylum seekers, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter, is the only situation in which it is impossible to transfer the applicant to that Member State, or whether there are other situations in which it is impossible to transfer the applicant to the Member State responsible, namely where, owing to the applicant's state of health, the transfer itself constitutes a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter.

Importantly, the **Supreme Court** also sought answers to the issue of whether the Supreme Court itself or the **Constitutional Court** was the court of last resort that should have addressed a preliminary reference on the interpretation of Article 4 of the Charter.

Reasoning of the Court

In *C.K. and other*, the CJEU brought its previous jurisprudence in line with the *Tarakhel* judgment of the ECtHR and clarified that:

1. First, both 'systemic deficiencies' and 'individual violations' of Article 4 Charter can act as limitations to Dublin transfer.

   Article 4 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 Regulation No. 604/2013 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.

2. The threshold of individual violations of Article 4 Charter in medical cases is that there must exist a "real and proven risk of significant and permanent deterioration in the state of health of the person".

3. Steps to be followed before suspending a Dublin transfer:

   Refusal is conditional upon the Member State's authorities taking first "the necessary precautions to ensure that the transfer takes place in conditions enabling appropriate and sufficient protection of that person's state of health. If, taking into account the particular seriousness of the illness of the asylum seeker concerned, the taking of those precautions is not sufficient to ensure that his transfer does not result in a real risk of a significant and permanent worsening of his state of health, it is for the authorities of the Member State concerned to suspend the execution of the transfer of the person concerned for such time as his condition renders him unfit for such a transfer".

4. Member States can assume responsibility for conducting their own examination of the asylum application by making use of the discretionary clause (Article 17 Dublin III Regulation) if "it is noted that the state of health of the asylum seeker concerned is not expected to improve in

the short term, or that the suspension of the procedure for a long period would risk worsening the condition of the person concerned".

Elements of judicial dialogue

The case is of great relevance due to the various judicial interaction techniques used to settled various lines of divergent jurisprudence at different levels.

Of great importance is the **bottom-up judicial dialogue** revealed by the ECtHR judgment in the *Tarakhel* case. In order to establish the threshold for the violation of Article 3 ECHR that would require a refusal to execute a Dublin transfer, the Strasbourg Court looked at the jurisprudence of the EU countries' courts. The ECtHR noted that several German administrative courts, for instance the **Stuttgart Administrative Court** (on 4 February 2013), the **Gelsenkirchen Administrative Court** (on 17 May and 11 April 2013) and the **Frankfurt am Main Administrative Court** (on 9 July 2013) have ruled against the return of asylum seekers to Italy under the Dublin Regulation, irrespective of whether they belonged to categories deemed to be vulnerable. In its judgment of 9 July 2013 (No. 7 K 560/11.F.A.) in particular, the **Frankfurt Administrative Court** held that the shortage of places in Italian reception centres and the living conditions there would be liable to entail a violation of Article 3 of the Convention if a 24-year-old Afghan asylum seeker were sent back from Germany to Italy. In its judgment the **Administrative Court** held as follows: "the court must examine the foreseeable consequences of sending a claimant to the receiving country bearing in mind both the general situation there and the claimant's personal circumstances, including his or her previous experience".

Secondly, the ECtHR cited the judgment of the **UK Supreme Court** in a case concerning three Eritrean asylum seekers and one from Iran challenging their return to Italy. The **UK Supreme Court** unanimously overturned the judgment of the **UK Court of Appeal** and held that both the systemic deficiencies and individual violations thresholds in cases of risk of violations of Article 3 ECHR due to a Dublin transfer should be retained as applicable tests to be followed by national courts.

The disagreement between various national courts from the same Member State and between different Member States, as well as between the CJEU and ECtHR concerning the threshold for the violation of Article 4 of the Charter that could limit a Dublin transfer, has then been clarified by way of a preliminary reference. Following the judgment of the **Constitutional Court of Slovenia**, a disagreement surfaced among the Supreme and the Constitutional Courts on the applicable fundamental rights standards stemming from a different understanding of these courts of the apparently conflicting jurisprudence of the CJEU and ECtHR. In this way, the Supreme Court triggered a revision of the CJEU jurisprudence in light of the latest developments in the ECtHR jurisprudence.

It is interesting to note that, in the follow-up judgment, the **Supreme Court** somehow diverged from the CJEU, holding that reference to the *Tarakhel v. Switzerland* case in connection with Article 3 of the ECHR was not appropriate in the present case since the circumstances of the two cases were different. When interpreting Article 3 of the ECHR it quoted the *Paposhvili v. Belgium* case, according to which "illness may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible".

Following up on *C.K.*, the CJEU ruled in *I. and others* (2019, C-297/17 e.a.)[39] that an asylum seeker may be transferred to the Member State that is responsible for processing the application or that has previously granted the applicant subsidiary protection unless the expected living conditions in that Member State would expose him or her to a situation of extreme material poverty, contrary to the prohibition of inhuman or degrading treatment.

Facts

The joined cases concerned the decisions adopted by the Federal Office for Migration and Refugees, Germany, 'the Office', refusing several Palestinian asylum seekers and their minor children, who were resident in Syria and stateless, a right to asylum on the ground that they had entered from a safe third country, as they had been recognized subsidiary protection in Bulgaria. In addition, a similar decision was adopted against an asylum applicant of Russian nationality, who claimed to be Chechen and who was rejected the right to asylum in Germany on the ground that he had entered from a safe third country, that is, Poland.

Preliminary questions referred to the Court

The German Federal Administrative Court asked, among other points, whether Article 33(2)(a) of the Procedures Directive must be interpreted as precluding a Member State from exercising the option granted by that provision to reject an application for the grant of refugee status as being inadmissible on the ground that the applicant has already been granted subsidiary protection by another Member State, where the living conditions of those granted subsidiary protection in that other Member State are in breach of Article 4 of the Charter, or do not satisfy the provisions of Chapter VII of the Qualification Directive, without however being such as to be in breach of Article 4 of the Charter. The referring court is uncertain whether, in some cases, the position is the same where those granted such protection do not receive, in that other Member State, any subsistence allowance, or where such allowance as they receive is markedly inferior to that provided in other Member States, though they are not treated differently, in that regard, from the nationals of that Member State.

Reasoning of the Court

In a Grand Chamber judgment from 2019, the CJEU concluded that an asylum seeker may be transferred to the Member State that is responsible for processing the application or that has previously granted the applicant subsidiary protection unless the expected living conditions in that Member State would expose him or her to a situation of extreme material poverty, contrary to the prohibition of inhuman or degrading treatment. This situation 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 his 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 (judgment of today's date, *Jawo*, C-163/17, paragraph 92 and the case-law cited)" (see para. 90).

The Court clarified that inadequacies in the social system of the Member State concerned do not warrant the conclusion that there is a risk of such treatment.

The CJEU held that the threshold for the violation of Article 4 of the Charter by inadequate living conditions in the Member State that granted subsidiary protection is not reached by the mere fact

[39] CJEU, Judgment of 19 March 2019, C-297/17 and others.

that social protection and/or living conditions are more favourable in the Member State to which the new application for international protection has been made than in the Member State that has previously granted subsidiary protection. Such a situation cannot support the conclusion that the person concerned would be exposed, in the event of a transfer to the latter Member State, to a real risk of suffering treatment in breach of Article 4 of the Charter (see, by analogy, *Jawo*, C-163/17, paragraph 97).

The Court went on to reason that inadequate living conditions in the sense of lack of subsistence allowance, or that such allowance is markedly inferior to that in other Member States, can reach the threshold of a violation of Article 4 of the Charter only when the applicant is, because of his or her particular vulnerability, irrespective of his or her wishes and personal choices, in a situation of extreme material poverty that meets the criteria described in paragraphs 89 to 91 of the judgment (see para. 93).

Impact on national case law in Member States other than the one of the court referring the preliminary question to the CJEU

France (obligation of information in Dublin transfer of a sick asylum seeker)

A Congolese national challenged a prefectoral decision of transfer to Portugal, the State through which he had entered the European Union on a short-stay visa, asserting the seriousness of his health condition (unbalanced diabetes). The appeal lodged by the applicant against the transfer decision was rejected on the grounds that it was not apparent from the documents in the file that, during the execution of the transfer measure, the Portuguese authorities were unable to ensure the continuity of the said treatment, in particular in so far as it is the responsibility of the prefectoral authority, by means of the procedure provided for in Article 32 of the Dublin III Regulation, to inform these authorities in good time of the needs linked to the applicant's health condition.

The applicant then asked the interim relief judge of the Lyon Administrative Court to suspend the execution of his transfer to the Portuguese authorities. His request was rejected. The applicant then asked the interim relief judge of the Council of State to annul the contested order and to grant his requests at first instance. He argued that the interim relief judge of the Lyon Administrative Court had made an error in law by considering that simply informing the Portuguese authorities was sufficient to ensure that he would benefit from the guarantees his health condition required upon arrival.

In this case (*Council of State, 15 October 2018, No. 424743*), the interim relief judge of the Council of State considered, in accordance with CJEU ruling C-578/16 of 16 February 2017, that the prefect had not manifestly failed to fulfil his obligations, as he had informed the Portuguese authorities, via the Dublin platform, of the health condition of the person concerned, specifying the nature of his condition, the medical treatment to be taken and the constraints linked to this treatment. The judge noted that the fact that this information was acknowledged on the Dublin platform on the same day was sufficient to allow the Portuguese authorities, once they had agreed with the transfer measure, to ensure the required medical care of the asylum seeker on arrival and the follow-up of his health condition.

French administrative courts also rely frequently on the CJEU ruling C-578/16 of 16 February 2017 to consider that there is no obligation for States' authorities to examine asylum requests of people with bad health conditions who cannot, for this reason, be deported to the Member State responsible of his request under the Dublin regulation (see for e.g. : CAA Paris, 3ème chambre, 17 dec. 2021, n°21PA03950 ; CAA Paris, 3ème chambre, 18 July 2022, n°22PA01412)

2.4. Guidelines emerging from the analysis

From the CJEU cases analysed above, several guidelines emerge to deal with cases related to collective expulsion, return and Dublin proceedings:

- Article 13, read in the light of Article 47 CFR, precludes domestic legislation under which there is no judicial review of amendments to return decisions that modify the country of destination; in such a case, national courts have to declare they have jurisdiction to hear an action against this decision (C-924/19 PPU, C-925/19 PPU).

- Directives 2008/115 and 2005/85, read in light of the principle of non-refoulement and the right to an effective remedy, do not preclude the adoption of a return decision concerning an applicant for international protection whose application has been rejected, provided that the legal effects of the return decision are suspended pending the outcome of the appeal (C-181/16).

- Under Article 4 CFR, a Dublin transfer can take place only in conditions which exclude the possibility that it might result in a real and proven risk of inhuman or degrading treatment, even in the absence of systemic flaws in the Member State responsible for examining the application for asylum (C-578/16 PPU).

- Under Article 4 CFR, an asylum seeker cannot be transferred to another Member State under the Dublin Regulation if the expected living conditions in the latter would expose him or her to a situation of extreme material poverty, amounting to inhuman or degrading treatment (C-297/17).

Part II – Effective Justice and the Right to International Protection

International law as well as EU law draw a clear distinction between third-country nationals who are looking for international protection and third-country nationals that are migrating for other reasons. Among the first category are people applying to be recognized as refugees in the meaning of Article 1(A) of the 1951 Geneva Convention, incorporated in Article 2(c) of the Qualification Directive, or to be granted subsidiary protection under Article 2(f) of the same text. As such, their rights and status are mainly laid down in the Qualification (2011), Reception Conditions and Procedures Directives (2013).

However, this apparently clear distinction drawn by those texts can be blurred in practice by the potentially uncertain legal situation of people who have just illegally crossed the borders of a Member State, or whose application is not yet registered or has just been accepted. Moreover, a migrant staying illegally on a State's territory can become a refugee, or a refugee an illegally staying migrant, in a very short period of time; in consequence, his/her rights, as well as States' obligations, can evolve very quickly.

The preliminary rulings of the Court during the period under observation provided welcome substantive clarifications on this issue, which is mainly related to the personal scope of the Reception Conditions Directive. Indeed, the interplay between the *Reception Conditions Directive*, which applies to "all third-country nationals and stateless persons who make an application for international protection on the territory, including at the border, in the territorial waters or in the transit zones of a Member State" (Article 3 RCD) and the *Return Directive*, which concerns "third-country nationals staying illegally on the territory of a Member State", can be tricky and lead to some confusion as to the applicable norms in a given situation. This is especially true concerning third-country nationals who have just (irregularly) entered the territory of a Member State and who wish to apply for international protection, but have not got a chance to lodge it officially yet. A Spanish court referred this issue to the CJEU, which decided that the *Reception Conditions Directive* applies to a third-country national as soon as he or she indicates his/her intention to seek international protection. This means that, even though he/she manifested his/her intention before an authority that it is not competent to register his/her application, his/her legal situation is governed by this directive and not by the *Return Directive*[40].

This being said, once it is established that the third-country national is an asylum seeker, he or she has to benefit from the right to effective justice and remedies as enshrined in Article 47 CFR and in various articles of the Procedures and Reception Conditions Directives (hereinafter *PD* and *RCD*) (Chapter 3). During the period under observation, the CJEU also gave useful interpretations of EU law regarding the powers of national courts and tribunals to vary administrative decisions on asylum (Chapter 4).

Questions addressed in this part:

- **In the light of Article 47, are national courts allowed to declare an application for international protection inadmissible without conducting a personal interview with the applicant?**

[40] CJEU, Judgment of 25 June 2020, *VL*, C-36/20 PPU (the judgment is not available in English).

- **Is a time limit of 10 days to bring an action against a decision of inadmissibility acceptable under the Procedures Directive read in the light of Article 47 CFR and the principle of effective judicial protection?**

- **When Member States offer a second level of jurisdiction to applicants for international protection whose application has been rejected, are those States required by EU law to give an automatic suspensive effect to such proceedings?**

- **Does the right to an effective remedy require national courts to admit appeals against a decision granting a legal status similar, but not identical, to another one?**

- **Does Article 47 confer on national courts and tribunals the power to vary administrative decisions on the grant of international protection?**

- **In the light of Article 47 CFR, should national courts and tribunals disapply national laws that require them to issue a ruling in a period of time too short to ensure an effective examination of the case?**

3. Right to an effective remedy and right to be heard

Over the past two years, the CJEU has answered multiple questions regarding asylum seekers' rights to an effective remedy and to be heard. Given that this right is guaranteed not only by Article 47 of the Charter, but also by EU law specifically devoted to asylum, such as, but not limited to, Article 26 *RCD*[41], it justifies a separate analysis from the one above (see *Part I*) that focused on the right of effective justice of third-country nationals who are not registered as asylum seekers.

The issues raised by those provisions led the CJEU to specify the conditions under which national authorities can declare an application inadmissible without conducting a personal interview with the applicant (Section 3.1.), the time limit and suspensory effect of an appeal against a decision on international protection (Section 3.2), and the interest of the beneficiary of subsidiary protection to lodge an appeal against such a decision (Section 3.3).

3.1. Inadmissibility of application for international protection and right to be heard

Relevant CJEU case

- CJEU, Judgment of 16 July 2020, *M.A. v. Bundesrepublik Deutschland*, C-517/17

Brief overview of EU law

Under Article 14 of Directive 2013/32:

> "Before a decision is taken by the determining authority, the applicant shall be given the opportunity of a personal interview on his or her application for international protection with a person competent under national law to conduct such an interview".

Article 15 of the same text sets out the requirements for a personal interview. Moreover, according to Article 34 of the same text:

> "Member States shall conduct a personal interview on the admissibility of [an] application [for international protection]".

The only exception to this obligation to conduct a personal interview concerns the case where the determining authority is able to take a positive decision or if the determining authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his or her control (Article 14(2), a, b) or for subsequent applications (Article 42). Nevertheless, the Court has been asked whether, in some other circumstances, administrative authorities of Member States are allowed to declare inadmissible an application for international protection without conducting a personal interview.

[41] According to which, "Member States shall ensure that decisions relating to the granting, withdrawal or reduction of benefits under this Directive or decisions taken under Article 7 which affect applicants individually may be the subject of an appeal within the procedures laid down in national law. At least in the last instance the possibility of an appeal or a review, in fact and in law, before a judicial authority shall be granted".

Main question addressed

- **In the light of Article 47, are national courts allowed to declare an application for international protection inadmissible without conducting a personal interview with the applicant?**

According to the CJEU in *M.A. v. Bundesrepublik Deutschland* (2020, C-517/17)[42], national legislation cannot allow administrative authorities to declare an application for international protection inadmissible without conducting a personal interview with the applicant, unless that legislation allows the latter, in the appeal procedure against that decision, to set out in person all of his or her arguments against the decision in a hearing which complies with the applicable conditions and fundamental guarantees set out in Article 15 of that directive. Moreover, the arguments of the applicant must be capable of altering the decision of inadmissibility.

The decision of the Court in that case insists, in line with its well-settled case law, on the "paramount importance" of the personal interview with an applicant for international protection. It nevertheless gives to national authorities some flexibility as to the stage of the procedure when the interview has to be conducted.

Facts

The applicant, who claimed to be an Eritrean national, entered Germany in September 2011 and applied for refugee status there. By a decision of 18 February 2013, national authorities declared that, because he had entered Germany from Italy, a safe third country, the applicant did not have the right to asylum in Germany. It declared its application inadmissible on the ground referred to in Article 33(2)(a) of the Procedures Directive and ordered his deportation to Italy.

The applicant brought an appeal against this decision before the German Federal Administrative Court. He claimed, *inter alia*, that the Office was not entitled to dispense with conducting a personal interview with him before it adopted the decision of 18 February 2013. The Court found that the procedure adopted by the German Office for asylum had failed to meet the requirements of Article 14 and 34(1) of Directive 2013/32, but wondered then whether there could be other exceptions to the obligation to conduct a personal interview than the ones laid down in Article 14(2) and 42 of Directive 2013/32.

Preliminary questions referred to the Court

The referring court asked the CJEU whether Article 14(1) of the Procedures Directive is to be interpreted as precluding national legislation under which failure to comply with the obligation to give an applicant for international protection the opportunity of a personal interview before declaring the application to be inadmissible does not lead to that decision being annulled and the case being remitted to the determining authority if the applicant has the opportunity to set out, in the appeal procedure, all of his or her arguments against the decision and those arguments are not capable of altering that decision.

Reasoning of the Court

The Court first recalled that the Procedures Directive sets out unequivocally the obligation to give an applicant for international protection the opportunity of a personal interview before a decision

[42] CJEU, Judgment of 16 July 2020, *M.A. v. Bundesrepublik Deutschland*, C-517/17.

is taken on his or her application (para. 46). It insists on the fact that this obligation "forms part of the basic principles and guarantees" set out in the Procedures and Reception Conditions Directives, is "of a fundamental importance in the asylum procedure" (para. 59), and applies to decisions on the admissibility of the application as well as to decisions on the substance (para. 47) – which is confirmed in Article 34 of the Procedures Directive.

It specified that when the determining authority is inclined to find that an application is admissible on the ground referred to in Article 33(2)(a) of the Procedures Directive (international protection already granted by another Member State), the personal interview on the admissibility of the application is intended to give the applicant the opportunity not only to state whether international protection has in fact already been granted to him or her in another Member State, but in particular to present all of the factors which differentiate his or her specific situation in order to enable the determining authority to rule out the possibility that the applicant, if transferred to that other Member State, would be exposed to a substantial risk of suffering inhuman or degrading treatment, within the meaning of Article 4 of the Charter (para. 49). It also enables the determining authority to assess the applicant's specific situation and degree of vulnerability (para. 54).

This being said, the Court noted that the Procedures Directive does not expressly govern the **legal consequences of a failure to comply with that obligation**. The consequences of such a failure are then to be determined by national law, which has nevertheless to respect the **principles of equivalence and effectiveness** (para. 57).

It follows from those rules and principles that, since the requirement for a full and *ex nunc* examination of both facts and points of law in an appeal may cover the grounds of inadmissibility referred to in Article 33(2) of the Procedures Directive, national legislation may dispense the determining administrative authority from conducting a personal interview before declaring an application for international protection inadmissible, only if the court or tribunal hearing the appeals against this decision conduct a hearing of the applicant in accordance with the conditions and fundamental guarantees applicable in the case in question (para. 68). Without such a hearing, the applicant's right to a personal interview under conditions which ensure appropriate confidentiality and allow him or her to present the grounds for his or her application in a comprehensive manner, including considerations which support the admissibility of the application, would not be guaranteed **at any stage of the asylum procedure**, which would negate a safeguard that the EU legislature considered to be fundamental in that procedure.

The CJEU thus answered the question referred to it by the referring court to the effect that, if there is no personal interview before the determining authority at first instance, it is only if (a) such an interview is conducted before the court or tribunal that hears the appeal against the decision adopted by that authority declaring the application inadmissible, and if (b) that interview is conducted in accordance with all of the conditions prescribed by the Procedures Directive, that it is possible to guarantee the effectiveness of the right to be heard at that subsequent stage of the procedure (para. 71).

Elements of judicial dialogue

The Court relied heavily on previous cases to insist on the importance of the personal interview in asylum proceedings (see, e.g., judgment of 26 July 2017, *Moussa Sacko*, C-348/16[43]; judgment of 25 July 2018, *Alheto*, C-585/16; judgment of 14 May 2020, *NKT Verwaltung and NKT v. Commission*, C-607/18 P), and that it is so fundamental that it does not allow Member States to apply the Court's

[43] For an in-depth analysis of this case, please see ReJus Casebook, pp. 69 sq.

case law according to which, in principle, an infringement of the rights of the defence results in annulment of the decision taken at the end of the administrative procedure at issue only if the outcome of the procedure might have been different had it not been for such an irregularity (judgment of 10 September 2013, *G and R*, C-383/13 PPU).

Impact on national case law in Member States other than the one of the court referring the preliminary question to the CJEU

Italy (right to a personal hearing in asylum proceedings)

Following the new legislation adopted in 2017 and the *Sacko Moussa* CJEU decision, the Italian Court of Cassation has had the opportunity to further clarify the issue concerning the personal hearing of the plaintiff at the judicial appeal stage of international protection.

Although the 2017 provisions imposed the compulsory videotaping of the asylum seeker's personal interview during the administrative proceedings, as a matter of fact this was not often available to judges at the appeal stage. In such situations, many first instance tribunals decided to hear the plaintiff personally. The Court of Cassation stated otherwise: in cases where the videotaping of the asylum seeker's personal interview is lacking, the judge must compulsory set a hearing for the parties, but there is no obligation to hear the plaintiff personally in so far as he has had the opportunity to produce written or even oral statements before the judge (see Court of Cassation, No. 5973/2019).

However, in later judgments the Court of Cassation has set the principle according to which in certain cases the judge, lacking the videotaping of the asylum seeker's personal interview, must necessarily conduct a personal hearing.

This applies, first, when the plaintiff submits before the judicial appeal new grounds or new elements that have not been examined during the administrative proceedings, provided they are circumstantiated and relevant. The personal hearing must be specifically asked for by the plaintiff. This finding follows CJEU decisions in *Alheto* (25 July 2018, C-585/16) and *Ahmedbekova* (4 October 2018, C-652/16), which the Court of Cassation have explicitly referred to (see Court of Cassation, No. 27073/2019).

A further situation where the judge, lacking the videotaping of the personal interview with the asylum seeker, must hear the plaintiff personally occurs either when the judge deems it essential to require the applicant to provide explanations concerning contradictory statements he or she made during the administrative personal interview or when the plaintiff him/herself requests to be personally heard by the judge in order to provide such explanations. The request must concern specific points and statements he or she made and on which the negative decision of the administrative body was based. In this case, the obligation for the judge to hear the plaintiff personally stems indirectly from Article 16 of Directive 2013/32/EU, where it is stated that in conducting the personal interview "the determining authority shall ensure that the applicant is given an adequate opportunity to present elements needed to substantiate the application in accordance with Article 4 of Directive 2011/95/EU as completely as possible. This shall include the opportunity to give an explanation regarding elements which may be missing and/or any inconsistencies or contradictions in the applicant's statements".

Relying on this provision, which pertains to the administrative phase, the Court of Cassation highlights that whenever the denial of international protection has been grounded by the determining authorities on inconsistencies or contradictions that have not been contested during

the personal interview with the asylum seeker but merely referred to only in the final decision, the plaintiff must have the opportunity to clarify these inconsistencies before the judge through a personal hearing.

This safeguard is also based on the duty of cooperation and on the duty to grant an effective remedy, according to Article 46.1 of Directive 2013/32/EU; moreover, according to Article 46.3 of the Procedures Directive, the effective remedy must provide for a full and *ex nunc* examination of both facts and points of law.

Finland (situations under which a second asylum application can be considered a subsequent application)

The Finnish Immigration Service had rejected an application for international protection. The applicant appealed the decision to the Administrative Court of Northern Finland. As the applicant had disappeared while the appeal was pending, the Administrative Court had decided that there was no need to adjudicate. The applicant had later been returned from Germany to Finland based on the Dublin III Regulation, and he reapplied for asylum in Finland. The Finnish Immigration Service treated the application as a subsequent application and determined that no new elements or findings had arisen or been presented by the applicant, and therefore the application was inadmissible.

The applicant appealed the decision by the Finnish Immigration Service to the Administrative Court of Eastern Finland, which stated that as the Administrative Court of Northern Finland had decided there was no need to adjudicate the appeal concerning the applicant's first application, and as the Finnish Immigration Service had deemed the subsequent application inadmissible, the applicant had not had access to effective remedies before a court.

The Supreme Administrative Court referred to regulations according to which a person concerned could be considered to have withdrawn their appeal or forgone the possibility to appeal. As the applicant had disappeared, the Administrative Court of Northern Finland could take the decision that there was no need to adjudicate. With the decision that there was no need to adjudicate the appeal, the decision by which the plaintiff's application had been rejected by the Finnish Immigration Service had become final. The plaintiff's second application was to be treated as a subsequent application.

After appealing the decision by the Finnish Immigration Service regarding his first asylum application, the applicant had left Finland voluntarily and had been unreachable for at least two months when the Administrative Court of Northern Finland had decided that there was no need to adjudicate the appeal.

Under Article 46 (1) of the Procedures Directive, Member States have an obligation to ensure that applicants have an effective remedy in their international protection case. It is in accordance with the case law of the CJEU on that article and the principle of effectiveness enshrined therein, as well as with Article 47 of the Charter of Fundamental Rights, that the applicant has an effective remedy before a court or tribunal. In this respect, the applicant had had the possibility of an effective judicial remedy in accordance with Article 46 of the Procedures Directive and Article 47 of the Charter of Fundamental Rights, as required by Article 18 (2) of the Dublin III Regulation. As the plaintiff had disappeared after appealing the first decision, the Administrative Court had been right to decide that there was no need to adjudicate the appeal. The Supreme Administrative Court stated that the plaintiff had appealed his first asylum decision and had thus had access to an effective remedy as required by CFREU Article 47.

According to Article 102 of the Finnish Aliens Act, an application can be considered as a subsequent application only if the applicant has left Finland for a short period of time. What constitutes a short period of time cannot be defined in general terms but requires consideration of the facts of the case. In assessing the significance of the passage of time, the admission and readmission procedures and significant deadlines laid down in the Dublin III Regulation must be considered.

In the case at hand the applicant had been missing for over a year. The Dublin transfer of the applicant from Germany to Finland had been delayed as the German authorities had not been able to reach him. In these circumstances the Supreme Administrative Court decided that the plaintiff's second application could be considered as a subsequent application.

3.2. Time limit and suspensive effect of appeal against a decision of inadmissibility

Relevant CJEU cases

- CJEU, Judgment of 9 September 2020, *JP v. Commissaire général aux réfugiés et aux apatrides*, C-651/19
- CJEU, Judgment of 26 September 2018, *X., Y. v. Staatssecretaris van Veiligheid en Justitie*, C-180/17

Brief overview of EU law

Once national authorities have adopted a decision rejecting an application for international protection as inadmissible or unfounded, Article 46 of Directive 2013/32, Article 26 of Directive 2013/33 and Article 47 of the Charter require States to allow the applicant to lodge an appeal to contest such a decision.

Questions concerning the scope and effects of the right to appeal have already been extensively discussed in the ReJus Casebook[44], but recent questions referred to it brought the CJEU to make precisions on the acceptable time limit set by national legislation to bring an action against a decision of inadmissibility of a subsequent application for international protection, and the conditions for an appeal against a decision refusing international protection to be suspensive of an on-going return procedure.

Main question addressed

- **Is a time limit of 10 days to bring an action against a decision of inadmissibility acceptable under the Procedures Directive read in the light of Article 47 CFR and the principle of effective judicial protection?**

According to the CJEU in *JP v. Commissaire general aux réfugiés et aux apatrides (2020,* C-651/19)[45], Article 46 of Directive 2013/32, read in the light of Article 47 of the Charter, does not preclude national legislation which provides that proceedings challenging a decision declaring a subsequent application for international protection to be inadmissible are subject to a limitation period of 10 days, including public holidays, as from the date of service of such decision. This is so, under some conditions, even where, when the applicant

[44] See pp. 172 sq.
[45] CJEU, Judgment of 9 September 2020, *JP v. Commissaire général aux réfugiés et aux apatrides*, C-651/19.

concerned has not specified an address for service in that Member State, that service is made at the head office of the national authority responsible for the examination of those applications.

This case gives two important precisions on the legal regime of appeal proceedings against a decision of inadmissibility of a subsequent application for international protection. It led the Court to recall that if procedural rules concerning both the service of decisions relating to application for international protection and the setting of time limits in connection with the procedure for international protection fall within the procedural autonomy of Member States, such a procedural autonomy is subject to the principles of equivalence and effectiveness that require in particular that the time limit must be sufficient in practical terms to enable an effective remedy to be prepared and submitted.

Facts

After the rejection of his initial application, the appellant made a second application for international protection, which was declared to be inadmissible by national authorities. Since the appellant in the main proceedings had not specified an address for service, under national law, notice of the contested decision was sent to him at the head office of the national authority that took the decision.

In accordance with national legislation, the time limit of 10 days to bring an action against that decision started to run on the third working day following when the letter was delivered to the postal services. Since the day when that period expired was a Sunday, the expiry date was postponed to the day after.

Preliminary questions referred to the Court

The national court asked the CJEU whether Article 46 of Directive 2013/32 and Article 47 of the Charter allow national legislation to establish a time limit of 10 calendar days, starting from the service of the administrative decision, for bringing an action against a decision declaring a subsequent application for international protection lodged by a third-country national to be inadmissible, in particular where that service was made at the head office of the national authority where the applicant is deemed by law to have specified a place for service.

Reasoning of the Court

The Court started its reasoning by insisting on the fact that "notification of decisions relating to applications for international protection to the applicants concerned is essential if their right to an effective remedy is to be ensured" (para. 29). However, Directive 2013/32 does not lay down specific detailed rules governing notification of those decisions. The only obligation for Member States is to communicate decisions in writing to the applicant (Article 11 of Directive 2013/32), in reasonable time and in a language that he/she understands, and with a mention of how to challenge a negative decision (Article 12). Moreover, Article 13 of the same text has no provision that prescribes what action should be taken by Member States when the applicant has not communicated his/her address to national authorities. The procedural rules concerning service of decisions relating to applications for international protection thus fall within the scope of the principle of procedural autonomy of the Member States, subject to regard for the principles of equivalence and effectiveness (para. 35). The Court thus ruled that **regarding the principle of equivalence (para. 35-40)**, which requires equal treatment of claims based on a breach of national law and of similar claims based on a breach of EU law, it was up to the referring court to check

whether the principle of equivalence was respected in that case (para. 41). As to the **principle of effectiveness**, the CJEU found that national legislation which provides for the service of decisions at the head office of the competent national authority in cases where applicants have not communicated their postal address "makes it easier for those applicants to exercise their right to an effective remedy and helps to ensure respect for their rights of defence", since it ensures the service of the decision despite the lack of personal address of the applicant (para. 45). However, it underlined that such legislation may have such an effect only if two conditions are met: 1) the applicant is properly informed that, where he or she has not provided an address in the Member State concerned, the letters which the responsible authorities in connection with the examination of his or her application for international protection may send will be addressed to him or her at the head office of the competent national authority; 2) the conditions for access to that head office are not such that the receipt of those letters is excessively difficult (para. 45).

As to the **time limit** to lodge an appeal against a decision that has been served according to the rules exposed above, the Court here again found that the setting of time limits in connection with the procedure for international protection falls within the scope of the principle of the procedural autonomy of the Member States, subject to regard for the **principles of equivalence – the respect of which is to be determined by the referring court** – and **effectiveness** (para. 50).

As to the application of the **principle of effectiveness** to the time-limit issue, the Court rules that the "time limit must be sufficient in practical terms to enable an effective remedy to be prepared and submitted". However, the CJEU insisted on the fact that the procedure at stake concerned a subsequent application, which is intended for the submission, by the applicant concerned, of elements or findings that are new, as compared with those examined in relation to the preceding application (para. 59). Where the preliminary examination does not reveal elements or findings of that kind, that application is to be declared to be inadmissible. Accordingly, in an action challenging a decision declaring a subsequent application for international protection to be inadmissible, the applicant needs to do no more than establish that there were grounds for the position that were elements or findings that were new as compared with those examined in relation to his/her preceding application. Therefore, the drafting of such an application is not, a priori, of such particular complexity as to require a period greater than 10 days, including public holidays (para. 61). This is all the more true considering that Directive 2013/32 guarantees specific procedural rights such as the possibility of free legal assistance and representation, and access to a legal adviser (para. 32).

The Court thus concluded that Article 46 of Directive 2013/32 does not preclude national legislation that prescribes a limitation period of 10 days, including public holidays, for bringing an action challenging a decision declaring a subsequent application for international protection to be inadmissible, provided that the genuine access of the applicants affected by such a decision to the procedural safeguards granted by EU law to applicants for international protection is ensured within that period, which is for the referring court to determine.

Elements of judicial dialogue

The Court grounded its decision regarding the service of a decision on its case law regarding both the principle of equivalence (see, e.g., judgment of 26 September 2018, *Staatssecretaris van Veiligheid en Justitie*, C-180/17) and the principle of effectiveness, specifically as to the necessity to take into consideration, where relevant, the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the procedure (see, e.g., judgment of 24 October 2018, *XC and Others*, C-234/17).

As to the time-limit issue, it recalled that according to its settled case law, the curtailment of a time limit for bringing proceedings makes possible a more efficient processing of applications submitted by individuals whose claims to be granted refugee status are well founded (see, e.g., judgment of 28 July 2011, *S.D.*, C-69/10). It also relied on *Texdata Software* to affirm that the time limit must be sufficient in practical terms to enable an effective remedy to be prepared and submitted (see judgment of 26 September 2013, *Texdata Software*, C-418/11).

Main question addressed

- **When Member States offer a second level of jurisdiction to applicants for international protection whose application has been rejected, are those States required by EU law to give an automatic suspensive effect to such proceedings?**

In *X., Y. v. Staatssecretaris van Veiligheid en Justitie* (2018, C-180/17)[46], the Court held that Article 46 of Directive 2013/32 and Article 13 of Directive 2008/115, read in light of Articles 18, 19(2) and 47 of the Charter, do not preclude national legislation which, whilst making provision for appeals against judgment delivered at first instance upholding a decision rejecting an application for international protection and imposing an obligation to return, does not confer on that remedy automatic suspensory effect even in the case where the person concerned invokes a serious risk of infringement of the principle of non-refoulement.

The issue of the suspensive effect of an appeal is a recurring one in national and European case law, as it lies on the border between the rights of applicants for international protection to an effective remedy and to remain on the host State's territory while his or her application is pending or being examined, as guaranteed in particular by Article 46 of Directive 2013/32, and the Member States' rights to deport third-country nationals whose applications for international protection have been rejected. There is thus extensive case law on this point[47]. Nevertheless, the Court gave some useful precision in this case concerning Member States that offer a second degree of jurisdiction to asylum seeker whose application has been rejected both by administrative authorities and a first instance tribunal.

Facts

X and Y, Russian nationals, were notified of decisions rejecting their applications for international protection and imposing an obligation to return. Following the dismissal of their actions before The Hague (Netherlands) District Court challenging those decisions, they appealed against the judgments delivered to the Council of State.

Under Dutch law, an action at first instance against a decision on an asylum matter has automatic suspensory effect. However, while it is possible to appeal against a judgment confirming a decision rejecting an application for asylum and imposing an obligation to return, the appeal proceedings do not have automatic suspensory effect. It is nevertheless possible to apply to the Council of State for interim measures, with a view in particular to avoid expulsion, even though that application for interim measures does not itself have automatic suspensory effect.

X and Y requested such interim measures pending the outcome of the appeal proceedings. The referring court granted that application for interim measures and ruled that X and Y could not be expelled prior to the outcome of the appeal proceedings.

[46] CJEU, Judgment of 26 September 2018, *X., Y. v. Staatssecretaris van Veiligheid en Justitie*, C-180/17.
[47] See ReJus Casebook, pp. 188 sq.

Preliminary questions referred to the Court

The referring court asked in substance the CJEU whether Article 46 of Directive 2013/32 and Article 13 of Directive 2008/115, read in the light of Articles 18, 19(2) and 47 of the Charter, must be interpreted as precluding national legislation which, whilst making provision for appeals against judgments delivered at first instance upholding a decision rejecting an application for international protection and imposing an obligation to return, does not confer on that remedy automatic suspensory effect even where the person concerned invokes a serious risk of infringement of the principle of non-refoulement.

Reasoning of the Court

The Court noted first that, while the provisions of Directives 2013/32 and 2008/115 require the Member States to provide for an effective remedy against decisions rejecting an application for international protection and against return decisions, none of those provisions lays down the requirement that the Member States must grant a right to appeal to applicants for international protection whose appeals against the decision refusing their application have been unsuccessful at first instance, let alone that the exercise of such a right should be given automatic suspensory effect. It added moreover that such requirements cannot be inferred from the scheme or purpose of those directives. This is all the more true considering that Article 46(3) of Directive 2013/32 expressly refers to "appeals procedures before a court or tribunal of first instance" (para. 21-25).

Thus, while EU law does not preclude a Member State from making provision for a second level of jurisdiction for appeals against decisions refusing an application for international protection and return decisions, Directives 2013/32 and 2008/115 do not contain any rules on the introduction and putting into place of such a level of jurisdiction (para. 26). It is also clear from the case law of the Court that neither Article 46 of Directive 2013/32, nor Article 13 of Directive 2008/115, nor Article 47 of the Charter, read in the light of the safeguards laid down in Article 18 and Article 19(2) of the Charter, requires that there be two levels of jurisdiction (para. 30).

As to the suspensory effect of such appeal proceedings where they exist, the Court recalled the obligation of Member States, which are autonomous in that matter, to respect the principles of **equivalence** and effectiveness (para. 35). As to the first of these principles, the Court recalled that it is solely for the national court, which has direct knowledge of the detailed procedural rules applicable, to ascertain whether the actions concerned are similar as regards their purpose, cause of action and essential characteristics (para. 39). As to the principle of **effectiveness**, it held that the mere fact that an additional level of jurisdiction, provided for by national law, does not have automatic suspensory effect does not justify a finding that the principle of effectiveness has been disregarded, since EU law only requires that an applicant for international protection whose application has been refused should be able to enforce his rights effectively before a judicial authority (para. 43).

Elements of judicial dialogue

The Court's decision in *X., Y. v. Staatssecretaris van Veiligheid en Justitie* is in line with several previous cases, from both the CJEU and the ECtHR, in which they drew the line between States' obligation to provide applicants for international protection with an effective remedy when their application is rejected and States' right to return those applicants whose application did not succeed. Thus, the

CJEU relied on *G.* (2018)[48] to recall that it is for the Member States to ensure the full effectiveness of an appeal against a decision rejecting the application for international protection by suspending all the effects of the return decision during the period prescribed for bringing the appeal and, if such an appeal is brought, until resolution of the appeal.

It relied on both *Samba Diouf* (2011)[49] and *A.M. v. Netherlands* (ECtHR, 2016)[50] to make clear that there is no requirement for EU Member States and States parties to the ECHR to set up a second level of appeal.

3.3. Sufficient interest to lodge an appeal against a decision of protection

Relevant CJEU case

- CJEU, Judgment of 18 October 2018, *E.G. v. Republika Slovenija*, C-662/17

Brief overview of EU law

According to Article 46(2) of Directive 2013/32:

> "where the subsidiary protection status granted by a Member State offers the same rights and benefits as those offered by the refugee status under Union and national law, that Member State may consider an appeal against a decision considering an application unfounded in relation to refugee status inadmissible on the grounds of insufficient interest on the part of the applicant in maintaining the proceedings".

There are not many cases regarding the sufficient interest of an applicant for international protection to lodge an appeal against a decision rejecting his/her application, or granting him/her subsidiary protection instead of recognizing his/her refugee status. This issue is all the more important in view of the fact that national legislation tends to bring closer the legal status of refugees and beneficiaries of subsidiary protection[51]. The rapprochement of refugee status with that of subsidiary protection leads to the question of the real interest for an applicant to be granted the former instead of the latter. The CJEU recently adopted a strict approach, underlining the importance of the divergences that can exist in national legislation between the two status, especially as to the duration of the residence permit and some ancillary rights, such as the right to vote in local elections, the right to a passport, or the facilitation of family reunification.

Main question addressed

- **Does the right to an effective remedy require national courts to admit appeals against a decision granting a legal status similar, but not identical, to another one?**

In *E.G. v. Republika Slovenija* (2018, C-662/17)[52], the CJEU held that a court of a Member State may not dismiss an appeal brought against a decision considering an application unfounded in relation to refugee status but granting subsidiary protection status as inadmissible on the grounds of insufficient interest on the part of the applicant in maintaining the proceedings, where it is found that, under the applicable national

[48] CJEU, Judgment of 19 June 2018, *G.*, C-181/16. See ReJus Casebook, pp. 190 sq.
[49] CJEU, Judgment of 28 July 2011, *Samba Diouf*, C-69/10. See ReJus Casebook, pp. 112 sq.
[50] ECtHR, Judgment of 5 July 2016, *A.M. v. Netherlands*, 29094/09. See ReJus Casebook, p. 183.
[51] See, e.g., French National Law of 10 September 2018, No. 2018-778.
[52] CJEU, Judgment of 18 October 2018, *E.G. v. Republika Slovenija*, C-662/17.

legislation, those rights and benefits afforded by each international protection status are not genuinely identical.

As regards the sufficient interest of applicants for international protection to lodge an appeal against a decision rejecting their application, the case *E.G. v. Republika Slovenija* deserves consideration, as it underlines the importance of the right to an effective remedy against a decision granting a legal status which is similar, but not identical, to another one.

Facts

In 2016, E.G., who was 15 at the time, was granted subsidiary protection by Slovenian administrative authorities. E.G. brought an action against that decision, which was annulled by an administrative court and referred back to the administrative authorities, who adopted a fresh decision identical to the first one.

That decision was, *inter alia*, based on the ground that, if E.G. returned to Afghanistan, he would be left alone, without the support of his family, and would, as a minor, become an easy target for physical violence, human trafficking, sexual abuse or work in inhumane or dangerous conditions, so that he would run a serious risk of inhuman or degrading treatment.

E.G. brought an action against that new decision. His action was dismissed by the administrative court, and he lodged an appeal before the referring court (Supreme Court of Slovenia), in which he challenged the rejection of his application for refugee status. In support of his appeal, E.G. claimed that he intended to integrate himself into Slovenian society, learn Slovenian and finish his schooling there, but that, for that to be possible, he had to be granted refugee status, which confers more rights than subsidiary protection, such as an indefinite residence permit, a right to vote in local elections, the right to a passport valid for 10 years, and the right to family reunification, allowing family members to obtain a residence permit of indefinite duration.

The referring court considered that, having regard to the identical nature of the rights conferred by either status of international protection in Slovenian law, the issue arose of whether, in respect of both Slovenian law and EU law, the action brought against the contested decision was inadmissible on the ground of insufficient interest on the part of the applicant in maintaining the proceedings where he had been granted subsidiary protection status.

Preliminary questions referred to the Court

The referring court asked in substance whether the second subparagraph of Article 46(2) of Directive 2013/32 must be interpreted as meaning that a Member State may dismiss an appeal brought against a decision considering an application unfounded in relation to refugee status but granting subsidiary protection status as inadmissible on the grounds of insufficient interest on the part of the applicant in maintaining the proceedings if, under legislation of that Member State, subsidiary protection status offers the same rights and benefits as those offered by refugee status.

It also asked whether, if it is found that the rights and benefits afforded by each international protection status under the applicable national legislation are not identical, such an appeal may nevertheless be dismissed as inadmissible where it is ascertained that, having regard to the applicant's particular circumstances, granting refugee status could not confer on him more rights and benefits than granting subsidiary protection status.

Reasoning of the Court

The Court insisted firstly on the fact that the second subparagraph of Article 46(2) of Directive 2013/32 provides for a derogation from the obligation imposed on the Member States by Article 46 of Directive 2013/32 to provide for a right to an effective remedy before a court of tribunal against a decision rejecting an application for international protection (para. 44).

Therefore, the derogation from the right to a remedy set out in that subparagraph must be interpreted narrowly. It applies only if the rights and benefits offered by subsidiary protection status, granted by the Member State concerned, are genuinely identical to those offered by refugee status under Union law and the applicable national law (para. 49-50).

The Court found that, as far as concerns the right to reside, subsidiary protection status, as laid down in the Slovenian legislation, does not grant the same rights and benefits as those offered by refugee status under Union and national law, since the duration of the residence permit related to subsidiary protection status is not in line with the duration of the residence permit issued to persons to whom refugee status is granted. It insisted on the fact that there is a clear difference between, on the one hand, a residence permit for an indefinite period granted to refugees under Slovenian law, and, on the other hand, a residence permit for a limited period conferred, under Slovenian law, on persons granted subsidiary protection status (para. 54-55). It also underlined that the rules of national law relating to the grant, expiry, revocation or extension of each status of international protection do not concern the content of the rights conferred by each status. Those rules cannot therefore be taken into account as 'rights and benefits' within the meaning of the second subparagraph of Article 46(2) of Directive 2013/32 (para. 57).

The CJEU added to its reasoning that, having regard to the fact that the second subparagraph of Article 46(2) must be interpreted narrowly, that provision can apply only if the rights and benefits conferred by each international protection status in question are genuinely identical. Rights directly granted by each status, as well as 'ancillary rights', are then rights which must be taken into account in ascertaining whether the rights and benefits granted by each status of international protection are identical (para. 61). Moreover, the Court rejected the possibility of a Member State taking into account the particular circumstances of the applicant to reject an appeal as inadmissible even though the rights conferred are not genuinely identical. While the referring court argued that granting refugee status to the applicant instead of subsidiary protection would not afford him, in view of his particular circumstances, more rights and benefits, the CJEU ruled that, if the rights and benefits afforded by each status of international protection in question were genuinely not identical, such as in the case at issue in the main proceedings, and an appeal were nevertheless required to be dismissed as inadmissible on the ground of lack of a sufficient interest in maintaining the proceedings, **the fundamental right to an effective remedy before a court or tribunal, as enshrined in Article 47 of the Charter, would not be respected** (para. 69).

Elements of judicial dialogue

In *Sacko* (2017)[53], the CJEU concluded by holding that Articles 12, 14, 31 and 46 of the directive, read in the light of Article 47 of the Charter, must be interpreted as not precluding a national court from dismissing an appeal against a decision rejecting a manifestly unfounded application for international protection without hearing the applicant, provided that a hearing occurred in the administrative phase and the judge does not deem it necessary to conduct the hearing for the

[53] CJEU, Judgment of 26 July 2017, *S.*, C-348/16. See ReJus Casebook, pp. 69 sq.

purpose of ensuring full and *ex nunc* examination of facts and point of law. The Court relied on this finding in *E.G.*, to insist on the importance of Article 46(2) of Directive 2013/32, as it provides for a right to a remedy which corresponds to the right enshrined in Article 47. Relying on the same case, the CJEU also underlined that the derogation from the right to a remedy set out in Article 46(2), second subparagraph, must be interpreted narrowly, as applying only if the rights and benefits offered by the different status are genuinely identical.

4. Powers of national courts or tribunals

Relevant CJEU cases

- CJEU, Judgment of 29 July 2019, *A.T. v. Bevándorlási és Menekültügyi Hivatal*, C-556/17
- CJEU, Judgment of 19 March 2020, *Bevándorlási és Menekültügyi Hivatal*, C-406/18

Brief overview of EU law

In recent years, several Member States have passed new laws to face the so-called 'migration crisis'. Many of those laws are aimed at accelerating asylum proceedings, reducing asylum seekers' rights, and obliging courts and tribunals to issue judgments faster.

This movement resulted in several questions referred to the CJEU, which had the opportunity to check whether those new laws respected EU law or not. In particular, the CJEU had to interpret Article 46(3) and Article 46(10) of Directive 2013/32.

According to Article 46(3):

> "(…) Member States shall ensure that an effective remedy provides for 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".

According to Article 46(10):

> "Member States may lay down time limits for the court or tribunal (…) to examine the decision of the determining authority".

Read in conjunction with Article 47 of the Charter, those articles led the CJEU to rule on national courts and tribunals' power to vary administrative decisions on the grant of international protection, and to substitute their decision for those of administrative bodies, and to bypass national laws that set a time limit too short to ensure an effective review of the situation of the applicant for international protection.

Main question addressed

- **Does Article 47 confer on national courts and tribunals the power to vary administrative decisions on the grant of international protection?**

The CJEU ruled in *T. v. Bevándorlási és Menekültügyi Hivatal* (2019, C-556/17)[54] that Article 46(3) of Directive 2013/32, read in conjunction with Article 47 of the Charter, must be interpreted as meaning that, where a first instance court or tribunal has found, after making a full and *ex nunc* examination of the fact and law, that an applicant must be granted international protection, but an administrative body adopts a contrary decision, that court or tribunal must vary that decision and substitute its own decision for it, disapplying as necessary the national law that would prohibit it from proceeding in that way.

Thus, in that case the CJEU allowed national courts to substitute their own decision for those of an administrative body when the latter did not comply with the judgment of the former. This

[54] CJEU, Judgment of 29 July 2019, *A.T. v. Bevándorlási és Menekültügyi Hivatal*, C-556/17.

decision allows courts to overstep national laws that reserve for administrative bodies the power to grant international protection, thus amounting to a risk of undermining the right to an effective remedy if administrative bodies do not comply with courts' rulings. However, some conditions have to be fulfilled for the national courts to have such a power under EU law.

Facts

Mr T., a Russian national, made an application for international protection in Hungary in 2014.

By a decision of 15 August 2014, the Immigration Office rejected that application for international protection. Mr T. brought an appeal against that decision before an administrative and labour court.

In 2015, the law on the management of mass immigration entered into force in Hungary, and withdrew the power of administrative courts to vary administrative decisions on the grant of international protection.

That court, by a judgment of 6 May 2015, annulled the said decision and ordered the Immigration Office to conduct a new procedure and make a new decision. The decision was annulled on the grounds that it contained inconsistencies and that the Immigration Office had failed generally to examine the facts that had been submitted for its assessment and, as regards those facts that it had taken into account, had assessed them in a biased manner. In its decision, that court also provided the Immigration Office with detailed guidance as to the factors that it was required to examine in the new procedure that was to be undertaken.

Nevertheless, the Immigration Office, by a decision of 22 June 2016, again rejected Mr T.'s application for international protection. Mr T. brought an appeal against that decision, which led to the annulment of that decision by a court decision of 25 February 2017. The court ordered the Immigration Office to conduct a new procedure and take a new decision.

By decision of 15 May 2015, the Immigration Office rejected, for the third time, Mr T.'s application for international protection.

The referring court was thus seized of a third appeal.

Preliminary questions referred to the Court

The referring court asked the CJEU whether Article 46(3) of Directive 2013/32, read in conjunction with Article 47 of the Charter, must be interpreted as conferring on a first instance court, seized of an appeal against a decision rejecting an application for international protection, the power to vary that administrative decision and to substitute its own decision for that of the original administrative body that adopted it.

Reasoning of the Court

The Court first insisted on the fact that, where a person meets the minimum standards set by EU law to qualify for international protection because he or she fulfils the conditions laid down in Directive 2011/95, Member States are required, subject to the grounds for exclusion provided for by that directive, to grant the international protection status sought, since those Member States have no discretion in that respect (para. 50).

Moreover, pursuant to Article 46(3) of Directive 2013/32, Member States are required to order their national law in such a way that the processing of the appeals includes an examination, by the court of tribunal, of all the fact and points of law necessary in order to make an up-to-date assessment of the case at hand, so that application for international protection may be considered in an exhaustive manner without it being necessary to refer the case back to the determining authority (para. 51-53).

It is true, however, that Article 46(3) only concerns the examination of the appeal brought and therefore does not govern what happens after any annulment of the decision under appeal. Thus, it remains open to Member States to provide that the file must, following an annulment, be referred back to that body for a new decision. Nevertheless, States have to comply, when implementing that directive, with **Article 47 of the Charter**. Therefore, the characteristics of the remedy provided for in Article 46 of Directive 2013/32 must be determined in a manner that is consistent with Article 47, which is sufficient in itself and does not need to be made more specific. Lastly, this right to an effective remedy would be deprived of any practical effect if it were accepted that, after delivery of a judgment in which the court or tribunal of first instance conducted a full and *ex nunc* assessment of the international protection of the applicant, the quasi-judicial or administrative body could take a decision that ran counter to that assessment (para. 54-58).

Applying those principles to the facts of the case, the Court found, in a landmark paragraph, that where a court or tribunal rules exhaustively on an appeal and makes, on that occasion, an up-to-date examination of the 'international protection needs' of the applicant on the basis of all the relevant elements of fact and law, following which it reaches the conclusion that the applicant must be granted the status of refugee or person eligible for subsidiary protection status, and that court or tribunal annuls the decision of the administrative or quasi-judicial body rejecting that application and refers the case file back to that body, the latter is, subject to matters of fact or law arising that objectively require a new up-to-date assessment, **bound by the decision of that court or tribunal and the grounds that support it**. Therefore, in the context of such a referral back, **that body no longer has a discretionary power as to the decision to grant or refuse the protection sought in the light of the same grounds as those that were submitted to that court or tribunal**, otherwise Article 46(3) of Directive 2013/32, read in conjunction with **Article 47** of the Charter, as well as Articles 13 and 18 of Directive 2011/95, would be deprived of all their practical effect (para. 66).

Accordingly, 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 seized 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 (para. 74).

Elements of judicial dialogue

The Court relied on several cases to come to this finding, but it grounded several major points of its decision on *Alheto* and *Mahdi.*

In *Alheto* (2018)[55], the Court already defined the scope of Article 46(3) of Directive 2013/32 by specifying that Member States must ensure that the court or tribunal have to carry out a full and *ex*

[55] CJEU, Judgment of 25 July 2018, *Alheto*, C-585/16.

nunc examination of both facts and points of law, including an examination of the international protection needs (para. 105-106). It also found in the *Alheto* case that it remains open to the Member States to provide that a file must, after an annulment pronounced by a court or tribunal, be referred back to an administrative body for a new decision.

In *Mahdi*, a case concerning the detention of third-country nationals which was extensively studied in the previous casebook[56], the Court found that a judicial authority deciding upon an application for the extension of detention must be able to rule on all relevant matters of fact and of law in order to determine whether an extension of detention is justified, which requires an in-depth examination of the matters of fact specific to each individual case. And the Court added that where the detention that was initially ordered is no longer justified in the light of those requirements, the judicial authority having jurisdiction 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.

The *T.* case is thus an application of both the *A.* and *M.* cases, concerning the power of national courts and tribunals in the field of international protection.

Impact on national case law in Member States other than the one of the court referring the preliminary question to the CJEU

The Netherlands (domestic courts' power to substitute their own decisions for those of administrative authorities)

In the Dutch case of 16 April 2020 (ECLI:NL:RBDHA:2020:3502), the Dutch court of first instance took account of the CJEU's preliminary ruling in Judgment of the Court (Grand Chamber) of 29 July 2019, Case C-556/17, *A.T. v. Bevándorlási és Menekültügyi Hivatal*:

The Dutch court of first instance (*rechtbank*) had received an appeal against a decision from the Secretary of State declaring a Croatian national to be an undesirable immigrant. The court had granted the appeal, annulled the decision, and instructed the Secretary of State to retake the decision while taking into account various factors. The Secretary of State reissued the decision without taking into account the guidance offered by the court. In this case the second decision was appealed.

The Dutch court established that the guidance the court had previously given the Secretary of State had not been applied to the decisions. The court decided it would substitute its own decision for that made by the Secretary of State. The court decided to do so because of the unwillingness of the Secretary of State to apply the guidance offered and the already lengthy proceedings. The court also pointed out that, following from *T.*, the right to an effective remedy enshrined in Article 47 of the CFR includes that when an administrative body refuses to take into account a previous judgment the court should vary the decision and substitute its own in accordance with the previous judgment in question. The court did not mention Article 46(3) as this case did not relate to an application for international protection but to a declaration as an undesirable immigrant.

The court concluded that the appeal was well founded, annulled the decision, and substituted its own decision.

[56] See ReJus Casebook, spec. pp. 147 sq. See also above, Part I.

In the Dutch case of 15 June 2020 (ECLI:NL:RBDHA:2020:5272), the Dutch court of first instance took account of the CJEU's preliminary rulings in Judgment of the Court (Grand Chamber) of 29 July 2019, Case C-556/17, *A.T. v. Bevándorlási és Menekültügyi Hivatal* and Judgment of the Court (Grand Chamber) of 25 July 2018, Case C-585/16 *S.A. v. Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite*, as follows:

In previous proceedings the Dutch court had received an appeal against a decision of the Secretary of State denying the application for international protection from an unaccompanied minor from West Darfur (Sudan). The court granted the appeal, annulled the decision and instructed the Secretary of State to issue a new decision, while taking into account the assessment of the court. The court then received an appeal due to a lack of timely decision from the Secretary of State. The court ordered the Secretary of State to issue a decision within seven weeks. The Secretary of State issued a decision denying international protection, which is the one being appealed in the current case.

The court granted the appeal and annulled the decision. The court mentioned both *T.* and *Alheto* while demonstrating that the decision should have been taken in a timelier manner and in accordance with the assessment of the court. However, the court could no longer substitute the decision in accordance with its precious assessment, as it would do under *T.*, because of changed circumstances. Nevertheless, the court varied the decision and substituted its own decision in place of the decision of the Secretary of State. It did this based on Dutch administrative law (Article 8:72(3(b)) AWB (General Administrative Law Act)).

The court concluded that the appeal was well founded, annulled the decision, and substituted its own decision.

*The Secretary of State appealed the decision. The appeal is pending before the *Raad van State* (Council of State). The Secretary of State was granted a motion to suspend the decisions of the Dutch court until the appeal is decided (ECLI:NL:RVS:2020:1791).

Main question addressed

- **In the light of Article 47 CFR, must national courts and tribunals disapply national laws that require them to issue a ruling in a period of time too short to ensure an effective examination of the case?**

In *P.G. v. Bevándorlási és Menekültügyi Hivatal* (2020, C-406/18)[57], the Court found that EU law does not preclude national legislation from setting a period of 60 days for the national courts to give a ruling on an action against a decision rejecting an application for international protection, provided that the court is able to ensure, within that period, that the substantive and procedural rules which EU law affords to the applicant are effective. If that is not the case, that court must disapply the national legislation laying down the period for adjudication and, once that period has elapsed, deliver its judgment as promptly as possible.

The *P.G.* case raised two issues. The first concerned the power of national courts or tribunals to vary an administrative decision, and to substitute their decision for that of the administrative body. The CJEU relied on *T.* (see above) to confirm this power. The second issue concerned the time limit set by national legislation for national courts and tribunals to issue their rulings. On that point, the CJEU relied on its previous case law, which strikes a balance between the procedural autonomy of Member States and the principles of equivalence and effectiveness.

[57] CJEU, Judgment of 19 March 2020, *Bevándorlási és Menekültügyi Hivatal*, C-406/18.

Facts

The application for international protection of P.G., an Iraqi Kurd, was rejected by the Hungarian authorities. He brought an action before the referring court against the refusal to grant him international protection.

Apart from the issue of administrative authorities' resistance to national courts' findings, which was similar in the *T.* case analysed above, the referring court also faced the issue of the maximum period of 60 days for trial, laid down by Hungarian law. The referring court took the view that, in certain cases, of which the case in the main proceedings appeared to be representative, such a period is not sufficient to gather the necessary information, determine the factual context, hear the interested party and, therefore, give a properly reasoned judicial decision.

Preliminary questions referred to the Court

The referring court asked if Article 47 of the Charter and Article 31 of Directive 2013/32 may be interpreted, in the light of Articles 6 and 13 ECHR, as meaning that legislation of a Member State which lays down a single mandatory time limit of 60 days in total for judicial proceedings in asylum matters, irrespective of any individual circumstances and without regard to the particular features of the case or any potential difficulties in relation to evidence, is compatible with those provisions.

Reasoning of the Court

According to Article 46(10) of Directive 2013/32, Member States are authorized to lay down time limits for judgment. Moreover, as follows from settled case law of the Court, 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 respect the principles of equivalence and of effectiveness (para. 25-26).

The Court then addressed the **scope of the right to an effective remedy**. It recalled first that this right requires courts and tribunals to carry out 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. It then insisted on the obligation to base a decision to grant refugee status or subsidiary protection on an individual assessment – the whole proceedings having to respect the right to an interpreter, the possibility of communicating, *inter alia*, with UNHCR, access to certain information, the possibility of legal assistance and access to free legal representation. The right to an effective remedy also includes the right to a hearing (para. 28-31).

Thus, the principle of effectiveness of EU law implies an obligation on the part of the court to disapply national legislation which considers a 60-day period to be mandatory if it is not, in practical terms, in a position to ensure, within this period, compliance with all those rules (para. 32-34).

However, since Article 46(4) of Directive 2013/32 also requires the Member States to establish a **reasonable time period for adjudication**, the obligation on a court to disapply national legislation laying down a period for adjudicating which is incompatible with the principle of effectiveness of EU law cannot relieve it of all obligation to act expeditiously. It merely requires it to consider the period given to it as indicative (para. 36).

Elements of judicial dialogue

The Court relied on *T.* (2019) to recall the obligation for courts to carry out a full and *ex nunc* examination of both facts and points of law. It then relied on its case law on the content of the right to an effective remedy, in particular as to the obligation to base decisions on an individual assessment (*F.*, 2018[58] and *Y. and Z.*, 2012[59]) and the obligation to provide for a hearing of the applicant (*S.*, 2017[60]). It also grounded its reasoning on *A.* (2017[61]) to insist on the requirement for Member States not to make it excessively difficult or impossible in practice to exercise the rights conferred by EU law.

4.1. Guidelines emerging from the analysis

According to the CJEU preliminary rulings during the period under observation, in light of Article 47 CFR and of the right to an effective remedy enshrined in EU asylum law, domestic courts have to follow the following guidelines when dealing with issues related to applications for international protection:

- An applicant whose application for international protection has been declared inadmissible by administrative authorities without being interviewed must have the possibility to **set out in person all of his/her arguments against this decision at the appeal level** (C-517/18).

- Proceedings challenging a decision declaring a subsequent application for international protection to be **inadmissible** can be subject to a **limitation period of 10 days,** including public holidays (C-651/19).

- A decision can be **served at the head office of the national authority** which issued it, provided that the applicant has not specified an address in the Member State concerned (C-651/19).

- There is **no requirement** under EU law for **appeal** against a judgment delivered at first instance to have a **suspensory effect**, even in the case where the person concerned invokes a **serious risk of refoulement** (C-180/17).

- An **appeal against a decision** rejecting an application to be recognized as a refugee but **granting subsidiary protection** can be declared **inadmissible** only if the rights and benefits afforded by each international protection status are **genuinely identical** (C-662/17).

- National courts have **to vary an administrative decision and substitute its own decision** for it when administrative authorities refuse to apply a first instance decision which, after making a full and *ex nunc* examination of the facts and law, granted international protection (C-556/17).

[58] CJEU, Judgment of 25 January 2018, *F.*, C-473/16.
[59] CJEU, Judgment of 5 September 2012, *Y. and Z.*, C-71/11.
[60] CJEU, Judgment of 26 July 2017, *S.*, C-348/16.
[61] CJEU, Judgment of 15 March 2017, *A.*, C-3/16.

- National courts have to **disapply national legislation** which does not provide for an **extension of the time limit** set to give a ruling on an action against a decision rejecting an application for international protection where the court is unable to ensure, within that period, that the substantive and procedural rules which EU law affords to the applicant are effective (C-406/18).

Part III – Asylum and Migration in Times of Crisis

Contrary to some other treaties in the field of human rights, such as the ICCPR[62] or the ECHR[63], the Charter of Fundamental Rights of the European Union has no express provision allowing States to derogate from fundamental rights in the event of public emergencies. However, Article 52 CFR provides for the possibility to interfere, under certain conditions, with the rights guaranteed by the Charter[64], and the main EU instruments in the field of migration and asylum law do have such provisions. Thus, for example, Article 6(1) and 6(2) of the Family Reunification Directive states that:

> 1. The Member States may reject an application for entry and residence of family members on grounds of public policy, public security or public health.
>
> 2. Member States may withdraw or refuse to renew a family member's residence permit on grounds of public policy or public security or public health.

Similarly, but without any reference whatsoever to public health, Article 7(4) of the Return Directive reads:

> 4. If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure or may grant a period shorter than seven days.

As to EU law regarding border control and international protection, it is full of references to public policy, national security, and/or public health, which for example are valid ground for restricting the entry of third-country nationals into the Schengen Area[65] or reintroducing control at the internal borders of Schengen Member States[66]. The threat that a beneficiary of international protection might pose to national security or the community may also open the way to his or her exclusion from this protection[67], or to the refusal or withdrawal of the latter[68].

However, a third-country national who is subject to a measure grounded on national security, public policy or public health is still entitled to the right to an effective remedy as enshrined in Article 47 if the application of EU law is involved.

The worldwide COVID-19 pandemic had, and still has, a profound impact on third-country nationals staying, legally or not, on Member States' territories or wishing to enter the EU. Although

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[62] See, e.g., Article 4: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".

[63] See, e.g., Article 15: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law".

[64] "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

[65] See, e.g., Article 6(a) of the Schengen Borders Code.

[66] See, e.g., Recital 30 and Article 25 of the Schengen Borders Code.

[67] See Article 17(1)(d) of the Qualification Directive.

[68] See Article 14(5) of the Qualification Directive.

it is far too soon to have CJEU case law on those issues, the Commission, as well as other regional or international institutions, such as EASO or UNHCR, have published guidelines and recommendations to address States' need to protect public health while respecting third-country nationals' rights (Chapter 6).

Nevertheless, during the period under observation the CJEU ruled several important cases on the articulation between national security and public policy issues and third-country nationals' right to an effective remedy (Chapter 5).

Questions addressed in this part:

- **Do national authorities have to assess that a third-country national poses a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society to refuse or withdraw his/her residence permit?**

- **In the light of Article 47 CFR, what are the powers of national courts when an appeal is lodged against a decision that refused a Schengen visa on the ground of an objection raised by another Schengen Member State?**

- **How should national security interests of Member States be balanced with the rights a third-country national is entitled to once recognized as a refugee?**

5. Asylum and migration in times of threats to national security and public order

National security and public order are well-known grounds on which Member States may rely to interfere with third-country nationals' rights. They are enshrined in most of the EU instruments relating to migration and asylum law and policies, such as the Return Directive, the Family Reunification Directive, and the Qualification, Reception Conditions and Procedures Directives. However, given the consequences of decisions taken on public policy or national security grounds, which may amount to the deprivation of the right to family reunification or to the deportation of third-country nationals, Article 47 CFR plays a major role to ensure that the latter may duly challenge such decisions.

During the period under observation, the CJEU delivered three important preliminary rulings on those issues. The first two concern third-country nationals who do not benefit from international protection (Section 5.1.), while the third exposes the conditions under which a refugee can be deprived of his/her residence permit for national security reasons, and the consequences of such a deprivation (Section 5.2.).

5.1. Migrants' rights and public policy and national security issues

The definition of "serious threat affecting one of the fundamental interests of [...] society", which can lead a Member State to refuse or withdraw the residence permit of a third-country national, is of the utmost importance to guide national courts in the assessment of the legality of such measures.

The Court gave some useful indications on that point in a 2019 preliminary ruling, judging that public authorities cannot rely on the sole fact that a third-country national has been convicted for an offence to consider him/her as a threat to public policy (Section 5.1.1). The Court also specified, in another preliminary ruling, the rights, under Article 47 CFR, of third-country nationals whose application for a visa has been rejected by a Member State on the ground of an objection raised by another Member State (Section 5.1.2).

5.1.1. Family reunification and public policy issues

Main question addressed

- **Do national authorities have to assess that a third-country national poses a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society to refuse or withdraw his/her residence permit?**

In *G.S. and V.G. v. Staatssecretaris van Justitie en Veiligheid* (2019, C-381/18 & C-382/18)[69], the Court found that Article 6(1) and 6(2) of Directive 2003/86 must be interpreted as not precluding a national practice under which the competent authorities may, on grounds of public policy, first reject an application for entry and residence on the basis of a criminal conviction imposed during a previous stay on the territory of the Member State concerned and, second, withdraw a residence permit or refuse to renew it where a sentence

[69] CJEU, Judgment of 12 December 2019, *G.S. and V.G. v. Staatssecretaris van Justitie en Veiligheid*, C-381/18 and C-382/18.

sufficiently severe in comparison with the duration of the stay has been imposed on the applicant. It added that national courts have to verify whether the offence which warranted the criminal conviction at issue is sufficiently serious to establish that it is necessary to rule out residence of the applicant.

According to Article 6 of Directive 2003/86:

> 1. The Member States may reject an application for entry and residence of family members on grounds of public policy, public security or public health.
> 2. Member States may withdraw or refuse to renew a family member's residence permit on grounds of public policy or public security or public health.
> When taking the relevant decision, the Member State shall consider, besides Article 17, the severity or type of offence against public policy or public security committed by the family member, or the dangers that are emanating from such person.

According to Article 17 of the same text:

> Member States shall take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family.

The *G.S. and V.G.* case mainly raised two issues: 1) the obligation, or not, for Member States to state the reasons as to why the personal conduct of the family member concerned poses a genuine, present and sufficiently serious threat to one of the fundamental interests of society and, 2) if not, the requirements under Article 6(2) that apply to the reasons for the withdrawal of or the refusal to renew a residence permit. The referring court asked in substance whether the solution found by the ECtHR in *B. v. Switzerland* (2001)[70] and *Ü. v. The Netherlands* (2006)[71], where the Strasbourg Court decided that a balance has to be struck between the interest of the family member concerned and the sponsor concerned to exercise the right to family reunification, on the one hand, and the interest of the Member State to protect public policy, on the other hand, applies in EU law.

Facts

In 2009, G.S., a third-country national, was granted in the Netherlands, on the basis of the national provisions relating to family reunification, a residence permit as the 'partner' of a sponsor. That permit was renewed for the period from 2010 to 2014.

In 2012, G.S. was sentenced in Switzerland to a term of imprisonment of four years and three months for participation in drug trafficking, in respect of acts which took place until September 2010. G.S. then applied for renewal of his residence permit in the Netherlands.

From 1999 to 2011, V.G., also a third-country national, was resident, in part lawfully, in the Netherlands. During that period, V.G. was sentenced four times to a fine or community service for shoplifting and driving while intoxicated. In June 2011, he was surrendered to the Armenian authorities in connection with alleged drug offences.

In 2016, V.G.'s wife, a Netherlands national, applied for the grant of a residence permit to V.G. under the legislation on family reunification.

[70] ECtHR, Judgment of 2 August 2001, *B. v. Switzerland*, No. 54273/00.
[71] ECtHR, Judgment of 18 October 2006, *Ü. v. The Netherlands*, No. 46410/99.

In both cases, the State Secretary rejected the application on grounds of public policy. He also withdrew G.S.'s residence permit retroactively with effect from 4 September 2010 and imposed an entry ban on him. In adopting those decisions, the State Secretary acted on the basis of an appraisal framework provided for by national law, 1) enabling a residence permit to be withdrawn or its renewal to be refused where the sentence imposed on the person concerned is sufficiently severe in comparison with the duration of his lawful residence in the Netherlands (G.S. case) and 2), enabling entry of a third-country national on the basis of family reunification to be refused if he has been sentenced for a criminal offence to community service or a fine, including where the offence was committed more than five years ago in so far as the person concerned was a repeat offender (V.G. case). In addition, in both cases, the State Secretary weighed the interests of the person concerned and his partner against the general interest in the protection of public policy.

Preliminary questions referred to the Court

The referring court asked, in essence, whether Article 6(1) and (2) of Directive 2003/86 must be interpreted as precluding a national practice under which the competent authorities may, on grounds of public policy, first, reject an application, founded on that directive, for entry and residence, on the basis of a criminal conviction imposed during a previous stay on the territory of the Member State concerned and, second, withdraw a residence permit founded on that directive or refuse to renew it where a sentence sufficiently severe in comparison with the duration of the stay has been imposed on the applicant.

Reasoning of the Court

The Court stated that it is apparent from its settled case law that certain members of a European citizen's family can be regarded as posing a threat to public policy only if their individual conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society of the Member State concerned (see, e.g., CJEU, judgments of 29 April 2004, *O. and O.*, C-482/01 and C-493/01). But it also remarked that any reference by the EU legislature to the concept of 'threat to public policy' does not necessarily have to be understood as referring exclusively to individual conduct representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society of the Member State concerned.

According to the Court, then, the scope of the concept of 'grounds of public policy' within the meaning of Article 6(1) and (2) has to be defined by taking into account the wording of those provisions, their context, and the objectives pursued by the legislation of which they form part.

As regards the wording of those provisions, the Court noted that the directive does not expressly require the personal conduct of the individual concerned to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society in order for that individual to be capable of being regarded as a threat to public policy (para. 56). It added that Article 6(1) and (2) do not establish a link between the concept of 'threat to public policy' and the risk of one of the fundamental interests of society being adversely affected (para. 57). Moreover, as to the context of those provisions, the Court noticed that Recital 14 of the directive states that the notion of 'public policy' may cover a conviction for committing a serious crime, which tends to indicate that the mere existence of such a conviction could suffice to establish that there is a threat to public policy, within the meaning of the directive, without it being necessary to establish a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society of the Member State concerned (para. 58). Adopted to promote family reunification and to grant protection to third-country nationals, this directive imposes on the Member States precise positive obligations, and requires them to authorize the family reunification of certain members of

the sponsor's family, without being left a margin of appreciation (para. 60-61). Accordingly, since authorization of family reunification is the general rule, Article 6(1) and (2) must be interpreted strictly and in accordance with the **principle of proportionality**, which requires that national authorities cannot go beyond what is necessary to ensure that public policy is safeguarded (para. 62-64).

Therefore, the competent authorities cannot automatically take the view that a third-country national is a threat to public policy merely because he or she has been convicted of some or other criminal offence. They can establish that a third-country national is a threat to public policy in relying solely upon the fact that that national has been convicted of a criminal offence only if that offence is so serious, or of such a type, that it is necessary to rule out residence of that national on the territory of the Member State concerned (para. 65-68).

The Court added that before adopting a negative decision on the basis of Article 6 of Directive 2003/86, the competent authorities must carry out, in accordance with Article 17, an individual assessment of the situation of the person concerned, taking due account of the nature and solidity of that person's family relationships, of the duration of his or her residence in the Member State and of the existence of family, cultural and social ties with his or her country of origin (para. 68).

Elements of judicial dialogue

In its *Zh. and O.* (2015)[72], *T.* (2015)[73] and *N.* (2016)[74] cases, the Court found, relying *inter alia* on Article 7(4) of Directive 2008/115, that a Member State is required to assess the concept of 'risk to public policy' within the meaning of that article on a case-by-case basis, in order to ascertain whether the personal conduct of the third-country national concerned poses a genuine and present risk to public policy. It added that when it relies on general practice or any assumption in order to determine such a risk, without properly taking into account the national's personal conduct and the risk that that conduct poses to public policy, a Member State fails to have regard to the requirements relating to an individual examination of the case concerned and to the principle of proportionality. It follows that the fact that a third-country national is suspected, or has been criminally convicted, of an act punishable as a criminal offence under national law cannot, in itself, justify a finding that that national poses a risk to public policy within the meaning of Article 7(4) of Directive 2008/115 (*Zh. and O.*, para. 50; see also *T.*, para. 79 and *N.*, para. 65).

Moreover, in *Chakroun* (2010)[75], the Court insisted on the fact that Directive 2003/86 requires Member States, in the cases determined by the directive, to authorize family reunification of certain members of the sponsor's family, without being left a margin of appreciation (para. 41). It also added that the margin for manoeuvre of the Member States must not be used by them in a manner which would undermine the objective of the directive, which is to promote family reunification, and the effectiveness thereof (para. 43).

Lastly, in its *B.* (2001)[76] and *Ü.* (2006)[77] cases, the ECtHR ruled that if it is for the States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens, their decisions in this field must, in so far as they may interfere with a right protected by Article 8 ECHR, be

[72] CJEU, Judgment of 11 June 2015, C-554/13.
[73] CJEU, Judgment of 24 June 2015, C-373/13.
[74] CJEU, Judgment of 15 February 2016, C-601/15 PPU.
[75] CJEU, Judgment of 4 March 2010, C-578/08.
[76] ECtHR, Judgment of 2 August 2001, *B. v. Switzerland*, No. 54273/00.
[77] ECtHR, Judgment of 18 October 2006, No. 46410/99.

necessary in a democratic society, that is to say justified by a pressing social need, and, in particular, proportionate to the legitimate aim pursued. Therefore, a fair balance has to be struck between the alien's right to respect for his family life, on the one hand, and the prevention of disorder or crime, on the other (*Boultif*, para. 46-47. See also *Üner*, para. 67).

The CJEU did not mention *B.* and *Ü.* in its *G.S.* and *V.G.* cases. It nevertheless came to an analogous solution, given that it considered that national courts have to verify whether the offence which warranted the criminal conviction is sufficiently serious to establish that it is necessary to rule out residence of the applicant. On the very same day, it also ruled that in the absence of a conviction, the competent authorities can invoke a threat to public policy only if there is consistent, objective and specific evidence that provides grounds for suspecting that the third-country national has committed such an offence, and that the principle of proportionality is respected[78].

5.1.2. Visa and public policy issues

Main question addressed

- **In the light of Article 47 CFR, what are the powers of national courts when an appeal is lodged against a decision that refused a Schengen visa on the ground of an objection raised by another Schengen Member State?**

In *R.N.N.S. and K.A. v. Minister van Buitenlandse Zaken* (2020, C-225/19 & C-226/19)[79], the Court found that: 1) a Member State which has adopted a decision refusing to issue a visa, because another Member State objected to the issuing of that visa on public policy grounds, is required to indicate, in that decision, the identity of that Member State, the specific ground for refusal based on that objection, accompanied, where appropriate, by the essence of the reasons for that objection, and the authority which the visa applicant may contact in order to ascertain the remedies available in that other Member State and, 2) where an appeal is lodged against that decision, the courts of the Member State which adopted that decision cannot examine the substantive legality of the objection raised by another Member State to the issuing of the visa.

According to Article 32(2) and (3) of Regulation 810/2009, as amended by Regulation 610/2013:

> 2. A decision on refusal [of a visa] and the reasons on which it is based shall be notified to the applicant by means of the standard form set out in Annex VI.
>
> 3. Applicants who have been refused a visa shall have the right to appeal. Appeals shall be conducted against the Member State that has taken the final decision on the application and in accordance with the national law of that Member State. Member States shall provide applicants with information regarding the procedure to be followed in the event of an appeal, as specified in Annex VI.

According to Article 32(1)(a)(vi) of the same text:

> Without prejudice to Article 25(1), a visa shall be refused if the applicant (…) is considered to be a threat to public policy, internal security or public health (…) or to the international relations of any of the Member States, in particular where an alert has been issued in Member States' national databases for the purpose of refusing entry on the same grounds.

[78] CJEU, Judgment of 12 December 2019, C-380/18.
[79] CJEU, Judgment of 24 November 2020, C-225/19 and C-226/19.

In *R.N.N.S. and K.A.*, the Court had to interpret those provisions to determine the obligation of States when a visa is refused by a Member State to a third-country national, on the ground of an objection raised by another Member State for public policy reasons. In consequence, the Court's answer helps to delineate, in light of Article 47 CFR, the reach of national courts' powers when reviewing a decision that is partly grounded on reasons stated by foreign, although European, authorities.

Facts

R.N.N.S. is an Egyptian national who lives in Egypt. He married a Dutch national in 2017 and just before his wedding applied for a visa in order to visit his parents-in-law, who live in the Netherlands.

By decision of 19 June 2017, the administrative authorities of the Netherlands rejected that application, on the ground that one or more Member States had considered R.N.N.S. to be a threat to public order, internal security or public health, as defined in Article 2(21) of the Schengen Borders Code, or to the international relations of one of the Member States. That decision was notified to R.N.N.S. by means of the standard form. While the sixth box of that form was ticked, the form mentioned neither the identity of the Member State that had objected to the issuing of a visa nor the reasons for that objection.

R.N.N.S. submitted a complaint against that decision to the Minister, who rejected that complaint. R.N.N.S. thus brought an action against that latter decision arguing, *inter alia*, that he was deprived of effective judicial protection since he was not able to challenge the Minister's decision of 19 June 2017 as to its substance. The Minister contends that, under Dutch law, where a Member State objects to the issuing of a visa, the reasons for that objection cannot be reviewed as to their substance; the applicant must bring proceedings to that end before the courts of the Member State which raised that objection.

In the course of the proceedings, the Minister notified R.N.N.S. of the identity of the Member State that had objected to the issuing of a visa to him. In 2018, R.N.N.S. contacted Hungary's diplomatic representatives in several countries, seeking clarifications as to the reasons for the objection raised by that Member State. He did not obtain any clarifications through those inquiries, nor was he informed of the identity of the authority that had raised that objection in Hungary.

K.A. is a Syrian national who lives in Saudi Arabia. In 2018, she applied for a visa in order to visit her children living in the Netherlands. The Minister refused to issue a visa, on the same ground as for R.N.N.S., and the decision was served to her in the same way, using the same standard form with no indication as to the Member State that had objected to the issuing of a visa nor the reasons for that objection. K.A. submitted a complaint against that decision to the Minister. In that complaint, surmising that the Federal Republic of Germany might have objected to the issuing of a visa to her, K.A. asked the Minister to seek information from the German authorities concerning the reason she had been considered a threat to public order, internal security or public health. The Minister rejected that complaint.

K.A. brought an action against the latter decision, arguing, *inter alia*, that she was deprived of effective judicial protection since she was not able to challenge the Minister's decision of 15 January 2018 as to its substance. She submitted, in particular, that the ground for refusal given in that decision was expressed in an excessively broad manner and that the Minister should have requested the German authorities to communicate the reasons for their objection to the issuing of her visa. According to the Minister, under the Visa Code, he was required neither to ask the

German authorities for the reasons underlying their objection to the issuing of a visa to K.A. nor to inform her of those reasons.

It is to be noticed that, in both cases, no alert for the purpose of refusing a visa had been issued in the VIS concerning either R.N.N.S. or K.A. In consequence, they were unable to bring an action or lodge a complaint on the basis of the VIS. Moreover, neither R.N.N.S. nor K.A. were aware of any decision concerning them in relation to public policy, internal security, public health or the international relations of any of the Member States that might have been adopted by the competent authorities of the Member States that objected to the issuing of their visas. Furthermore, according to the referring court, in the decisions of 19 June 2017 and 15 January 2018, the Minister did not provide R.N.N.S. and K.A. with any information concerning the possibility of bringing proceedings against those decisions in the Member States which objected to the issuing of their respective visas.

Preliminary questions referred to the Court

The referring court asked, in essence, whether Article 32(2) and (3) of the Visa Code, read in the light of Article 47 of the Charter, must be interpreted as meaning:

1. that a Member State which has adopted a final decision refusing to issue a visa on the basis of Article 32(1)(a)(vi) of that code because another Member State objected to the issuing of that visa is required to indicate, in that decision, the identity of the Member State which raised that objection, the specific ground for refusal based on that objection and the remedies available against that objection;

2. that, where an appeal is lodged against that decision on the basis of Article 32(3) of that code, the courts of the Member State which adopted that decision must be able to examine the substantive legality of the objection raised by that other Member State to the issuing of the visa.

Reasoning of the Court

The Court first recalled that the existence of a threat to public policy, internal security or public health or to the international relations of any of the Member States is a ground for refusing a visa, irrespective of whether it concerns the Member States of the competent consulate of another Member State (para. 36). The court added that the authorities of the State refusing the visa may provide information as to the Member State that raised an objection and the reasons why it did so in the 'Remarks' section of the standard form (para. 39). In accordance with Article 32(3) of Regulation 2016/399, applicants who have been refused a visa have the right to appeal against that decision, which must be lodged against the Member State that has taken the final decision on the visa application and in accordance with the national law of that Member State (para. 40). The characteristics of such an appeal must be determined in accordance with **Article 47 CFR**, according to which **judicial review** is to be effective, the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him or her is based, either by reading the decision itself or by requesting and obtaining notification of those reasons, without prejudice to the power of the court with jurisdiction to require the authority concerned to provide that information, so as to make it possible for him or her to defend his or her rights in the **best possible conditions and to decide, with full knowledge** of the relevant facts, whether there is any point in applying to the court with jurisdiction, and in order to put the latter fully in a position in which

it may carry out the review of the lawfulness of the national decision in question (para. 43)[80]. Therefore, an applicant who is refused a visa because of an objection raised by a Member State on one of the grounds referred to in Article 32(1)(a)(vi) of the Visa Code must be able to ascertain the specific ground for refusal underlying that decision, as well as the identity of the Member State which objected to the issuing of that visa. Accordingly, even though the statement of reasons corresponding to the box of the standard form is predefined, if the competent national authority applies the public policy ground for refusal, it must indicate, in the section of the standard form entitled 'Remarks', the identity of the Member State or Member States that objected to the issuing of a visa, and the specific ground for refusal based on that objection accompanied, where appropriate, by the essence of the reasons for that objection (para. 45-46).

Moreover, Article 47 CFR requires that the judicial review of such a decision cover its legality, taking into account all of the elements in the file, both factual and legal, on which the competent national authority based that decision. However, given the broad discretion of national authorities in that respect, the judicial review of that discretion is limited to ascertaining whether the contested decision is based on a sufficiently solid factual basis and verifying that it is not vitiated by a manifest error (para. 48-50).

The Court drew a distinction, however, between the review carried out by the courts of the Member State which adopted the final decision refusing a visa, which concerns the examination of the legality of that decision, in accordance with Article 32(3) of the Visa Code, and, on the other hand, the review of the merits of the objection to the issuing of a visa raised by another Member State in the context of the prior consultation procedure provided for in Article 22 of that code[81], which is for the national courts of that other Member State or Member States to carry out. Thus, if the courts of the Member State which adopted a final decision refusing a visa, because of an objection raised by another Member State, must be able to verify that the procedure of prior consultation of central authorities had been applied correctly, they cannot review the substantive legality of the objection. In order, then, to enable the visa applicant to exercise his or her right to challenge this objection, it is for the competent authorities of the Member State which adopted the final decision refusing a visa to indicate the authority which the applicant may contact in order to ascertain the remedies available to that end in that other Member State (para. 51-56).
The Court also recalled that in accordance with Article 25 of the Visa Code, a Member State may in any event issue a visa with limited territorial validity (para. 55).

Elements of judicial dialogue

The issue at stake in this case is very specific to the system set up by Schengen Member States for regulating the issuance of visas. There is thus no useful judicial dialogue with the ECtHR on this point.

[80] See also on this point, more recently, CJEU, Judgment of 10 March 2021, C-949/19.
[81] "1.) A Member State may require the central authorities of other Member States to consult its central authorities during the examination of applications lodged by nationals of specific third countries or specific categories of such nationals. Such consultation shall not apply to applications for airport transit visas. 2.) The central authorities consulted shall reply definitively within seven calendar days after being consulted. The absence of a reply within this deadline shall mean that they have no grounds for objecting to the issuing of the visa. 3.) Member States shall notify the Commission of the introduction or withdrawal of the requirement of prior consultation before it becomes applicable. This information shall also be given within local Schengen cooperation in the jurisdiction concerned. 4.) The Commission shall inform Member States of such notifications. 5.) From the date of the replacement of the Schengen Consultation Network, as referred to in Article 46 of the VIS Regulation, prior consultation shall be carried out in accordance with Article 16(2) of that Regulation."

The CJEU relied on its own case law. In particular, it relied on *K.* (2013)[82] and *Fahimian* (2017)[83] to ground the assertion according to which competent national authorities have a broad discretion in examining a visa application, the judicial review of the decision rejecting such an application being limited to ascertaining the reality of the facts and the lack of a manifest error of assessment. The Court also recalled its *El Hassani* case (2017), in which it decided that the EU legislature left to the Member States the task of deciding the nature and specific conditions of the remedies available to visa applicants, provided that in doing so they respect the principles of equivalence and effectiveness[84].

More recently, the Court again took the same view regarding the refusal of a visa, covered by Directive 2016/801, for the purpose of studies[85]. Relying also on the *E.H.* case, it ruled that "the characteristics of the appeal procedure envisaged in Article 34(5) of Directive 2016/801[86] must be determined in a manner that is consistent with Article 47 of the Charter", which "requires the Member States to provide for an appeal procedure against [the refusal of a visa], the procedural rules of which are a matter for the legal order of each Member State, in conformity with the principles of equivalence and effectiveness, and that procedure must, at a certain stage, guarantee a judicial appeal".

In this case, the applicant, a third-country national, applied to the consul for a national long-stay visa in order to undertake postgraduate studies in Poland. As his application was rejected, he requested the consul to review the application. The consul refused a visa once again. The applicant therefore brought an action before the Regional Administrative Court, relying in particular on *E.H.* The Regional Administrative Court dismissed the action. It held that the solution adopted in *E.H.* was not applicable to the case in the main proceedings, on the ground that the visa at issue in that judgment was a Schengen visa, whereas, in the case in the main proceedings, the applicant had applied for a national long-stay visa, a visa which is issued in accordance with national law. The Supreme Administrative Court stated that under national law the consul's decision refusing to issue a national long-stay visa to a foreign national is not amenable to judicial review. Consequently, the referring court raised the question of whether EU law requires the same level of protection to be established for national long-stay visas as that applicable to Schengen visas, resulting from the judgment in *E.H.*

The CJEU ruled that since Directive 2016/801 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing was applicable to the case, Member States were required by Article 34(5) of this directive and 47 CFR, when refusing to grant a visa for purposes of studies, to provide for an appeal procedure against this refusal.

5.2. Beneficiaries of international protection and national security issues

Several Member States are confronted on a regular basis with refugees or beneficiaries of international protection who either have committed severe offences on their territory or pose a threat to their national security. However, instead of acting in such cases on the sole ground of

[82] CJEU, Judgment of 19 December 2013, C-84/12.
[83] CJEU, Judgment of 4 April 2017, C-544/15.
[84] CJEU, Judgment of 13 December 2017, C-403/16.
[85] CJEU, Judgment of 10 March 2021, C-949/19, point 44-46.
[86] According to which, "Any decision declaring inadmissible or rejecting an application, refusing renewal, or withdrawing an authorisation shall be open to legal challenge in the Member State concerned, in accordance with national law. The written notification shall specify the court or administrative authority with which an appeal may be lodged and the time limit for lodging the appeal".

national criminal law, as recommended by the 1951 Geneva Convention, they tend to rely more frequently on the possibility offered by EU law of withdrawing refugee status from refugees who are considered as a danger to national security or the community. The CJEU issued a landmark ruling on this possibility in 2019.

Main question addressed

- **How should national security interests of Member States be balanced with the rights a third-country national is entitled to once recognized as a refugee?**

In *M. v. Ministerstvo vnitra* and *X., X. v. Commissaire general aux réfugiés et apatrides* (2019, C-391/16, C-77/17 & C-78/17)[87], the Court found that a refugee whose status is refused or withdrawn on the ground of national security or public policy reasons does not cease to be a refugee. Therefore, he/she is entitled to the rights that the 1951 Geneva Convention grants to every refugee, whatever the legality of his/her stay on the host State's territory, and cannot be deported to a country where he/she would face a risk of being tortured or submitted to inhuman and/or degrading treatment.

According to Article 14(4), (5) and (6) of Directive 2011/95:

> 4. Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when:
>
> (a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present;
>
> (b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.
>
> 5. In situations described in paragraph 4, Member States may decide not to grant status to a refugee, where such a decision has not yet been taken.
>
> 6. Persons to whom paragraphs 4 or 5 apply are entitled to rights set out in or similar to those set out in Articles 3, 4, 16, 22, 31, 32 and 33 of the Geneva Convention in so far as they are present in the Member State.

When adopted, this provision raised concern as to its compatibility with the 1951 Geneva Convention, which does not list the threat to national security or public order as a ground for exclusion from refugee status, but only as an exception to the principle of non-refoulement. Indeed, according to Article 1F of the 1951 Geneva Convention:

> The provisions of this Convention shall not apply to 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 United Nations.

Whereas, according to Article 33(2):

> The benefit of the [prohibition of expulsion or return] may not […] be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in

[87] CJEU, Judgment of 14 May 2019, C-391/16, C-77/17 and C-78/17.

> 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.

In this case, the CJEU had thus either to declare Article 14(5) and (6) of Directive 2011/95 incompatible with the provisions of the Geneva Convention, or to find a way to articulate those European and international provisions. It opted for the second approach, and found a way to balance the national security interests of a State with the rights granted to third-country nationals recognized as refugees. French national case law completed this solution with interesting findings as to the power of national courts when reviewing an administrative decision of refusal or withdrawal of refugee status on the ground of threats to national security or to the community of the host country.

Facts

In 2006, M., a Russian national from Chechnya, was granted the right to asylum. However, before and after being granted this right, he committed various offences of robbery and extortion, for which he had been sentenced to prison. In light of this, M.'s right to asylum was revoked in 2014.

In 2015, X., an Ivorian national, submitted an application for asylum. By a decision of 2016, national authorities refused to grant him refugee status, because of offences he had committed on the host State's territory. National authorities however issued an opinion according to which, in view of his well-founded fears of persecution, X. could not be directly or indirectly refouled to Côte d'Ivoire.

In 2007, X., a DRC national, was recognized as a refugee. In 2010, he was sentenced to 25 years' imprisonment for homicide and aggravated robbery. In 2016, his refugee status was withdrawn by national authorities of the host State. They also stated that the removal of X. would not be unlawful since the fears X. had raised in 2007 were no longer relevant.

Questions referred to the Court

The issues referred to the Court concerned, in essence, the question of whether the effect of Article 14(4) and (5) of Directive 2011/95 is to exclude the third-country national or the stateless person concerned, who satisfies the material conditions laid down by Article 2(d) of that directive to be recognized as a refugee, from being a refugee and whether, as a result, it infringes Article 1 of the Geneva Convention. More specifically, their questions concern the fact that the scenarios referred to in Article 14(4) and (5) of Directive 2011/95 do not correspond to the exclusion and cessation clauses set out in Article 1(C) to (F) of the Geneva Convention, while those exclusion and cessation clauses are, within the scheme of that convention, exhaustive.

Reasoning of the Court

The Court insisted first of all on the fact that, in accordance with a general principle of interpretation, an EU measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter. Thus, if the wording of secondary EU law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with primary law (para. 77).

It then recalled that the Common European Asylum System, of which Directive 2011/95 is part, is based on the full and inclusive application of the Geneva Convention and the Protocol, which constitutes the cornerstone of the international legal regime for the protection of refugees. Thus, although Directive 2011/95 establishes a system of rules including concepts and criteria common to the Member States and thus peculiar to the European Union, it is nonetheless based on the Geneva Convention and its purpose is, *inter alia*, to ensure that Article 1 of that convention is complied with in full (para. 78-84).

The Court then remarked that being a 'refugee' for the purposes of Article 2(d) of Directive 2011/95 and Article 1(A) of the Geneva Convention is not dependent on formal recognition thereof through the granting of 'refugee status' as defined in Article 2(e) of the directive. The result of formal recognition as a refugee, which the granting of refugee status constitutes, is that the refugee concerned is the beneficiary of international protection for the purpose of Directive 2011/95, so that he or she is entitled to all the rights and benefits laid down in Chapter VII of that directive (para. 89-92).

This being said, the Court noted that Article 14(4) and (5) of Directive 2011/95 cannot be interpreted as meaning that, in the context of the system introduced by that directive, the effect of the revocation of refugee status or the refusal to grant that status is that the third-country national or the stateless person concerned who satisfies the conditions set out in Article 2(d) of that directive is no longer a refugee. Indeed, in such a case, the person concerned does not cease to satisfy the material conditions on which his or her being a refugee depends. Therefore, Article 14(4) to (6) of Directive 2011/95 cannot be interpreted as meaning that the effect of the revocation of refugee status or the refusal to grant that status is that the third-country national concerned is not a refugee for the purposes of Article 1A of the Geneva Convention and is thus excluded from the international protection which, under Article 18 of the Charter, he or she must be guaranteed in compliance with that convention. In the event that a Member State decides to apply Article 14(4), the third-country nationals concerned will then solely be denied the rights and benefits set out in Chapter VII of Directive 2011/95, those rights and benefits being associated with that status. But refugees affected by Article 14 continue to be entitled to the rights enshrined in the Charter of Fundamental Rights, as far as EU law is concerned, and to certain rights laid down in the Geneva Convention (para. 93-100), such as, for example, the right not to be discriminated against in the enjoyment of the rights guaranteed by the Convention, freedom of religion, the right to access to primary education, or the right to access to justice.

More precisely, refugees to whom Article 14(5) has been applied may not, for example, be refouled if this would expose them to the risk of their fundamental rights being infringed (Article 21 CFR). They also benefit from the rights of the Geneva Convention listed in Article 14(6) of Directive 2011/95 and the rights provided for by that Convention which do not require a lawful stay on the host States' territory (para. 101-112).

Elements of judicial dialogue

In 2015, the CJEU already ruled in *H.T.*[88] that a refugee whose residence permit is revoked pursuant to Article 24(1) of Directive 2004/83 retains his or her refugee status, at least until that status actually ends (para. 95). It also added in the same judgment that a refugee to whom Article 14(5) has been applied cannot be refouled (para. 71). However, the *M., X. and X.* case is the first one in which the Court ruled on the compatibility of Article 14(5) with the Geneva Convention, and confirmed that refugees to whom such a provision is applied remained refugees and cannot

[88] CJEU, Judgment of 24 June 2015, C-373/13.

therefore be returned to their country of origin since, as refugees, it is established that they have well-founded fears of persecution there.

In France, the *Cour nationale du droit d'asile* and the *Conseil d'État* have both anticipated and applied the CJEU's ruling, and gave some useful interpretation as to the right of an effective remedy and as to national courts' power when they have to rule on an appeal from a refugee whose status has been withdrawn.

Indeed, in 2019, few months before the CJEU ruling, the *Conseil d'État* decided that when a refugee lodges an appeal against an administrative decision of withdrawal of his or her refugee status grounded on a *note blanche* from the national intelligence services, the national court seized of this appeal has to invite those services to provide further information on the threat to national security if it judges that the *note blanche* is insufficient in itself[89]. The *Cour nationale du droit d'asile* ruled for its part that, given the judgment of the CJEU on 14 May 2019, a refugee affected by the application of Article 14(5) could not be returned to his/her country of origin, given that he/she is still a refugee and therefore has well-founded fears of persecution there[90].

5.3. Guidelines emerging from the analysis

CJEU case law on national security and public order issues leads to the following recommendations to Member States and judicial authorities:

- Member States may, on grounds of public policy, **reject an application for entry and residence** on the basis of a **criminal conviction** imposed during a previous stay on the territory of the Member State concerned (C-381/18 & C-382/18).

- Member States may **withdraw a residence permit or refuse** to renew it where a **sentence sufficiently severe in comparison with the duration of the stay** has been imposed on the applicant (C-381/18 & C-382/18).

- National courts are required to **check whether the offence which warranted a criminal conviction is sufficiently serious** to establish that it is necessary to rule out residence of a third-country national (C-381/18 & C-382/18).

- A third-country national whose **application for a visa** is rejected by a Member State because another **Member State objected on the ground of public policy** has the **right to know the identity of the latter**, the **specific ground** for refusal and the reasons for that objection as well as **the authority he/she may contact** to ascertain the remedies available in the objecting State (C-381/18 & C-382/18);

- National courts of a Member State **cannot examine the substantive legality of the objection raised by another Member State** to the issuing of a visa (C-225/19 & C-226/19).

- A **refugee that poses a threat to national security or the community**, in the meaning of Article 14(5) of the Qualification Directive, **does not cease to be a refugee**; he/she has lost only the European part of his/her status, and cannot be deported to a country

[89] Conseil d'Etat, 20 février 2019, No. 421212.
[90] *Cour nationale du droit d'asile*, *avis*, 14 février 2020, *M.T.*, No. 20002805 C+. See also CNDA, 26 juillet 2019, M.T., No. 17053942 C+.

where he/she would face a risk of being tortured or submitted to inhuman and/or degrading treatment (C-391/16 e.a.).

6. Asylum and migration in times of a global pandemic

The global pandemic has had – and continues to have – a profound impact on migration in general and on refugees in particular. The figures indeed show an unprecedented drop in migration worldwide, mainly due to restrictions imposed by States. Those restrictions question, in particular, the rights of third-country nationals affected by these measures to contest them before a judge.

Thus, initial estimations show that asylum applications in Europe decreased by 33% in the first six months of 2020, compared to the same period in 2019 (by 66% considering only the second quarter). A rebound could be observed as of May 2020, but this was rather the result of the processing of applications from people who had entered before the lockdown measures taken by the Member States[91]. More generally, lockdown measures have significantly affected international migration. Preliminary estimations indeed suggest that the pandemic may have slowed the growth of the pool of international migrants by about two million by mid-2020, 27% less than the growth expected since mid-2019, according to a United Nations report[92].

During the pandemic, Member States have taken numerous measures to address public health challenges, such as the closing of their borders[93].

Indeed, restrictions on external borders were among the first defensive measures adopted against the pandemic. To reduce the risk of spread of the disease through travel to the EU, on 16 March 2020, the Commission adopted a communication on a "Temporary restriction on non-essential travel to the EU from third countries into the EU+ area" [94]. In this communication, the Commission recommended the European Council to act with a view to the rapid adoption, by the Heads of State or Government of the Schengen Member States, together with their counterparts of the Schengen Associated States, of a temporary restriction of non-essential travel from third countries into the EU+ area[95]. This recommendation was followed up on 17 March 2020 with the agreement on coordinated action at external borders based on the recommendation from the Commission.

To assist Member States in this matter, on 30 March 2020 the Commission adopted a communication providing guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on effects on visa policy[96]. This document provides guidance as regards:

- the introduction of temporary travel restriction applying to all non-essential travel from third countries to the EU+ area;

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[91] OCDE, *Perspectives des migrations internationales 2020*, Éditions OCDE, Paris, 2020. Online: https://doi.org/10.1787/6b4c9dfc-fr

[92] Report of the Population Division of the United Nations Department of Economic and Social Affairs, "International Migration 2020 - Highlights", 2020.

[93] "Fundamental rights of refugees, asylum applicants and migrants at the European borders", note FRA European Union Agency for Fundamental Rights, 2020.

[94] Communication from the Commission to the European Parliament, the European Council and the Council COVID-19: Temporary Restriction on Non-Essential Travel to the EU; COM/2020/115 final.

[95] The 'EU+ area' should include all Schengen Member States (including Bulgaria, Croatia, Cyprus and Romania), as well as the four Schengen Associated States. It would also include Ireland and the United Kingdom if they decided to align.

[96] Communication from the Commission: COVID-19, Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy; COM (2020), 2050, final.

- the facilitation of transit arrangements for the repatriation of EU citizens and their family members stranded in third countries;
- minimum service in consulates for processing visa applications;
- and dealing with overstay caused by travel restrictions, including for visa-waived third-country nationals.

On 8 April 2020[97] and 8 May 2020[98], the Commission adopted two follow-up communications. In them, the Commission invited the Member States to prolong the travel restriction until 15 June 2020.

Several Member States have also taken steps to close their internal borders to deal with the spread of the COVID-19 virus.

It should be emphasized here that although public health considerations are not expressly included among the reasons evoked by the provisions of Article 25 of the Schengen Borders Code (Regulation (EU) 2016/399) justifying the temporary reintroduction of border control at internal borders, the Member States concerned considered that the pandemic constituted a situation of serious threat justifying recourse to the measures provided for in the aforementioned article. They relied in particular on the provisions of Article 6.1 (e) of the same code, which requires, among other conditions for entry into the Schengen area, that the person does not constitute a threat to public health. In the unprecedented context, the Commission considered that the restrictive measures taken by Member States were proportional to the threat[99].

The COVID-19 situation thus mainly resulted in restrictions on borders. But it also amounted to the suspension or alteration of asylum and statelessness determination procedures in many European countries[100] (Section 6.1). Many countries have also tried to alter reception conditions and to facilitate detention and/or removal (Section 6.2).

While it is far too early, at the time this casebook is written, to rely on CJEU cases (which are still non-existent), the recommendations issued by the EU Commission and by other international institutions, as well as national case law and practices, already provide for interesting views on the right to effective justice of third-country nationals at a time of global pandemic.

6.1. Restrictions on access to procedures

In order to support Member States, the Commission has prepared guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement[101]. This guidance illustrates how to ensure continuity of procedures as far as possible, while fully ensuring the protection of people's health and fundamental rights in line with the EU Charter of Fundamental Rights. At the same time, it recalls the fundamental principles that must continue to apply, so that access to the asylum procedure continues to the greatest extent possible during the COVID-19 pandemic.

[97] COM(2020) 148, 8 April 2020.
[98] COM(2020) 222, 8 May 2020.
[99] Communication: Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services. C(2020), 1753 final. Online: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20200316_covid-19-guidelines-for-border-management.pdf
[100] For more information: https://www.iom.int/fr/covid19 and https://data2.unhcr.org/en/situations/covid-19
[101] Communication from the Commission: Covid-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement. 2020/C 126/02; C/2020/2516.

In particular, all applications for international protection must be registered and processed, even if with some delays. Emergency and essential treatment of illness, including for COVID-19, must be ensured[102]. In pandemic situations, alternative measures such as testing, isolation and quarantine may enable authorities to manage the arrival of asylum applicants, while respecting the right to asylum and protection from refoulement.[103]

For its part, UNHCR recommends[104], where entry bans or border closures are implemented, an explicit exemption for asylum seekers combined with medical screenings or testing and quarantine. Where asylum seekers wish to enter from another EU Member State or Schengen Associated State, any entry refusal should be coordinated with that State to ensure that foreigners have access to asylum in that State, in compliance with the principle of non-refoulement.

Measures taken at the national level which have impacted the right to lodge an application for international protection (Section 6.1.1.), the right to be heard (Section 6.1.2.) and the time limits for examining an application (Section 6.1.3.) have thus to take those recommendations into account.

6.1.1. Registration and lodging of asylum applications

Under the Schengen Borders Code (Regulation (EU) 2016/399), measures to manage risks to public health must be non-discriminatory and proportionate. Articles 18 and 19 of the EU Charter provide that Member States have to give access to asylum procedures for people who seek international protection. Then, protection needs cannot be set aside while implementing measures to address public health considerations at the borders. Refusing entry of all asylum applicants, or of those of a particular nationality, does not comply with the right to seek asylum and could lead to a risk of violating the principle of non-refoulement[105].

In its guidance communication[106], the Commission points out that third-country nationals who apply for international protection must have their application registered by the national authorities. Difficulties due to the health crisis, such as unusual delays, should not be considered as good reason to refuse to register an application. Indeed, even though events such as the COVID-19 pandemic were not foreseen in Directive 2013/32/EU, the application of derogatory rules laid down by this directive can be considered, especially those provided for by Articles 6 (extended time limit for the registration of asylum claims) and 31 (extended time limit for the examination of asylum claims). However, the scope of this derogation may only be justified to the extent provided for in the applicable EU regulations and directives[107].
Thus, according to the Commission, Article 6(5) of the Asylum Procedures Directive, which allows Member States to extend the time limit for the registration of applications where simultaneous applications by a large number of third-country nationals or stateless persons make it very difficult

[102] COM (2020/C 126/02).
[103] "Fundamental rights of refugees, asylum applicants and migrants at the European borders", note, FRA, European Union Agency for Fundamental Rights, 2020, p. 7.
[104] Practical Recommendations and Good Practice to Address Protection Concerns in the Context of the COVID-19 Pandemic, UNHCR, 9 April 2020.
[105] "Fundamental rights of refugees, asylum applicants and migrants at the European borders", note, FRA, European Union Agency for Fundamental Rights, 2020, p. 7.
[106] COM (2020/C 126/02).
[107] ECRE, ELENA: Legal Note on Derogations from Asylum Procedures as a Result of Emergency Measures, 24 June 2020. Online: https://www.ecre.org/elena-legal-note-on-derogations-from-asylum-procedures-as-a-result-of-emergency-measures/

in practice to respect these time limits, may be applied by Member States for a limited period of time as a result of the COVID-19 situation. Moreover, Regulation No. 603/2013 specifically provides for the possibility to postpone the collection of fingerprints because of measures taken to protect public health[108].

The Commission also recommended that, where necessary, it should be possible to lodge applications by means of a form either by postal mail or preferably online. In accordance with Article 6(4) of the Asylum Procedures Directive[109], the application will be deemed lodged once the form has reached the competent authorities[110]. UNHCR also recommended simplifying the registration process and focusing only on the recording of essential data and the identification of specific needs. It insisted firstly on electronic submission of the registration request and support for the applicant provided either by phone or online, and secondly the automatization of the issuance and/or extension of documentation. EASO also issued a practical guide to help Member States in conducting online registration[111].

States' practices

These modalities for the lodging of asylum applications were followed by some Member States, who introduced procedures by post, online or by telephone. Thus, a number of States maintained the pre-registration or registration of asylum seekers, including Austria, Georgia, Germany, Ireland, Liechtenstein, Moldova, Slovakia, Slovenia and Switzerland. Similarly, in Malta, the Office of the Refugee Commissioner confirmed that, although it was closed, it would be accepting asylum applications via email[112]. These issues also raised important legal claims in several Member States.

In **Belgium**, the Tribunal of Brussels made clear that these electronic registration processes must allow the material reception of applicants for international protection. It ruled in consequence that electronic registration that blocked access to material reception was unlawful (First Instance Tribunal of Brussels (Civil Section) - Decision No. 2020/105/C, 5 October 2020)[113].

In **France**, in March 2020, the registration of asylum applications was suspended in the Île-de-France region, due to the State's inability to ensure secure access, from a health point of view, to the registration and application processing points. Few steps were taken by State authorities to guarantee the continuity of services. Finally, the Council of State judged this suspension to be contrary to the fundamental right to asylum (France, Council of State, 30 April 2020, No. 440250, 440253).

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[108] Article 9(2) of Regulation (EU) No. 603/2013: "By way of derogation from paragraph 1, where it is not possible to take the fingerprints of an applicant for international protection on account of measures taken to ensure his or her health or the protection of public health, Member States shall take and send such fingerprints as soon as possible and no later than 48 hours after those health grounds no longer prevail.
"In the event of serious technical problems, Member States may extend the 72-hour time-limit in paragraph 1 by a maximum of a further 48 hours in order to carry out their national continuity plans".

[109] "Notwithstanding paragraph 3, an application for international protection shall be deemed to have been lodged once a form submitted by the applicant or, where provided for in national law, an official report, has reached the competent authorities of the Member State concerned".

[110] COM (2020/C 126/02); for more information see point 1, Asylum.

[111] For more information: EASO Practical Guide, *Practical recommendations on conducting remote/online registration (lodging)*, June 2020.

[112] ELENA Weekly Legal Update: *Asylum measures in selected European countries following Covid-19 global health crisis*, 20 March 2020. Online: https://mailchi.mp/ecre/elena-weekly-legal-update-20-march-2020?e=989a4aebdd#8

[113] https://www.asylumlawdatabase.eu/en/content/first-instance-tribunal-brussels-civil-section-decision-no-2020105c-5-october-2020. For more information: ELENA Weekly Legal Update, 9 October 2020. Online: https://mailchi.mp/ecre/elena-weekly-legal-update-09-october-2020?e=989a4aebdd#12

The same situation occurred in **the Netherlands**, where the coronavirus outbreak led to exceptional measures. Asylum procedures were suspended until 6 April inclusive. The registration of third-country nationals was limited to the taking of fingerprints and taking possession of documents[114].

In some cases, the lack of guidance or clarity from national authorities questioned the very possibility of filing an asylum application. This was the case for example in **Cyprus**, where national authorities stopped registering asylum applications without any official notice. In **Italy**, no official suspension of asylum registrations were announced, but *Questor* (public security offices) were in practice all closed[115]. In **Hungary**, new measures introduced because of the pandemic ('Omnibus Bill') made applications for asylum impossible on the territory of Hungary as well as at border crossing points – with the exception of some categories of persons.[116]

6.1.2. Right to be heard

The Commission recommended that Member States as far as possible made use of specific temporary arrangements such as video conferencing or by installing safety glass, provided that necessary arrangements concerning the facilities were set up and that interpretation as well as access to legal assistance and representation was ensured by the competent authorities. Member States were allowed to make use of Article 14(2)(b) of the Asylum Procedures Directive[117] and omit the personal interview, depending on the circumstances of the case, particularly if there were reasonable indications suggesting an applicant might have contracted COVID-19. In such cases, reasonable efforts should be made to allow the applicant to submit further information. Moreover, the absence of a personal interview should not adversely affect the decision of the determining authority.

Furthermore, where allowed by national legislation, it was possible to conduct the preliminary admissibility examination of a subsequent application on the sole basis of written submission, without holding a personal interview, in accordance with Article 42(2)(b) of the Asylum Procedures Directive[118].

EASO has also made recommendations on conducting the personal interview remotely[119].

States' practices

[114] European Council on Refugees and Exiles (ECRE), Information Sheet 23 April 2020: Covid-19 measures related to asylum and migration across Europe. Online: https://www.ecre.org/wp-content/uploads/2020/04/COVID-INFO-23-April.pdf

[115] European Council on Refugees and Exiles (ECRE), Information Sheet 23 April 2020: Covid-19 measures related to asylum and migration across Europe. Online: https://www.ecre.org/wp-content/uploads/2020/04/COVID-INFO-23-April.pdf

[116] Particularly those already holding subsidiary protection status in Hungary; those recognized as a refugee or as having subsidiary protection for their family members; and anyone subject to measures restricting their liberty unless they are found to have entered the territory irregularly. For more information, ELENA Weekly Legal Update, 19 June 2020. Online: https://mailchi.mp/ecre/elena-weekly-legal-update-19-june-2020?e=989a4aebdd#7

[117] "The personal interview on the substance of the application may be omitted where: (b) the determining authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his or her control. When in doubt, the determining authority shall consult a medical professional to establish whether the condition that makes the applicant unfit or unable to be interviewed is of a temporary or enduring nature".

[118] "Member States may lay down in national law rules on the preliminary examination pursuant to Article 40. Those rules may, inter alia: [...] (b) permit the preliminary examination to be conducted on the sole basis of written submissions without a personal interview, with the exception of the cases referred to in Article 40(6)".

[119] EASO Practical Guide, *Practical recommendations on conducting the personal interview remotely*, May 2020.

Many States postponed personal interviews or organized specific arrangements to carry them out. For instance, the **Danish government** suspended all interviews until after 31 March 2020. **Norway** also announced that all asylum interviews and appointments with the immigration police would be suspended as a result of the new measures[120]. In **Austria**, interviews were only carried out where this was considered indispensable[121].

In **the Netherlands**, due to the closure of the district courts on 17 March 2020, no court hearings could be held in the buildings that were usually open to the public. No physical hearings could be held and a video conference was not possible in all instances, because of the limited capacity and the fact that the facilities available, particularly in detention centres, were too small to comply with the measures related to the COVID-19 crisis. The Administrative Jurisdiction Division of the Council of State ruled on the question of whether this violated a foreign national's right to be heard. The Division concluded that refraining from hearing a foreign national was possible given the special circumstances of the COVID-19 crisis, and that to settle a case in writing was temporarily acceptable as a hearing method. Thus, the court was required to make a recognizable and individual assessment of all the interests involved (Netherlands, Raad van State (Council of State), 202001949/1/V3, 7 April 2020).

In **France**, after the temporary suspension of the registration of asylum applications, access to procedures was restored, although subject to derogatory procedures. By order of 13 May 2020, the French government authorized the National Court for Asylum (*Cour nationale du droit d'asile*, CNDA) to hear all the cases faster and by a single judge (instead of a panel of three) and that members of the administrative courts could sit from a location separate from the courtroom using a video conferencing device. In an ordinance on provisional measures, the Council of State partly suspended the order of 13 May 2020 undermining the fundamental guarantee of collegiality, which asylum seekers are entitled to. On the other hand, the judge considered that the requests did not put forward any argument likely to raise doubts about the legality of the provisions allowing judges to participate in the hearing by video conferencing device (France, Council of State, 8 June 2020, No. 440717, 440812, 440867).

In the United Kingdom, the High Court declared unlawful some arrangements for dealing with Upper Tribunal immigration appeals during the coronavirus pandemic, particularly the making of some appeal decisions without a hearing and with an overall 'paper norm', meaning a presumption that judges should decide appeal cases based on written submissions, without an oral hearing (Joint Council for the Welfare of Immigrants v. President of the Upper Tribunal (UT) [2020], EWHC 3103 (Admin) Case No. CO/2197/2020)[122].

[120] ELENA Weekly Legal Update: *Asylum measures in selected European countries following Covid-19 global health crisis*, 20 March 2020. Online: https://mailchi.mp/ecre/elena-weekly-legal-update-20-march-2020?e=989a4aebdd#8

[121] Practical Recommendations and Good Practice to Address Protection Concerns in the Context of the COVID-19 Pandemic, UNHCR, 9 April 2020.

[122] https://www.bailii.org/ew/cases/EWHC/Admin/2020/3103.html. For more information: ELENA Weekly Legal Update, 27 November 2020.

6.1.3. Time limit for examination procedure

Concerning the time limit for concluding the examination procedure, Article 31(3)(b) of the Asylum Procedures Directive allows Member States to extend the six months period for concluding the examination of applications by a period not exceeding a further nine months where a large number of third-country nationals or stateless persons simultaneously apply for international protection, making it very difficult in practice to conclude the examination within this time limit.

It should be possible, then, for Member States to apply this temporary derogatory rule where it is very difficult in practice for them to respect the six-month time limit for the examination of applications as a result of the COVID-19 situation.

6.2. Reception conditions, transfer, detention and removal

The COVID-19 pandemic also affected the reception conditions (Section 6.2.1.), Dublin transfer (Section 6.2.2.), and detention and removal of third-country nationals (Section 6.2.3.). European and international authorities issued recommendations in those fields. However, Member States' practices reveal very divergent policies, ranging from a stronger protection of migrants' rights to a weaker one.

6.2.1. Reception conditions and documentation

As regards reception conditions, Member States may make use of the possibility under Directive 2013/33/EU to exceptionally set, in duly justified cases and for a reasonable period, different modalities from those normally required. Indeed, according to Article 18(9) of this text:

> In duly justified cases, Member States may exceptionally set modalities for material reception conditions different from those provided for in this Article, for a reasonable period which shall be as short as possible, when:
> (a) an assessment of the specific needs of the applicant is required, in accordance with Article 22;
> (b) housing capacities normally available are temporarily exhausted;
> Such different conditions shall in any event cover basic needs.

However, if a State makes use of such a possibility, UNHCR recommends that documents of asylum seekers and stateless persons affected by the suspension should be automatically and, where possible, electronically extended for the duration of the suspension[123].

States' practices

Many States maintained the issuance of documentation to ensure legal stay and access to services. In Bosnia and Herzegovina, attestations of 'intention to seek asylum' continued to be issued to new arrivals, as were temporary residence permits in Germany.

In Portugal, in light of difficulties in obtaining or renewing necessary documents, the government decided to extend the validity of all documents expiring after 24 February 2020, including those related to asylum status and residence permits, until at least 30 June 2020 (Decision No. 3863-

[123] Practical Recommendations and Good Practice to Address Protection Concerns in the Context of the COVID-19 Pandemic, UNHCR, 9 April 2020, p. 13.

B/2020). Similarly, in Ireland, permits that were due to expire before 20 May were automatically renewed for a period of two months on the same conditions. In Italy, stay permits that expired between 31 January and 15 April were valid until 15 June 2020[124].

6.2.2. Dublin transfers

Before carrying out any transfer, Member States should consider the situation related to COVID-19, including that resulting from the heavy pressure on the health system, in the Member State responsible. Moreover, Member States should give due consideration to not delay the examination of applications, taking into account the current situation.

Where a transfer to the responsible Member State is not carried out within the applicable time limit, responsibility shifts to the Member State that requested the transfer, pursuant to Article 29(2) of the Dublin Regulation. No provision of the Regulation allows derogation from this rule in a situation such as the one resulting from the COVID-19 pandemic. Furthermore, pursuant to Article 5(2) of the Dublin Regulation, Member States are not obliged to hold a personal interview where the applicant has received relevant information on the implementation of that Regulation[125] and has already provided the information relevant for determining the Member State responsible by other means. Provided that these conditions are met, such omission may be considered as an appropriate measure, in particular if there is suspicion that an applicant has contracted COVID-19. Where an interview is omitted, the Member States shall ensure that the applicant has the opportunity to submit further information relevant for the correct determination of the Member State responsible before a transfer decision is taken.[126]

States' practices

Because of the COVID-19 crisis, it was temporarily impossible to transfer foreign nationals from **the Netherlands** to Italy. The question was whether this meant that Italy could no longer be deemed the responsible state for examining asylum applications. It follows that the fact that a transfer is temporarily impossible is an 'actual obstacle'; however, this does not change Italy's responsibility for examining the asylum application. The Jurisdiction Division ruled that the State Secretary should assess whether and when in the future the transfer of the foreign nationals could actually take place (Netherlands, Raad van State (Council of State), 201907322/1, 201907435/1 and 202001915/1, 8 April 2020).

On 21 April 2020, the Court of the Hague confirmed that the Dublin Regulation did not contain a provision to allow suspension of Dublin time limits as a result of COVID-19 (Netherlands, 21 April 2020, Case NL20.6494). This judgment was followed by another decision on 29 May 2020 where the District Court confirmed that one of the objectives of the Dublin Regulation was to determine the Member State responsible in the short term, in order to ensure effective access to procedures granting international protection[127].

The same reasoning was followed in Germany. The Administrative Court of Greifswald ruled that the COVID-19 crisis did not influence the six-month time limit of Article 29(1) of the Dublin III

[124] ELENA Weekly Legal Update, *Asylum measures in selected European countries following Covid-19 global health crisis*, 20 March 2020. Online: https://mailchi.mp/ecre/elena-weekly-legal-update-20-march-2020?e=989a4aebdd#8

[125] Referred to in Article 4 of the Dublin Regulation.

[126] COM (2020/C 126/02); for more information see Point 1.2 Dublin (transfers and procedures).

[127] Rechtbank Den Haag, 29 May 2020, No. 20.7482, ECLI:NL:RBDHA:2020:4818. Online: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2020:4818

Regulation and confirmed that Article 27(4) Dublin III could not suspend this time limit if the suspension was aimed solely at preventing the expiration of the transfer period and not at enabling effective legal protection for the applicant (Germany, 28 August 2020, VG Greifswald 3. Kammer, 3 A 1865/19 HGW)[128].

In another decision, the Federal Administrative Court also ruled that the implementation of Dublin transfers could not be administratively suspended over the time limits provided by the Dublin III Regulation due to the COVID-19 outbreak. The German court confirmed the unlawfulness of the extension of Dublin deadlines because of the COVID-19 crisis (Germany, Federal Administrative Court [Bundesverwaltungsgericht], *Applicants (Iraq)* v. *Federal Office for Migration and Refugees*, 18 September 2020, 5106/2019)[129].

6.2.3. Detention and removal orders

Article 15(4) of the Return Directive requires that detention for the purpose of removal shall cease immediately when it appears that a reasonable prospect of removal no longer exists in an individual case. But the temporary restrictions introduced by Member States and third countries to prevent and contain the spread of COVID-19 should not be interpreted as automatically leading to the conclusion that a reasonable prospect of removal no longer exists in all cases.

In this regard, the Commissioner of the Council of Europe had called on all Council of Europe Member States to review the situation of rejected asylum applicants and irregular migrants in immigration detention, and to release them to the maximum extent possible. Similarly, the Committee for the Prevention of Torture (CPT) issued a set of principles to be applied by relevant authorities, including refraining to the maximum extent possible from detaining migrants. Following its statement of principles relating to the treatment of persons deprived of their liberty in the context of the COVID-19 pandemic, issued on 20 March 2020[130], the CPT recommends guaranteeing basic principles to protect the health and safety of all persons deprived of their liberty, reinforcing staff availability, and that any restrictive measure taken should have a legal basis and be necessary, proportionate, respectful of human dignity and restricted in time.

States' practices

Restrictions taken by the Member States affected detention given the temporary discontinuation of asylum procedures and returns.

Some countries, including Spain, Belgium and the Netherlands, released third-country nationals in administrative detention, whereas other countries counter-balanced restrictions.

In **France**, following an order to leave French territory, an Egyptian national was held in immigration detention. The duration of the immigration detention was extended due to the COVID-19 situation and the impossibility for the applicant to return to his country of origin. The court ruled his immediate release from detention due to the uncertainty regarding the possibility for the applicant to leave French territory (due to COVID-19 travel restrictions) and the maximum period of the immigration detention, and also to the detention conditions for vulnerable persons

[128] https://mailchi.mp/ecre/elena-weekly-legal-update-18-september-2020#9
[129] https://caselaw.easo.europa.eu/pages/viewcaselaw.aspx?CaseLawID=1252. See also: https://mailchi.mp/ecre/elena-weekly-legal-update-16-october-2020#11
[130] CPT, Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (Covid-19) pandemic, 20 March 2020 - https://rm.coe.int/16809cfa4b

that suffer from serious health conditions during the COVID-19 pandemic (France - Administrative Court of Appeal of Montpellier, 19 March 2020, No. 2020-213).

Following a return order, an applicant was held in detention. Then, an extension of the detention was ordered. However, the closure of international borders and the health crisis made the applicant's return no longer possible. Due to the COVID-19 health crisis, and especially the cancellation of flights to the applicant's country of origin, the continuation of immigration detention was no longer required because an effective return could not be considered as a reasonable perspective. The release of the applicant was ordered (France - Judiciary Tribunal of Perpignan, 18 March 2020, No. RG20/00356).

Concerning the grounds for removal orders and expulsion during the COVID-19 pandemic, in Germany, the Regional Administrative Court dismissed the request for a ban on a deportation to Afghanistan during the COVID-19 pandemic (Regional Administrative Court [Verwaltungsgerichte], Applicant (Afghanistan) v. Federal Office for Migration and Refugees (BAMF), 2 September 2020, Case No. W 1 K 20.30872)[131]. An Afghan claimant had his application for asylum rejected and had filed a subsequent claim arguing that he was suffering from chronic depressive syndrome. He also claimed that due to the COVID-19 pandemic in Afghanistan, there was at least a right to a deportation ban because, in addition to the effects of the disease itself, there was also economic deterioration and stigmatization of returnees in relation to COVID-19. The application was rejected as inadmissible. The Court held that the general situation in Afghanistan does not amount to inhuman or degrading treatment within the meaning of Article 3 ECHR and the situation for single male Afghan citizens who are capable of working was not so serious that deportation would constitute a violation of Article 3 ECHR.

Similarly, in Germany, the Regional Administrative Court held that a return to Nigeria is not precluded by the COVID-19 pandemic. The Court held that, even if the economic situation in Nigeria may worsen due to the effects of the COVID-19 pandemic, it does not consider it to be sufficiently likely at the time of the decision that the economic and social conditions will develop so negatively that the applicant will not be able to at least secure the subsistence level (Regional Administrative Court [Verwaltungsgerichte], Applicant (Nigeria) v. Federal Office for Migration and Refugees (BAMF), 1 September 2020, Case No. 9 K 507 / 18.A).[132]

6.3. Guidelines emerging from the analysis

The guidelines and recommendations issued by the European Commission, as well as by international authorities such as UNHCR, insist on the following points that Member States have to follow in order to address migrants' rights in a context of threats to public health:

- Member States can **refuse the entry of third-country nationals on the ground of public health issues**. However, any decision on refusal of entry needs to **be proportionate** and **non-discriminatory**.

- Member States can **reintroduce border controls** on the ground of a risk posed by a contagious disease. However, in such a case, Member States have to **notify** the reintroduction of border controls in accordance with the Schengen Borders Code. Such controls should be applied in a **proportionate** manner and with **due regard to the health** of the individuals concerned.

[131] https://caselaw.easo.europa.eu/pages/viewcaselaw.aspx?CaseLawID=1257
[132] https://caselaw.easo.europa.eu/pages/viewcaselaw.aspx?CaseLawID=1318

- Member States have to **give access to asylum procedures** for people who seek international protection. Protection needs cannot be set aside while implementing measures to address public health considerations at the borders.

- Third-country nationals who apply for international protection must have their **application registered** by the national authorities even with specific temporary arrangements like online procedures.

- Difficulties due to the health crisis, such as **unusual delays, should not be considered as good reason to refuse to register** an application;

- Member States can **omit the personal interview**, depending on the circumstances of the case. **Specific temporary arrangements** like video conferencing are recommended.

- **The Dublin Regulation does not contain a provision to allow suspension** of Dublin time limits as a result of COVID-19.

- Detention for the purpose of removal shall cease immediately when it appears that a reasonable prospect of removal no longer exists in an individual case. However, the **temporary restrictions** introduced by Member States and third countries to prevent and contain the spread of COVID-19 should **not be interpreted as automatically leading to the conclusion that a reasonable prospect of removal no longer exists** in all cases.

- Member States are **not obliged to hold a personal interview in Dublin procedures**. Where an interview is omitted, the Member States shall ensure that the applicant has the opportunity to submit further information relevant for the correct determination of the Member State responsible before a transfer decision is taken.