



Quarterly update on

- Treaties
  - Legislation and
  - Jurisprudence
- on
- European Asylum Issues

Editorial Board

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**Contents**

	Editorial	2
1.	Qualification for Protection	
	1.1 Adopted measures	3
	1.2 Proposed measures	4
	1.3 Jurisprudence	
	1.3.1 CJEU	5
	1.3.2 CJEU pending	7
	1.3.3 ECtHR	8
	1.3.4 CAT	21
	1.3.5 CCPR	22
	1.3.6 national judgments	23
2.	Asylum Procedure	
	2.1 Adopted measures	24
	2.2 Proposed measures	25
	2.3 Jurisprudence	
	2.3.1 CJEU	25
	2.3.2 CJEU pending	26
	2.3.3 ECtHR	26
	2.3.4 CAT	31
	2.3.5 national judgments	32
3.	Responsibility Sharing	
	3.1 Adopted measures	33
	3.2 Proposed measures	34
	3.3 Jurisprudence	
	3.3.1 CJEU	34
	3.3.2 CJEU pending	36
	3.3.3 ECtHR	36
	3.3.4 national judgments	38
4.	Reception	
	4.1 Adopted measures	38
	4.2 Proposed measures	39
	4.3 Jurisprudence	
	4.3.1 CJEU	39
	4.3.2 CJEU pending	40
	4.3.3 ECtHR	40

## Editorial

**Welcome** to the fourth edition in 2014 of **NEAIS**.

We would like to draw your attention to some recent developments.

### Sexuality

The Geneva Convention nor the Qualification Directive contains an explicit reference to a well-founded fear of being persecuted for reasons of sexual orientation as a ground for refugee status. In C-199...201/12 (X, Y & Z) the CJEU decided in November 2013 that homosexuals form a particular social group, membership of which may give rise to a genuine fear of persecution in countries where criminal laws specifically target homosexuals.

The next question to the CJEU on this issue was how national authorities have to proceed in order to establish homosexuality as a credible ground. The CJEU answered that question in C-148...150/13 (A, B & C) of December 2014. Although the Court merely indicates that credibility is - in the end - the main issue, it stipulates also which methods can not be used in order to 'prove' a sexual orientation.

Interestingly, the Court does not say that such proof is impossible (as AG Sharpston concluded) but it states that (a) "such evidence does not necessarily have probative value" and (b) "such evidence would of its nature infringe human dignity, the respect of which is guaranteed by Article 1 of the Charter".

This second point is most important.

The CJEU rules that any form of submission to tests with a view to establishing homosexuality is in violation of Article 1 of the Charter of Fundamental Rights of the EU. Not 'just' one of the subsequent Articles of the Charter but the very first on human dignity. This implies that sexual orientation is part of this human dignity and therefore part of Fundamental Rights in the EU.

This raises the question how MS that - still - use questionable methods will implement this judgment of the CJEU.

Nijmegen, December 2014, Carolus Grütters & Tineke Strik

-.-.-

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## About

**NEAIS** is the Newsletter on European Asylum Issues. This newsletter is designed for judges who need to keep up to date with European developments in the area of asylum. **NEAIS** contains European legislation and jurisprudence on four central themes regarding asylum: (1) qualification for protection; (2) procedural safeguards; (3) responsibility sharing and (4) reception conditions of asylum seekers. On each theme **NEAIS** provides a list of: (a) measures already adopted, (b) measures in preparation and (c) relevant jurisprudence (of CJEU, ECtHR, CAT, CCPR and national courts). On all other issues regarding Migration and borders law we would refer the reader to the other newsletter: **NEMIS**, the Newsletter on European Migration Issues.

## 1 Qualification for Protection

### 1.1 Qualification for Protection: Adopted Measures

#### Directive 2004/83

*On minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons*

\* OJ 2004 L 304/12

impl. date: 10-10-2006

\* Revised by Dir. 2011/95

#### *CJEU Judgments*

**New** ☞ CJEU C-148/13, *A, B, C*.

2 Dec. 2014 art. 4

☞ CJEU C-481/13, *Qurbani*

17 July 2014 art. 14(6)

☞ CJEU C-604/12, *H.N.*

8 May 2014

☞ CJEU C-285/12, *Diakite*

30 Jan. 2014 art. 15(c)

☞ CJEU C-199/12, *X, Y, Z*

7 Nov. 2013 art. 9(1)(a); 10(1)(d)

☞ CJEU C-364/11, *El Kott a.o.*

19 Dec. 2012 art. 12(1)(a)

☞ CJEU C-277/11, *M.M.*

22 Nov. 2012 art. 4(1)

☞ CJEU C-71/11 and C-99/11, *Y. and Z.*

5 Sep. 2012 art. 2(c) and 9(1)(a)

☞ CJEU C-57/09 & C-101/09, *B. and D.*

9 Nov. 2010 art. 12(2)(b) & (c)

☞ CJEU C-31/09, *Bolbol*

17 June 2010 art. 12(1)(a)

☞ CJEU C-175/08, *Abdulla a.o.*

2 Mar. 2010 art. 2(c), 11 & 14

☞ CJEU C-465/07, *Elgafaji*

17 Feb. 2009 art. 2(e), 15(c)

#### *CJEU pending cases*

☞ CJEU C-562/13, *Abdida*

pending art. 15(b)

☞ CJEU C-542/13, *M'Bodj*

pending art. 20(3), 28(2), 29(2)

☞ CJEU C-472/13, *Shepherd*

pending art. 9(2)+12(2)

☞ CJEU C-373/13, *T.*

pending art. 21(2)+(3)

#### *National Judgments*

☞ Germany: BVerwGE 10 C 23.12

20 Feb. 2013 art. 9(1)

☞ Belgium: 218.075

16 Feb. 2012 art. 15(b)

☞ Germany: BVerwGE 10 C 13.10

17 Nov. 2011 art. 2(e), 4(4), 15(c)

See further: § 1.3

#### Directive 2011/95

*Revised directive on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection*

\* OJ 2011 L 337/9

impl. date: 22-12-2013

UK, IRL opt out

\* Recast of Dir. 2004/83

#### *CJEU pending cases*

**New** ☞ CJEU C-443/14, *Alo*

pending art. 33

See further: § 1.3

#### Directive 2001/55

*On minimum standards for giving temporary protection in the event of a mass influx of displaced persons*

\* OJ 2001 L 212/12

#### Temporary Protection

#### ICCPR

#### Anti-Torture

*International Covenant on Civil and Political Rights*

\* 999 UNTS 14668

impl. date: 1976

\* art. 7: Prohibition of torture or cruel, inhuman or degrading treatment or punishment

#### *CCPR Views*

☞ CCPR 1763/2008, *Ernst Sigan Pillai et al. v CAN* 25 Mar. 2011 art. 7 (qual.)

☞ CCPR 1544/2007, *Mehrez Ben Abde Hamida v. CAN* 11 May 2010 art. 7 (qual.)

See further: § 1.3

#### CAT

#### Anti-Torture

*UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*

\* 1465 UNTS 85

impl. date: 1987

\* art. 3: Protection against Refoulement

*CAT Views*

☞ CAT 391/2009, <i>M.A.M.A. et al. v SWE</i>	10 July	2012	art. 3 (qual.)
☞ CAT 381/2009, <i>Abolghasem Faragollah et al. v CH</i>	21 Nov.	2011	art. 3 (qual.)
☞ CAT 379/2009, <i>Bakatu-Bia v SWE</i>	3 June	2011	art. 3 (qual.)
☞ CAT 336/2008, <i>Harminder Singh Khalsa v CH</i>	26 May	2011	art. 3 (qual.)
☞ CAT 339/2008, <i>Said Amini v DNK</i>	30 Nov.	2010	art. 3 (qual.)
☞ CAT 373/2009, <i>M.A. and L.G. v SWE</i>	19 Nov.	2010	art. 3 (qual.)
☞ CAT 300/2006, <i>A.T. v FRA</i>	11 May	2007	art. 3 (qual.)
☞ CAT 281/2005, <i>E.P. v AZE</i>	1 May	2007	art. 3 (qual.)
☞ CAT 279/2005, <i>C.T. and K.M. v SWE</i>	22 Jan.	2007	art. 3 (qual.)
☞ CAT 233/2003, <i>Agiza v SWE</i>	20 May	2005	art. 3 (qual.)
☞ CAT 43/1996, <i>Tala v SWE</i>	15 Nov.	1996	art. 3 (qual.)

See further: § 1.3

**ECHR****Non-Refoulement***European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols*

\* ETS 005

impl. date: 1953

\* art. 3: Prohibition of Torture, Inhuman or Degrading Treatment or Punishment

*ECtHR Judgments*

<b>New</b>	☞ ECtHR Ap.no. 52589/13, <i>M.A. v SWI</i>	18 Nov.	2014	art. 3 (qual.)
<b>New</b>	☞ ECtHR Ap.no. 71932/11, <i>Trabelsi v BEL</i>	4 Sep.	2014	art. 3 (qual.)
<b>New</b>	☞ ECtHR Ap.no. 17897/09, <i>M.V. &amp; M.T. v FRA</i>	4 Sep.	2014	art. 3 (qual.)
	☞ ECtHR Ap.no. 34098/11, <i>A.A. a.o. v SWE</i>	24 July	2014	art. 3 (qual.)
	☞ ECtHR Ap.no. 58363/10, <i>M.E. v DEN</i>	8 July	2014	art. 3 (qual.)
	☞ ECtHR Ap.no. 71932/11, <i>Mohammadi v AUS</i>	3 July	2014	art. 3 (qual.)
	☞ ECtHR Ap.no. 71398/12, <i>M.E. v SWE</i>	26 June	2014	art. 3 (qual.)
	☞ ECtHR Ap.no. 39093/13, <i>Gayratbek Saliyev v RUS</i>	17 Apr.	2014	art. 3 (qual.)
	☞ ECtHR Ap.no. 20110/13, <i>Ismailov v RUS</i>	17 Apr.	2014	art. 3 (qual.)
	☞ ECtHR Ap.no. 689519/10, <i>A.A.M. v SWE</i>	3 Apr.	2014	art. 3 (qual.)
	☞ ECtHR Ap.no. 49341/10, <i>W.H. v SWE</i>	27 Mar.	2014	art. 3 (qual.)
	☞ ECtHR Ap.no. 35/10, <i>Zarmayev v BE</i>	27 Feb.	2014	art. 3 (qual.)
	☞ ECtHR Ap.no. 43611/11, <i>F.G. v SWE</i>	16 Jan.	2014	art. 3 (qual.)
	☞ ECtHR Ap.no. 58802/12, <i>A.A. v CH</i>	7 Jan.	2014	art. 3 (qual.)
	☞ ECtHR Ap.no. 11161/11, <i>B.K.A. v SWE</i>	19 Dec.	2013	art. 3 (qual.)
	☞ ECtHR Ap.no. 7974/11, <i>N.K. v FRA</i>	19 Dec.	2013	art. 3 (qual.)
	☞ ECtHR Ap.no. 1231/11, <i>T.H.K v SWE</i>	19 Dec.	2013	art. 3 (qual.)
	☞ ECtHR Ap.no. 48866/10, <i>T.A. v SWE</i>	19 Dec.	2013	art. 3 (qual.)
	☞ ECtHR Ap.no. 28127/09, <i>Ghorbanov a.o. v TUR</i>	3 Dec.	2013	art. 3 (qual.)
	☞ ECtHR Ap.no. 10466/11, <i>R.J. v FRA</i>	19 Sep.	2013	art. 3 (qual.)
	☞ ECtHR Ap.no. 886/11, <i>K.A.B. v SWE</i>	5 Sep.	2013	art. 3 (qual.)
	☞ ECtHR Ap.no. 61204/09, <i>I. v. SWE</i>	5 Sep.	2013	art. 3 (qual.)
	☞ ECtHR Ap.no. 71680/10, <i>A. a.o. v SWE</i>	27 June	2013	art. 3 (qual.)
	☞ ECtHR Ap.no. 50094/10, <i>M.E. v FRA</i>	6 June	2013	art. 3 (qual.)
	☞ ECtHR Ap.no. 25393/10, <i>Rafaa v FRA</i>	30 May	2013	art. 3 (qual.)
	☞ ECtHR Ap.no. 18372/10, <i>Mo.M. v FRA</i>	18 Apr.	2013	art. 3 (qual.)
	☞ ECtHR Ap.no. 17299/12, <i>Aswat v UK</i>	16 Apr.	2013	art. 3 (qual.)
	☞ ECtHR Ap.no. 70073/10 & 44539/11, <i>H. and B. v UK</i>	9 Apr.	2013	art. 3 (qual.)
	☞ ECtHR Ap.no. 2964/12, <i>I.K. v AUT</i>	28 Mar.	2013	art. 3 (qual.)
	☞ ECtHR Ap.no. 60367/10, <i>S.H.H. v UK</i>	29 Jan.	2013	art. 3 (qual.)
	☞ ECtHR Ap.no. 52077/10, <i>S.F. v SWE</i>	15 May	2012	art. 3 (qual.)
	☞ ECtHR Ap.no. 33809/08, <i>Labsi v SK</i>	15 May	2012	art. 3 (qual.)
	☞ ECtHR Ap.no. 24027/07, <i>Babar Ahmad v UK</i>	10 Apr.	2012	art. 3 (qual.)
	☞ ECtHR Ap.no. 27765/09, <i>Hirsi v ITA</i>	23 Feb.	2012	art. 3 (qual.)
	☞ ECtHR Ap.no. 8139/09, <i>Othman v UK</i>	17 Jan.	2012	art. 3 (qual.)
	☞ ECtHR Ap.no. 23505/09, <i>N. v SWE</i>	20 July	2010	art. 3 (qual.)
	☞ ECtHR Ap.no. 25904/07, <i>N.A. v UK</i>	17 July	2008	art. 3 (qual.)
	☞ ECtHR Ap.no. 1948/04, <i>Salah Sheekh v NL</i>	11 Jan.	2007	art. 3 (qual.)
	☞ ECtHR Ap.no. 24245/03, <i>D. v TUR</i>	22 June	2006	art. 3 (qual.)
	☞ ECtHR Ap.no. 2345/02, <i>Said v NL</i>	5 July	2005	art. 3 (qual.)
	☞ ECtHR Ap.no. 58510/00, <i>Venkadajalasarma v NL</i>	17 Feb.	2004	art. 3 (qual.)

*(1.1: Qualification for Protection: Adopted Measures)*

☞ ECtHR Ap.no. 40035/98, <b>Jabari v TUR</b>	11 July	2000	art. 3 (qual.)
☞ ECtHR Ap.no. 24573/94, <b>H.L.R. v FRA</b>	27 Apr.	1997	art. 3 (qual.)
☞ ECtHR Ap.no. 13163/87, <b>Vilvarajah v UK</b>	30 Oct.	1991	art. 3 (qual.)
☞ ECtHR Ap.no. 15576/89, <b>Cruz Varas v SWE</b>	20 Mar.	1991	art. 3 (qual.)
☞ ECtHR Ap.no. 14038/88, <b>Soering v UK</b>	7 July	1989	art. 3 (qual.)
See further: § 1.3			

*1.2 Qualification for Protection: Proposed Measures*

- \* nothing to report

*1.3 Qualification for Protection: Jurisprudence***1.3.1 CJEU Judgments on Qualification for Protection**

- New**
- ☞ CJEU C-148/13, **A, B, C.**, [2 Dec. 2014]
    - \* interpr. of Dir. 2004/83: **Qualification** [art. 4]
    - \* ref. from 'Raad van State' (Netherlands)
    - \* *Joined cases: C-148, 149, 150/13. Art 4(3)(c) must be interpreted as precluding, in the context of the assessment by the competent national authorities, acting under the supervision of the courts, of the facts and circumstances concerning the declared sexual orientation of an applicant for asylum, whose application is based on a fear of persecution on grounds of that sexual orientation, the statements of that applicant and the documentary and other evidence submitted in support of his application being subject to an assessment by those authorities, founded on questions based only on stereotyped notions concerning homosexuals. Art 4 must be interpreted as precluding, in the context of that assessment, the acceptance by those authorities of evidence such as the performance by the applicant for asylum concerned of homosexual acts, his submission to 'tests' with a view to establishing his homosexuality or, yet, the production by him of films of such acts.*
  - ☞ CJEU C-175/08, **Abdulla a.o.**, [2 Mar. 2010]
    - \* interpr. of Dir. 2004/83: **Qualification** [art. 2(c), 11 & 14]
    - \* ref. from 'Bundesverwaltungsgericht' (Germany)
    - \* *When the circumstances which resulted in the granting of refugee status have ceased to exist and the competent authorities of the Member State verify that there are no other circumstances which could justify a fear of persecution on the part of the person concerned either for the same reason as that initially at issue or for one of the other reasons set out in Article 2(c) of Directive 2004/83, the standard of probability used to assess the risk stemming from those other circumstances is the same as that applied when refugee status was granted.*
  - ☞ CJEU C-57/09 & C-101/09, **B. and D.**, [9 Nov. 2010]
    - \* interpr. of Dir. 2004/83: **Qualification** [art. 12(2)(b) & (c)]
    - \* ref. from 'Bundesverwaltungsgericht' (Germany)
    - \* *The fact that a person has been a member of an organisation (which, because of its involvement in terrorist acts, is on the list forming the Annex to Common Position 2001/931/CFSP on the application of specific measures to combat terrorism) and that that person has actively supported the armed struggle waged by that organisation, does not automatically constitute a serious reason for considering that that person has committed 'a serious non-political crime' or 'acts contrary to the purposes and principles of the United Nations.*
  - ☞ CJEU C-31/09, **Bolbol**, [17 June 2010]
    - \* interpr. of Dir. 2004/83: **Qualification** [art. 12(1)(a)]
    - \* ref. from 'Fővárosi Bíróság' (Hungary)
    - \* *Right of a stateless person, i.e. a Palestinian, to be recognised as a refugee on the basis of the second sentence of Article 12(1)(a)*
  - ☞ CJEU C-285/12, **Diakite**, [30 Jan. 2014]
    - \* interpr. of Dir. 2004/83: **Qualification** [art. 15(c)]
    - \* ref. from 'Raad van State' (Belgium)

- \* *On a proper construction of Art. 15(c) and the content of the protection granted, it must be acknowledged that an internal armed conflict exists, for the purposes of applying that provision, if a State's armed forces confront one or more armed groups or if two or more armed groups confront each other. It is not necessary for that conflict to be categorised as 'armed conflict not of an international character' under international humanitarian law; nor is it necessary to carry out, in addition to an appraisal of the level of violence present in the territory concerned, a separate assessment of the intensity of the armed confrontations, the level of organisation of the armed forces involved or the duration of the conflict.*
- ☞ CJEU C-364/11, *El Kott a.o.*, [19 Dec. 2012]
- \* interpr. of Dir. 2004/83: **Qualification** [art. 12(1)(a)]
- \* ref. from 'Fővárosi Bíróság' (Hungary)
- \* *The cessation of protection or assistance from organs or agencies of the UN other than the UNHCR 'for any reason' includes the situation in which a person who, after actually availing himself of such protection or assistance, ceases to receive it for a reason beyond his control and independent of his volition. It is for the competent national authorities of the MS responsible for examining the asylum application made by such a person to ascertain, by carrying out an assessment of the application on an individual basis, whether that person was forced to leave the area of operations of such an organ or agency, which will be the case where that person's personal safety was at serious risk and it was impossible for that organ or agency to guarantee that his living conditions in that area would be commensurate with the mission entrusted to that organ or agency.*  
*The fact that a person is ipso facto 'entitled to the benefits of the directive' means that that MS must recognise him as a refugee within the meaning of Article 2(c) of the directive and that person must automatically be granted refugee status, provided always that he is not caught by Article 12(1)(b) or (2) and (3) of the directive.*
- ☞ CJEU C-465/07, *Elgafaji*, [17 Feb. 2009]
- \* interpr. of Dir. 2004/83: **Qualification** [art. 2(e), 15(c)]
- \* ref. from 'Raad van State' (Netherlands)
- \* *Minimum standards for determining who qualifies for refugee status or for subsidiary protection status - Person eligible for subsidiary protection - Article 2(e) - Real risk of suffering serious harm - Article 15(c) - Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of armed conflict*
- ☞ CJEU C-604/12, *H.N.*, [8 May 2014]
- \* interpr. of Dir. 2004/83: **Qualification**
- \* ref. from 'Supreme Court' (Ireland)
- \* *The QD does not preclude a national procedural rule under which an application for subsidiary protection may be considered only after an application for refugee status has been refused, provided that: (1) it is possible to submit the application for refugee status and the application for subsidiary protection at the same time and, (2) the national procedural rule does not give rise to a situation in which the application for subsidiary protection is considered only after an unreasonable length of time, which is a matter to be determined by the referring court.*
- ☞ CJEU C-277/11, *M.M.*, [22 Nov. 2012]
- \* interpr. of Dir. 2004/83: **Qualification** [art. 4(1)]
- \* ref. from 'High Court' (Ireland)
- \* *The requirement that the MS concerned cooperate with an applicant for asylum, as stated in the second sentence of Article 4(1)QD, cannot be interpreted as meaning that, where a foreign national requests subsidiary protection status after he has been refused refugee status and the competent national authority is minded to reject that second application as well, the authority is on that basis obliged – before adopting its decision – to inform the applicant that it proposes to reject his application and notify him of the arguments on which it intends to base its rejection, so as to enable him to make known his views in that regard.*  
*However, in the case of a system such as that established by the national legislation at issue in the main proceedings, a feature of which is that there are two separate procedures, one after the other, for examining applications for refugee status and applications for subsidiary protection respectively, it is for the national court to ensure observance, in each of those procedures, of the applicant's fundamental rights and, more particularly, of the right to be heard in the sense that the applicant must be able to make known his views before the adoption of any decision that does not grant the protection*



requested. In such a system, the fact that the applicant has already been duly heard when his application for refugee status was examined does not mean that that procedural requirement may be dispensed with in the procedure relating to the application for subsidiary protection.

☞ CJEU C-481/13, *Qurbani*, [17 July 2014]

\* interpr. of Dir. 2004/83: **Qualification** [art. 14(6)]

\* interpr. of **Refugee Convention** [art. 31]

\* ref. from 'Oberlandesgericht Bamberg' (Germany)

\* *Although the Court accepted in Bolbol (C-31/09) and El Karem (C-364/11) that it had jurisdiction to interpret the provisions of the Geneva Convention to which EU law made a renvoi, it must be noted that the present request for a preliminary ruling contains no mention of any rule of EU law which makes a renvoi to Article 31 of the Geneva Convention and, in particular, no mention of Article 14(6) of Directive 2004/83. The point should also be made that the present request contains nothing which suggests that the latter provision is relevant in the case in the main proceedings.*

*Therefore, the Court rules that it has no jurisdiction to reply to the questions referred for a preliminary ruling.*

☞ CJEU C-199/12, *X, Y, Z*, [7 Nov. 2013]

\* interpr. of Dir. 2004/83: **Qualification** [art. 9(1)(a); 10(1)(d)]

\* ref. from 'Raad van State' (Netherlands)

\* *Joined cases C-199, 200, 201/12. The court ruled on the issue whether homosexuals - for the the assessment of the grounds of persecution - may be regarded as being members of a social group.*

*Art. 10(1)(d) must be interpreted as meaning that the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group.*

*Article 9(1), read together with Article 9(2)(c), must be interpreted as meaning that the criminalisation of homosexual acts per se does not constitute an act of persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution.*

*Article 10(1)(d), read together with Article 2(c), must be interpreted as meaning that only homosexual acts which are criminal in accordance with the national law of the Member States are excluded from its scope. When assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation.*

☞ CJEU C-71/11 and C-99/11, *Y. and Z.*, [5 Sep. 2012]

\* interpr. of Dir. 2004/83: **Qualification** [art. 2(c) and 9(1)(a)]

\* ref. from 'Bundesverwaltungsgericht' (Germany)

\* *1. Articles 9(1)(a) QD means that not all interference with the right to freedom of religion which infringes Article 10(1) EU Charter is capable of constituting an 'act of persecution' within the meaning of that provision of the QD;*

*– there may be an act of persecution as a result of interference with the external manifestation of that freedom, and*

*– for the purpose of determining whether interference with the right to freedom of religion which infringes Article 10(1) EU Charter may constitute an 'act of persecution', the competent authorities must ascertain, in the light of the personal circumstances of the person concerned, whether that person, as a result of exercising that freedom in his country of origin, runs a genuine risk of, inter alia, being prosecuted or subject to inhuman or degrading treatment or punishment by one of the actors referred to in Article 6 QD.*

*2. Article 2(c) QD must be interpreted as meaning that the applicant's fear of being persecuted is well founded if, in the light of the applicant's personal circumstances, the competent authorities consider that it may reasonably be thought that, upon his return to his country of origin, he will engage in religious practices which will expose him to a real risk of persecution. In assessing an application for refugee status on an individual basis, those authorities cannot reasonably expect the applicant to abstain from those religious practices.*

### 1.3.2 CJEU pending cases on Qualification for Protection

New

- ☞ CJEU C-562/13, *Abdida*
- \* interpr. of Dir. 2004/83: **Qualification** [art. 15(b)]
- \* [AG: 4 Sep 2014](#)
- \* ref. from 'Arbeidshof Brussel' (Belgium)
- \* *On the question to what type of medical treatment an asylum seeker is entitled pending appeal and whether this should have suspensive effect.*
  
- ☞ CJEU C-443/14, *Alo*
- \* interpr. of Dir. 2011/95: **Qualification II** [art. 33]
- \* ref. from 'Bundesverwaltungsgericht' (Germany)
- \* *Is a place of residence condition imposed on beneficiaries of subsidiary protection status compatible with Art 33 or Art 29, where it is based on the objective of achieving a reasonable distribution of social assistance burdens among the relevant institutions within the territory of the State?*
  
- ☞ CJEU C-542/13, *M'Bodj*
- \* interpr. of Dir. 2004/83: **Qualification** [art. 20(3), 28(2), 29(2)]
- \* [AG: 17 Juli 2014](#)
- \* ref. from 'Grondwettelijk Hof' (Belgium) 26-09-2013
- \* *On the differences on the right to benefits between a disabled TCN authorised by a Member State to reside in its territory for medical reasons, and a disabled TCN benefiting from subsidiary protection status.*
  
- ☞ CJEU C-472/13, *Shepherd*
- \* interpr. of Dir. 2004/83: **Qualification** [art. 9(2)+12(2)]
- \* ref. from 'Bayerisches Verwaltungsgericht München' (Germany)
- \* *On the meaning of persecution in the context of a person who cannot reconcile the performance of military service with his conscience and is faced with dishonourable discharge from the army, the imposition of a prison sentence and the social ostracism and disadvantages associated therewith.*
  
- ☞ CJEU C-373/13, *T.*
- \* interpr. of Dir. 2004/83: **Qualification** [art. 21(2)+(3)]
- \* ref. from 'Verwaltungsgerichtshof Baden Württemberg' (Germany)
- \* *Is the revocation or termination of the residence permit issued to a beneficiary of refugee status (by expulsion under national law, for example) permissible under European Law only in cases where the conditions laid down in Article 21(3) in conjunction with (2) of the Qual.Dir (I or II) are satisfied?*

### 1.3.3 ECtHR Judgments and decisions on Qualification for Protection

- ☞ ECtHR Ap.no. 71680/10, *A. a.o. v SWE*, [27 June 2013]
- \* no violation of **ECHR** [art. 3 (qual.)]
- \* *The eight cases concerned ten Iraqi nationals having applied for asylum in Sweden. Their applications had been rejected and the ECtHR noted that the Swedish authorities had given extensive reasons for their decisions. The Court further noted that the general situation in Iraq was slowly improving, and concluded that it was not so serious as to cause by itself a violation of art. 3 in the event of a person's return to the country.*
- The applicants in two of the cases alleged to be at risk of being victims of honour-related crimes, and the Court found that the events that had led the applicants to leave Iraq strongly indicated that they would be in danger upon return to their home towns. The Court also found these applicants unable to seek protection from the authorities in their home regions of Iraq, nor would any protection provided be effective, given reports that 'honour killings' were being committed with impunity. However, these two applicants were considered able to relocate to regions away from where they were persecuted by a family or clan, as tribes and clans were region-based powers and there was no evidence to show that the relevant clans or tribes in their cases were particularly influential or powerful or connected with the authorities or militia in Iraq. Furthermore, the two applicants were both Sunni Muslims and there was nothing to indicate that it would be impossible or even particularly difficult for them to find a place to settle where they would be part of the majority or, in any event, be able to live in relative safety.*
- The applicants in the other six cases were Iraqi Christians whom the Court considered able to relocate*



to the three northern governorates of Dahuk, Erbil and Sulaymaniyah, forming the Kurdistan Region of northern Iraq. According to international sources, this region was a relatively safe area where the rights of Christians were generally being respected and large numbers of this group had already found refuge. The Court pointed to the preferential treatment given to the Christian group as compared to others wishing to enter the Kurdistan Region, and to the apparent availability of identity documents for that purpose. Neither the general situation in that region, including that of the Christian minority, nor any of the applicants' personal circumstances indicated the existence of a risk of inhuman or degrading treatment. Furthermore, there was no evidence to show that the general living conditions would not be reasonable, the Court noting in particular that there were jobs available in Kurdistan and that settlers would have access to health care as well as financial and other support from UNHCR and local authorities.

☞ ECtHR Ap.no. 34098/11, *A.A. a.o. v SWE*, [24 July 2014]

\* no violation of *ECHR* [art. 3 (qual.)]

\* *The applicants were four Somali citizens, a father and his three children born in 1990, 1994 and 1997. They applied for asylum in Sweden, claiming to be members of the Sheikal clan and having lived together in southern Somalia since 1999. The Swedish authorities, referring to language analysis and to their various explanations as well as A.A.'s several passport stamps from Somaliland and northern Somalia, found it much more likely that they had been living in Somaliland for years before leaving for Sweden, and that they could consequently be returned there.*

*While there were no indications that the applicants had any affiliations with the majority Isaaq clan in Somaliland, the ECtHR found strong reasons to question the veracity of the applicants' account of their origin in southern Somalia and their denial of any ties with northern Somalia. They could therefore be expected to provide a satisfactory explanation for the discrepancies alleged by the Swedish authorities. Such explanation had not been provided, and the Court further noted that the applicants had not contested the findings of the language analyst before the domestic authorities, and that A.A. had provided contradictory statements about a crucial event and had been vague about the situation in southern and central Somalia.*

*Against this background, the Court was satisfied that the assessment by the Swedish authorities that the applicants must have been former residents of Somaliland before leaving Somalia, was adequate and sufficiently supported by relevant materials. At the same time the Court noted the intention to remove the applicants directly to Somaliland, and that a fresh assessment would have to be made by the Swedish authorities in case the applicants should not gain admittance to Somaliland. Their deportation to Somaliland would therefore not involve a violation of art. 3.*

☞ ECtHR Ap.no. 58802/12, *A.A. v CH*, [7 Jan. 2014]

\* violation of *ECHR* [art. 3 (qual.)]

\* *The applicant was a Sudanese asylum seeker, claiming to originate from the region of North Darfur. He alleged to have fled his village after it had been attacked and burnt down by the Janjaweed militia that had killed his father and many other inhabitants, and mistreated himself.*

*The ECtHR noted that the security and human rights situation in Sudan is alarming and has deteriorated in the last few months. Political opponents of the government are frequently harassed, arrested, tortured and prosecuted, such risk affecting not only high-profile people, but anyone merely suspected of supporting opposition movements.*

*As the applicant had been a member of the Darfur rebel group SLM-Unity in Switzerland for several years, the Court noted that the Sudanese government monitors activities of political opponents abroad. While acknowledging the difficulty in assessing cases concerning *sur place* activities, the Court had regard to the fact that the applicant had joined the organisation several years before launching his present asylum request when it was not foreseeable for him to apply for asylum a second time. In view of the importance of art. 3 and the irreversible nature of the damage that results if the risk of ill-treatment materialises, the Court preferred to assess the claim on the grounds of the political activities effectively carried out by the applicant. As he might at least be suspected of being affiliated with an opposition movement, the Court found substantial grounds for believing that he would be at risk of being detained, interrogated and tortured on arrival at the airport in Sudan.*

☞ ECtHR Ap.no. 689519/10, *A.A.M. v SWE*, [3 Apr. 2014]

\* no violation of *ECHR* [art. 3 (qual.)]

\* *The applicant was an Iraqi Sunni Muslim originating from Mosul. Despite certain credibility issues concerning an alleged arrest warrant and in absentia judgment, the ECtHR considered him to be at real risk of ill-treatment by al-Qaeda in Iraq due to his refusal to apologise for offensive religious*

statements and to having had an unveiled woman in his employment.

Based on considerations similar to those in the above mentioned case of *W.H. v. Sweden*, however, the Court found that the applicant would be able to relocate safely in KRI. Therefore his deportation would not involve a violation of art. 3 provided that he is not returned to parts of Iraq situated outside KRI. One dissenting judge considered this to be insufficient in order to comply with the guarantees for internal relocation as required under the Court's case law.

☞ ECtHR Ap.no. 17299/12, *Aswat v UK*, [16 Apr. 2013]

\* violation of **ECHR** [art. 3 (qual.)]

\* *An alleged international terrorist who had been detained in the UK pending extradition to the USA claimed that such extradition would not be compatible with art. 3. The case was originally processed together with *Babar Ahmad a.o. v. UK* (24027/07), but was adjourned in order to obtain further information. The Court distinguished this case from the former one, due to the severity of the applicant's mental health condition. In light of the medical evidence there was a real risk that extradition would result in a significant deterioration of the applicant's mental and physical health, amounting to treatment in breach of art. 3. The Court pointed to his uncertain future in an undetermined institution, possibly the highly restrictive regime in the 'supermax' prison ADX Florence, and to the different and potentially more hostile prison environment than the high-security psychiatric hospital in the UK where the applicant was currently detained.*

☞ ECtHR Ap.no. 11161/11, *B.K.A. v SWE*, [19 Dec. 2013]

\* no violation of **ECHR** [art. 3 (qual.)]

\* *The applicant was an Iraqi citizen, a Sunni Muslim from Baghdad. He claimed to be at risk of persecution because he had worked as a professional soldier in 2002-03 during the Saddam Hussein regime and had been a member of the Ba'ath party, and because of a blood feud after he had accidentally shot and killed a relative in Iraq.*

*The ECtHR first considered the general situation in Iraq, and referred to international reports attesting to a continued difficult situation, including indiscriminate and deadly attacks by violent groups, discrimination and heavy-handed treatment by authorities. In the Court's view, though, it appeared that the overall situation has been slowly improving since the peak in violence in 2007, and the Court saw no reason to alter the position taken in this respect four years ago in the case of *F.H. v. Sweden* (20 January 2009). It noted that the applicant had not claimed that the general circumstances on their own would preclude return, but asserted that this situation together with his personal circumstances would put him at risk of treatment prohibited by art. 3.*

*As regards the applicant's personal situation, the Court noted that the Swedish Migration Court had found his story coherent and detailed. The Court considered former members of the Ba'ath party and the military to be at risk today only in certain parts of Iraq and only if some other factors are at hand, such as the individual having held a prominent position in either organisation. Given the long time passed since the applicant left these organisations and the fact that neither he nor his family had received any threats because of this involvement for many years, the Court found no indication of risk of ill-treatment on this account. However, it did accept the Swedish Court's assessment of the risk of retaliation and ill-treatment from his relatives as part of the blood feud, noting that it may be very difficult to obtain evidence in such matters.*

*While the applicant was thus at risk of treatment contrary to art. 3, the Court accepted the domestic authorities' finding that these threats were geographically limited to Diyala and Baghdad and that he would be able to settle in another part of Iraq, for instance in Anbar the largest province in the country. In a dissenting opinion, one of the judges held this finding to reflect a failure to test the requisite guarantees in connection with internal relocation of applicants under art. 3.*

☞ ECtHR Ap.no. 24027/07, *Babar Ahmad v UK*, [10 Apr. 2012]

\* no violation of **ECHR** [art. 3 (qual.)]

\* *In a case concerning six alleged international terrorists who have been detained in the UK pending extradition to the USA, the Court held that neither their conditions of detention at a 'supermax' prison in USA (ADX Florence) nor the length of their possible sentences (mandatory sentence of life imprisonment without the possibility parole for one of the applicants, and discretionary life sentences for the others) would make such extradition being in violation of art. 3.*

☞ ECtHR Ap.no. 15576/89, *Cruz Varas v SWE*, [20 Mar. 1991]

\* no violation of **ECHR** [art. 3 (qual.)]

\* *Recognizing the extra-territorial effect of Art. 3 similarly applicable to rejected asylum seekers; finding no Art. 3 violation in expulsion of Chilean national denied asylum, noting that risk assessment*

by State Party must be based on facts known at time of expulsion.

- ☞ ECtHR Ap.no. 24245/03, **D. v TUR**, [22 June 2006]
  - \* violation of **ECHR** [art. 3 (qual.)]
  - \* *Deportation of woman applicant in view of the awaiting execution of severe corporal punishment in Iran would constitute violation of Art. 3, as such punishment would inflict harm to her personal dignity and her physical and mental integrity; violation of Art. 3 would also occur to her husband and daughter, given their fear resulting from the prospective ill-treatment of D.*
- ☞ ECtHR Ap.no. 43611/11, **F.G. v SWE**, [16 Jan. 2014]
  - \* no violation of **ECHR** [art. 3 (qual.)]
  - \* [Case referred to the Grand Chamber \(2 June 2014\)](#)
  - \* *An Iranian is refused asylum in Sweden and faces expulsion to Iran. The Court is divided (4-3) as to the question whether the applicant risks religious persecution in Iran.*
- ☞ ECtHR Ap.no. 39093/13, **Gayratbek Saliyev v RUS**, [17 Apr. 2014]
  - \* violation of **ECHR** [art. 3 (qual.)]
  - \* *The applicant was a Kyrgyz citizen of Uzbek ethnicity, wanted in Kyrgyzstan for violent offences allegedly committed during inter-ethnic riots in 2010. He was detained pending extradition, and released in 2013. His application for asylum in Russia had been refused. Considering the widespread and routine use of torture and other ill-treatment by law-enforcement agencies in the southern part of Kyrgyzstan in respect of members of the Uzbek community to which the applicant belonged, the impunity of law enforcement officers and the absence of sufficient safeguards for the applicant in the requesting country, the ECtHR found it substantiated that he would face a real risk of ill-treatment if returned to Kyrgyzstan. That risk was not considered to be excluded by diplomatic assurances from the Kyrgyz authorities, as invoked by Russia. Art. 3 would therefore be violated in case of his extradition to Kyrgyzstan. Also violation of art. 5(4) due to length of detention appeal proceedings.*
- ☞ ECtHR Ap.no. 28127/09, **Ghorbanov a.o. v TUR**, [3 Dec. 2013]
  - \* violation of **ECHR** [art. 3 (qual.)]
  - \* *The applicants were 19 Uzbek citizens who had been recognised as refugees by the UNHCR both in Iran and in Turkey, and the Turkish authorities had issued them asylum-seeker cards as well as temporary residence permits. Nonetheless, they had been summarily deported from Turkey to Iran twice in 2008. While the complaint that they had been at risk of further deportation from Iran to Uzbekistan had been declared manifestly ill-founded by the ECtHR as the applicants had been living in Iran as recognised refugees for several years before entering Turkey, this complaint concerned the circumstances of their deportation from Turkey. The Court held these circumstances to have caused feelings of despair and fear as they were unable to take any step to prevent their removal in the absence of procedural safeguards, and the Turkish authorities had carried out the removal without respect for the applicants' status as refugees or for their personal circumstances in that most of the applicants were children who had a stable life in Turkey. Thus, the Court concluded that the suffering had been severe enough to be categorised as inhuman treatment. Violation of Art. 3, 5(1) and 5(2).*
- ☞ ECtHR Ap.no. 70073/10 & 44539/11, **H. and B. v UK**, [9 Apr. 2013]
  - \* no violation of **ECHR** [art. 3 (qual.)]
  - \* *Both cases concerned the removal to Kabul of failed Afghan asylum seekers who had claimed to be at risk of ill-treatment by Taliban in Afghanistan due to their past work as a driver for the UN and as an interpreter for the US forces, respectively. The UK Government was proposing to remove the applicants directly to Kabul, and the cases therefore essentially deal with the adequacy of Kabul as an internal flight alternative. It had not been claimed that the level of violence in Afghanistan was such that any removal there would necessarily breach ECHR art. 3. The Court found no evidence to suggest that there is a general situation of violence such that there would be a real risk of ill-treatment simply by virtue of being returned to Afghanistan. The Court pointed to the disturbing picture of attacks carried out by the Taliban and other armed anti-government forces in Afghanistan on civilians with links to the international community, with targeted killing of civilians associated with, or perceived as supporting, the Afghan Government or the international community. Thus, the Court quoted reports about an 'alarming trend' of the assassination of civilians by anti-government forces, and the continuing conduct of a campaign of intimidation and assassination. At the same time the Court considered that there is insufficient*

evidence at the present time to suggest that the Taliban have the motivation or the ability to pursue low level collaborators in Kabul or other areas outside their control.

H. had left the Wardak province as an infant and had moved to Kabul where he had lived most of his life with his family. He had worked as a driver for the UN in Kabul between 2005 and 2008. Like the UK authorities, the ECtHR found no reason to suggest either that he had a high profile in Kabul such that he would remain known there or that he would be recognised elsewhere in Afghanistan as a result of his work.

B. had until early 2011 worked as an interpreter for the US forces in Kunar province with no particular profile, and had not submitted any evidence or reason to suggest that he would be identified in Kabul or that he would come to the adverse attention of the Taliban there. The Court pointed out that the UK Tribunal had found him to be an untruthful witness and found no reason to depart from this finding of fact. As regards B.'s claim that he would be unable to relocate to Kabul because he would be destitute there, the ECtHR noted that he is a healthy single male of 24 years, and found that he had failed to submit evidence suggesting that his removal to Kabul, an urban area under Government control where he still has family members including two sisters, would be in violation of art. 3.

☞ ECtHR Ap.no. 24573/94, *H.L.R. v FRA*, [27 Apr. 1997]

\* no violation of *ECHR* [art. 3 (qual.)]

\* Finding no violation of Article 3 in case of expulsion of a citizen of Columbia as there was no 'relevant evidence' of risk of ill-treatment by non-state agents, whereby authorities 'are not able to obviate the risk by providing adequate protection'.

☞ ECtHR Ap.no. 27765/09, *Hirsi v ITA*, [23 Feb. 2012]

\* violation of *ECHR* [art. 3 (qual.)]

\* For the first time the Court applied Article 4 of Protocol no. 4 (collective expulsion) in the circumstance of aliens who were not physically present on the territory of the State, but in the high seas. Italy was also held responsible for exposing the aliens to a treatment in violation with article 3 ECHR, as it transferred them to Libya 'in full knowledge of the facts' and circumstances in Libya.

☞ ECtHR Ap.no. 61204/09, *I. v. SWE*, [5 Sep. 2013]

\* violation of *ECHR* [art. 3 (qual.)]

\* A family of Russian citizens of Chechen origin applied for asylum in Sweden and submitted that they had been tortured in Chechnya and were at risk of further ill-treatment upon return to Russia. Despite the current situation in Chechnya, the ECtHR considers the unsafe general situation not sufficiently serious to conclude that the return of the applicants to Russia would amount to a violation of art. 3.

As far as the applicants' individual situation is concerned, the ECtHR notes that the Swedish authorities did not as such question that Mr. I had been subjected to torture. However, they had found that he had not established with sufficient certainty why he had been subjected to it and by whom, and had thus found reason to question the credibility of his statements. In line with the Swedish authorities, the ECtHR finds that the applicants had failed to make it plausible that they would face a real risk of ill-treatment.

However, the Court emphasises that the assessment of a real risk for the persons concerned must be made on the basis of all relevant factors which may increase the risk of ill-treatment. Due regard should be given to the possibility that a number of individual factors may not, when considered separately, constitute a real risk, but when taken cumulatively and considered in a situation of general violence and heightened security, the same factors may give rise to a real risk.

It was noted that Mr. I has significant and visible scars on his body, and the medical certificates held that the wounds could be consistent with his explanations as to both timing and extent of the ill-treatment. Thus, in case of a body search in connection with his possible detention and interrogation by the FSB or local law-enforcement officials upon return, these would immediately see that Mr. I has been subjected to ill-treatment in recent years, which could indicate that he took active part in the second war in Chechnya. Taking those factors cumulatively, in the special circumstances of the case, the Court finds that there were substantial grounds for believing that the applicants would be exposed to a real risk of treatment contrary to art. 3 if deported to Russia.

☞ ECtHR Ap.no. 2964/12, *I.K. v AUT*, [28 Mar. 2013]

\* violation of *ECHR* [art. 3 (qual.)]

\* The applicant was a Russian of Chechen origin, claiming that his removal to Russia would expose him to risk of ill-treatment as his family had been persecuted in Chechnya. His father had been working



the security services of former separatist President Maskarov, and had been murdered in 2001. The applicant claimed to have been arrested four times, threatened and at least once severely beaten by Russian soldiers in the course of an identity check in 2004. Together with his mother, he left Chechnya in 2004 and applied for asylum in Austria later that year. Both asylum applications were dismissed.

While the applicant had withdrawn his appeal, allegedly due to wrong legal advice, his mother was recognised as a refugee and granted asylum in appeal proceedings in 2009. The Austrian authorities did not, in the applicant's subsequent asylum proceedings, examine the connections between his and his mother's cases, but held that his reasons for flight had been sufficiently thoroughly examined in the first proceedings.

The ECtHR was not persuaded that the applicant's grievance had been thoroughly examined, and therefore assessed his case in the light of the domestic authorities' findings in his mother's case which had accepted her reasons for flight as credible. There was no indication that the applicant would be at a lesser risk of persecution upon return to Russia than his mother, and the alternative of staying in other parts of Russia had been excluded in her case as well.

In addition to the assessment of the applicant's individual risk, the Court observed the regularly occurring human rights violations and the climate of impunity in Chechnya, notwithstanding the relative decrease in the activity of armed groups and the general level of violence. The Court referred to its numerous judgments finding violations of ECHR arts. 2 and 3, and to reports about practices of reprisals and collective punishment of relatives and suspected supporters of alleged insurgents as well as occurrences of targeted human rights violations.

While there were thus substantial grounds to believe that the applicant would face a real risk of treatment contrary to art. 3 if returned to Russia, his mental health status – described as post-traumatic stress disorder and depression – was not found to amount to such very exceptional circumstances as required to raise a separate issue under art. 3.

☞ ECtHR Ap.no. 20110/13, *Ismailov v RUS*, [17 Apr. 2014]

\* violation of **ECHR** [art. 3 (qual.)]

\* The applicant was an Uzbek citizen whose extradition to Uzbekistan had been requested. The extradition request had been refused, and in parallel proceedings his application for asylum in Russia was refused.

The ECtHR held the general human rights situation in Uzbekistan to be 'alarming', the practice of torture in police custody being described as 'systematic' and 'indiscriminate', and confirmed that the issue of ill-treatment of detainees remains a pervasive and enduring problem. As to the applicant's personal situation, the Court observed that he was wanted by the Uzbek authorities on charges of participating in a banned religious extremist organisation, 'the Islamic Movement of Uzbekistan', and a terrorist organisation, 'O'zbekiston Islomiy Harakati' and that he was held to be plotting to destroy the constitutional order of Uzbekistan. The Court referred to various international reports and its own findings in a number of judgments, pointing to the risk of ill treatment which could arise in similar circumstances. The forced return to Uzbekistan, in the form of expulsion or otherwise, would therefore give rise to a violation of art. 3. Also violation of art. 5 (1)(f) and (4) on account of detention and unavailability of any procedure for judicial review of the lawfulness of detention.

☞ ECtHR Ap.no. 40035/98, *Jabari v TUR*, [11 July 2000]

\* violation of **ECHR** [art. 3 (qual.)]

\* Holding violation of Article 3 in case of deportation that would return a woman who has committed adultery to Iraq.

☞ ECtHR Ap.no. 886/11, *K.A.B. v SWE*, [5 Sep. 2013]

\* no violation of **ECHR** [art. 3 (qual.)]

\* The applicant is a Somali asylum seeker, originating from Mogadishu. He applied for asylum in 2009, claiming that he had fled Somalia due to persecution by the Islamic Courts and al-Shabaab, in particular by telephone calls threatening him to stop spreading Christianity. While the Swedish authorities intended to deport the applicant to Somaliland, the ECtHR did not find it sufficiently substantiated that he would be able to gain admittance and to settle there. The Court therefore assessed his situation upon return to Somalia in the context of the conditions prevailing in Mogadishu, his city of origin.

The general situation of violence in Mogadishu was assessed in the light of the criteria applied in *Sufi and Elmi v. UK* (28 June 2011). Against the background of recent information, in particular concerning al-Shabaab, the Court's majority held that the security situation in Mogadishu has improved since 2011 or the beginning of 2012, as the general level of violence has decreased. The



situation is therefore not, at present, of such a nature as to place everyone present in the city at a real risk of treatment contrary to arts. 2 or 3.

The two dissenting judges consider the majority's analysis of the general situation deficient and its conclusions premature, due to the unpredictable nature of the conflict and the volatility and instability of the situation in Mogadishu.

As regards the applicant's personal situation, the Court refers to the careful examination of the case by the Swedish authorities, and the extensive reasons given for their conclusions. It further notes that the applicant does not belong to any group at risk of being targeted by al-Shabaab, and allegedly has a home in Mogadishu where his wife lives, the Court concludes that he had failed to make it plausible that he would face a real risk of being killed or subjected to ill-treatment upon return there.

☞ ECtHR Ap.no. 33809/08, *Labsi v SK*, [15 May 2012]

\* violation of *ECHR* [art. 3 (qual.)]

\* An Algerian man, convicted in France of preparing a terrorist act, and convicted in his absence in Algeria of membership of a terrorist organisation, had been expelled to Algeria upon rejection of his asylum request in Slovakia. On the basis of the existing information about the situation in Algeria for persons suspected of terrorist activities, the Court found that there had been substantial grounds for believing that he faced a real risk of being exposed to treatment contrary to art. 3. The responding government's invocation of the security risk represented by the applicant was dismissed due to the absolute guarantee under art. 3. Assurances given by the Algerian authorities concerning the applicant's treatment upon return to Algeria were found to be of a general nature, and they had proven insufficient since the request for a visit by a Slovak official to the applicant, held in detention upon return, had not been followed.

The applicant's expulsion only one working day after the Slovak Supreme Court's judgment, upholding the dismissal of his asylum request, had effectively prevented him from attempting redress by a complaint to the Slovak Constitutional Court.

Expulsion of the applicant in disregard of an interim measure issued by the Court under Rule 39, preventing the Court from properly examining his complaints and from protecting him against treatment contrary to art. 3, was a violation of the right to individual application under art. 34.

**New**

☞ ECtHR Ap.no. 52589/13, *M.A. v SWI*, [18 Nov. 2014]

\* violation of *ECHR* [art. 3 (qual.)]

\* The applicant was an Iranian asylum seeker whose case had been rejected by the Swiss authorities. According to the applicant, he had been involved in anti-regime demonstrations from 2009 to 2011 and, as a consequence, been exposed to repressive measures, including a sentence in absentia to seven years' imprisonment, payment of a fine and 70 lashes of the whip.

The ECtHR set out observing that the applicant would in case be returned to a country where the human rights situation gives rise to grave concern in that it is evident that the Iranian authorities frequently detain and ill-treat persons who peacefully participate in oppositional or human rights activities. Not only the leaders of political organisations or other high-profile persons, but anyone who demonstrates or in any way opposes the Iranian regime may be at risk of being detained and ill-treated or tortured.

If the alleged punishment were to be enforced, such extensive flogging would have to be regarded as torture under ECHR art. 3. The prison conditions for political prisoners would also expose him to inhuman and degrading treatment and to the risk of being tortured. As the applicant had left Iran without an exit visa and without a passport, he was likely to be arrested upon return to Iran, the alleged conviction would be discovered immediately, and the sentence was therefore likely to be enforced upon his return.

In its assessment of the evidence, the Court agreed with the Swiss authorities that the applicant's story was manifesting some weaknesses. However, the Court noted that the credibility of the accounts given by the applicant at two interviews could not be assessed in isolation, but must be seen in the light of further explanations given by the applicant. The difference in nature of the two interview hearings and the fact that almost two years had lapsed until the second interview could also explain parts of the discrepancies.

As regards the documents submitted by the applicant, the Court did not agree that the veracity of his account could be assessed without having regard to these documents merely because some of the documents were copies, and on the basis of a generalised allegation by the Swiss Government that such documents could be purchased in Iran. There was no indication that the authorities had tried to verify the authenticity of the summons submitted, the Swiss court had not provided any reason why the copy of a judgment and another summons could not be taken into account, and the court had ignored

*the applicant's suggestion of having the credibility of these documents assessed. Against this background, the Court held that the applicant must be given the benefit of the doubt with regard to the remaining uncertainties.*

☞ ECtHR Ap.no. 58363/10, *M.E. v DEN*, [8 July 2014]

\* no violation of *ECHR* [art. 3 (qual.)]

\* *The applicant stateless Palestinian, who was granted asylum in Denmark in 1993, had been expelled due to criminal offences and was deported to Syria in 2010. He claimed this to be in violation of art. 3 in that he had been tortured upon return by the Syrian authorities. The Danish Government did not challenge this allegation of ill-treatment, but contested the alleged art. 3 violation.*

*In examining whether the Danish authorities were, or should have been, aware that the applicant would face a real and concrete risk of being subjected to such treatment, the ECtHR noted that the Syrian uprising and armed conflict had not yet begun at the time of deportation. It further noted that the applicant had not relied on art. 3 until a month after his deportation. Referring to an expert opinion on the *ne bis in idem* principle in Syrian law, provided during the expulsion case, the Court was not convinced that the Danish authorities should have been aware that the applicant would risk detention and 'double persecution' upon return to Syria. The Court also pointed out that the principle of *ne bis in idem* does not by itself raise an issue under art. 3.*

*Even while various international sources were reporting ill-treatment of detainees in Syria at the time of deportation, the Court stated that the applicant did not belong to a threatened minority, and had never been politically active or in conflict with the Syrian regime, nor been perceived as an opponent to the government due to his stay abroad. The Court therefore concluded that there were no substantial grounds to believe that he had been at risk of being subjected to treatment in breach of art. 3 upon return to Syria.*

☞ ECtHR Ap.no. 50094/10, *M.E. v FRA*, [6 June 2013]

\* violation of *ECHR* [art. 3 (qual.)]

\* *The applicant was an Egyptian belonging to the Coptic Christian community in his country of origin where he had been exposed to a number of attacks due to his religious belief. His reports of these incidents to the police had been unsuccessful, and before leaving Egypt in 2007 he was accused of proselytizing for which he was sentenced in absentia to 3 years of imprisonment.*

*The ECtHR referred to reports on numerous instances of violence and other persecution against Coptic Christians in Egypt in 2010-11, and on reluctance of Egyptian authorities to prosecute the perpetrators, and found no evidence that the situation had improved. The Court found strong evidence that the applicant would be a potential prime target for persecution and violence as a convicted proselytizer, whether free or imprisoned, and pointed to the serious doubt about on the applicant's ability to receive adequate protection from the Egyptian authorities. Given his background and the situation of Coptic Christians in Egypt, art. 3 would be violated in case of enforcement of the decision to deport the applicant.*

*Contrary to the judgment in *I.M. v. France* [2 February 2012 – see NEAIS 2012/1 p. 10], the ECtHR did not consider the examination of this case in the French 'fast-track' asylum procedure incompatible with art. 13. The Court emphasised the very substantial delay in the applicant's lodging of his asylum request (almost 3 years) and the fact that he had been able to lodge an appeal with suspensive effect against the removal order as well as an asylum request with suspensive effect. Given his delay, the applicant could not validly argue that the reduced and very short deadlines to prepare the asylum request in the special procedure had affected the accessibility of the remedies available to him, and there was therefore no violation of art. 13 in conjunction with art. 3.*

☞ ECtHR Ap.no. 71398/12, *M.E. v SWE*, [26 June 2014]

\* no violation of *ECHR* [art. 3 (qual.)]

\* case has been referred to the Grand Chamber on 17 Nov 2014.

\* *The applicant (a Libyan asylum seeker) had first explained that he had been involved in illegal transport of weapons for powerful clans from southern Libya, and that he had been stopped and interrogated under torture by the authorities. Subsequently he had added to his grounds for asylum, stating that he was homosexual and had entered into a relationship with N. in Sweden.*

*Referring to the Swedish authorities' view that the applicant had given contradictory and deliberately false information, and to their thorough examination of his claims in respect of the weapons transport, the ECtHR stated that the applicant lacked credibility and had thus failed to substantiate that he would face a real risk of arrest or ill-treatment on return to Libya on this basis. In reaching this conclusion, the Court also 'had regard to the change in power in Libya'.*

*As regards the applicant's sexual orientation, the Court noted that the Swedish Government had not questioned that he is homosexual and that his marriage to N. is serious. Nonetheless, the Court reiterated the lack of credibility found by the national authorities and held that the applicant had not given a satisfactory explanation of why he had changed and added to his story over time, in particular that in his first submission to the ECtHR he claimed that he had already lived as a homosexual in Libya before his departure, whereas he had never told the Swedish authorities about this, on the contrary having stated that he had planned to marry a woman in Libya. The Court held not to have sufficient foundation to conclude that the Libyan authorities actively persecute homosexuals, although homosexual acts are punishable by imprisonment under the Libyan Penal Code.*

*In addition, the Court found indications that the applicant during his stay in Sweden had made an active choice to live discreetly and not reveal his sexual orientation to his family in Libya, not because of fear of persecution but rather due to private considerations. Emphasising that the case did not concern permanent expulsion of the applicant to Libya, but only a temporary return while the Swedish authorities would be examining an application for family reunion with N., the Court considered this a reasonably short period of time that would not require the applicant to conceal or suppress an important part of his identity permanently or for a longer period of time. It was therefore not by itself sufficient to reach the threshold of art. 3.*

*In a dissenting opinion, one of the judges disagreed with the majority's conclusion on the applicant's possibility to avoid risk of persecution by exercising restraint in expressing his sexual orientation.*

- New**
- ☞ ECtHR Ap.no. 17897/09, *M.V. & M.T. v FRA*, [4 Sep. 2014]
    - \* violation of *ECHR* [art. 3 (qual.)]
    - \* *On several occasions in 2007, the applicants (a Russian couple) had accommodated an uncle who was a former Chechen rebel. After his last stay with them they had been harassed by men supposedly affiliated with the current Chechen President Kadyrov who came to their house, interrogated them about their uncle, and threatened and maltreated them.*
    - Referring to the applicants' family connections, in particular the uncle who had participated in the Chechen rebellion, and to the previous attacks and threats on their persons, and the general situation previously as well as presently in Chechnya, the Court held that their return would result in a real risk of ill-treatment by the Russian authorities.*
  - ☞ ECtHR Ap.no. 18372/10, *Mo.M. v FRA*, [18 Apr. 2013]
    - \* violation of *ECHR* [art. 3 (qual.)]
    - \* *The applicant had been accused of spying for the rebels in Chad, and had been taken into custody for five days, interrogated and subjected to torture. In addition, his shop had been destroyed, his possessions confiscated, and his family threatened.*
    - The Court held the general situation in Chad to give cause for concern, particularly for persons suspected of collaboration with the rebels. As regards the applicant's personal situation, the Court considered the medical certificates produced by him as sufficient proof of the alleged torture. As to his risk of ill-treatment in case of return, the Court noted that he had produced a warrant issued by the authorities against him, the authenticity of which had not been seriously disputed by the French Government. Due to the reasoning given by the French authorities and the fact that they had not been able to examine some of the evidence produced by the applicant, the Court could not rely on the French courts' assessment of the applicant's risk. Due to his profile, the medical certificates and the past and present situation in Chad, the Court found a real risk that he would be subjected to treatment contrary to art. 3.*
  - ☞ ECtHR Ap.no. 71932/11, *Mohammadi v AUS*, [3 July 2014]
    - \* no violation of *ECHR* [art. 3 (qual.)]
    - \* *The applicant - an Afghan asylum seeker - had arrived in Austria via Greece, Macedonia, Serbia and Hungary. As the Austrian authorities intended to transfer him to Hungary under the Dublin Regulation, he complained that this would subject him to treatment contrary to arts. 3 and 5. The ECtHR considered the case similar to Mohammed v. Austria [6 June 2013] and examined whether any significant changes had occurred since that judgment.*
    - Holding that the complaint regarding risk of arbitrary detention and detention conditions in Hungary was falling in fact under art. 3, the Court pointed out that there was no systematic detention of asylum seekers in Hungary any more, and that there had been improvements in the detention conditions.*
    - As regards the issue of access to asylum procedures the Court stated that, since the changes in Hungarian legislation in effect since January 2013, those asylum seekers transferred under the Dublin Regulation whose claims had not been examined and decided on the merits in Hungary would have*

access to such an examination. As the applicant had not yet had a decision on the merits of his case, he would have a chance to reapply for asylum and have his case duly examined if returned to Hungary. The Court further held it to be consistently confirmed that Hungary was no longer relying on the safe third country concept towards Serbia. The relevant country reports did not indicate systematic deficiencies in the Hungarian asylum system, and the Court therefore concluded that the applicant would currently not be at a real individual risk of being subjected to treatment contrary to art. 3 if transferred to Hungary.

☞ ECtHR Ap.no. 23505/09, *N. v SWE*, [20 July 2010]

\* violation of *ECHR* [art. 3 (qual.)]

\* *The Court observed that women are at particular risk of ill-treatment in Afghanistan if perceived as not conforming to the gender roles ascribed to them by society, tradition and even the legal system. The Court could not ignore the general risk to which she might be exposed should her husband decide to resume their married life together, or should he perceive her filing for divorce as an indication of an extramarital relationship; in these special circumstances, there were substantial grounds for believing that the applicant would face various cumulative risks of reprisals falling under Art. 3 from her husband, his or her family, and from the Afghan society.*

☞ ECtHR Ap.no. 25904/07, *N.A. v UK*, [17 July 2008]

\* violation of *ECHR* [art. 3 (qual.)]

\* *The Court has never excluded the possibility that a general situation of violence in the country of destination will be of a sufficient level of intensity as to entail that any removal thereto would necessarily breach Art. 3, yet such an approach will be adopted only in the most extreme cases of general violence where there is a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.*

☞ ECtHR Ap.no. 7974/11, *N.K. v FRA*, [19 Dec. 2013]

\* violation of *ECHR* [art. 3 (qual.)]

\* *The applicant Pakistani citizen was seeking asylum on the basis of his fear of ill-treatment due to his conversion to the Ahmadiyya religion. He alleged to have been abducted and tortured and that an arrest warrant had been issued against him for preaching this religion.*

*Observing that the risk of ill-treatment of persons of the Ahmadiyya religion in Pakistan is well documented, the ECtHR stated that belonging to this religion would not in itself be sufficient to attract protection under art. 3. Rather, the applicant would have to demonstrate being practising the religion openly and to be proselytising, or at least to be perceived as such.*

*While the French authorities had been questioning the applicant's credibility, in particular regarding the authenticity of the documents presented by him, the ECtHR did not consider their decisions to be based on sufficiently explicit motivations in that regard. The Court did not find the respondent State to have provided information giving sufficient reasons to doubt the veracity of the applicant's account of the events leading to his flight, and there was therefore no basis of doubting his credibility. The Court concluded that the applicant was perceived by the Pakistani authorities not as simply practising the Ahmadiyya belief, but as a proselytiser and thus having a profile exposing him to the attention of the authorities in case of return.*

☞ ECtHR Ap.no. 8139/09, *Othman v UK*, [17 Jan. 2012]

\* no violation of *ECHR* [art. 3 (qual.)]

\* referral to the Grand Chamber requested; refused by the ECtHR Panel on 9 May 2012

\* *Notwithstanding widespread and routine occurrence of torture in Jordanian prisons, and the fact that the applicant as a high profile Islamist was in a category of prisoners frequently ill-treated in Jordan, the applicant was held not to be in real risk of ill-treatment if being deported to Jordan, due to the information provided about the 'diplomatic assurances' that had been obtained by the UK government in order to protect his Convention rights upon deportation; the Court took into account the particularities of the memorandum of understanding agreed between the UK and Jordan, as regards both the specific circumstances of its conclusion, its detail and formality, and the modalities of monitoring the Jordanian authorities' compliance with the assurances.*

*Holding that ECHR art. 5 applies in expulsion cases, but that there would be no real risk of flagrant breach of art. 5 in respect of the applicant's pre-trial detention in Jordan.*

*Holding that deportation of the applicant to Jordan would be in violation of ECHR art. 6, due to the real risk of flagrant denial of justice by admission of torture evidence against him in the retrial of criminal charges.*



- ☞ ECtHR Ap.no. 10466/11, **R.J. v FRA**, [19 Sep. 2013]
  - \* violation of **ECHR** [art. 3 (qual.)]
  - \* *The applicant is a Tamil asylum seeker who claims to have been persecuted by the Sri Lankan authorities because of his ethnic origin and his political activities in support of the LTTE. The ECtHR reiterates that there is no generalised risk of treatment contrary to art. 3 for all Tamils returned to Sri Lanka, but only for those applicants representing such interest to the authorities that they may be exposed to detention and interrogation upon return. Therefore, the risk has to be assessed on an individual basis, taking into account the relevant factors (see: N.A. v. UK (17 July 2008)). Even while there were certain credibility issues concerning the applicant's story, the Court puts emphasis on the medical certificate precisely describing his wounds. As the nature, gravity and recent infliction of these wounds create a strong presumption of treatment contrary to art. 3, and as the French authorities have not effectively rebutted this presumption, the Court considers that the applicant had established the risk that he might be subjected to ill-treatment upon return. Art. 3 would therefore be violated in case of his expulsion.*
  
- ☞ ECtHR Ap.no. 25393/10, **Rafaa v FRA**, [30 May 2013]
  - \* violation of **ECHR** [art. 3 (qual.)]
  - \* *The Moroccan authorities had requested the applicant's extradition from France under an international arrest warrant for acts of terrorism. The applicant initiated procedures contesting his extradition, and a parallel procedure requesting asylum in France. While the French asylum authorities apparently recognised the risk of ill-treatment in Morocco due to the applicant's alleged involvement in an Islamist terrorist network, the Court reconfirmed the absolute nature of the prohibition under art. 3 and the impossibility to balance the risk of ill-treatment against the reasons invoked in support of expulsion. Given the human rights situation in Morocco and the persisting ill-treatment of persons suspected of participation in terrorist activities, and the applicant's profile, the Court considered the risk of violation of art. 3 in case of his return to be real.*
  
- ☞ ECtHR Ap.no. 52077/10, **S.F. v SWE**, [15 May 2012]
  - \* violation of **ECHR** [art. 3 (qual.)]
  - \* *Observing that the human rights situation in Iran gives rise to grave concern, and that the situation appears to have deteriorated since the Swedish domestic authorities determined the case and rejected the applicants' request for asylum in 2008-09, the Court noted that it is not only the leaders of political organisations or other high-profile persons who are detained, but that anyone who demonstrates or in any way opposes the current regime in Iran may be at risk of being detained and ill-treated or tortured. Acknowledging that the national authorities are best placed to assess the facts and the general credibility of asylum applicants' story, the Court agreed that the applicant's basic story was consistent notwithstanding some uncertain aspects that did not undermine the overall credibility of the story. While the applicants' pre-flight activities and circumstances were not sufficient independently to constitute grounds for finding that they would be in risk of art. 3 treatment if returned to Iran, the Court found that they had been involved in extensive and genuine political and human rights activities in Sweden that were of relevance for the determination of the risk on return, given their existing risk of identification and their belonging to several risk categories. Thus, their sur place activities taken together with their past activities and incidents in Iran lead the Court to conclude that there would be substantial grounds for believing that they would be exposed to a real risk of treatment contrary to art. 3 if deported to Iran in the current circumstances.*
  
- ☞ ECtHR Ap.no. 60367/10, **S.H.H. v UK**, [29 Jan. 2013]
  - \* no violation of **ECHR** [art. 3 (qual.)]
  - \* *The applicant had been seriously injured during a rocket launch in Afghanistan in 2006 and left disabled, following several amputations, for the UK in 2010. His asylum application had been refused, and he was refused permission to appeal this decision. The Court reiterated that ECHR art. 3 does not imply an obligation on States to provide all illegal immigrants with free and unlimited health care. Referring to the applicant's assertion that disabled persons were at higher risk of violence in the armed conflict in Afghanistan, the Court held that expulsion would only be in violation of art. 3 in very exceptional cases of general violence where the humanitarian grounds against removal were compelling. It pointed out that the applicant had not complained that his removal to Afghanistan would put him at risk of deliberate ill-treatment from any party, nor that the levels of violence were such as to entail a breach of art. 3. The Court emphasised that the applicant had received both medical treatment and support throughout the four years he had spent in Afghanistan after his accident. It did not accept the applicant's claim*



## (1.3.3: Qualification for Protection: Jurisprudence: ECtHR Judgments)

*that he would be left destitute due to total lack of support upon return to Afghanistan, as he had not given any reason why he would not be able to make contact with his family there.*

- ☞ ECtHR Ap.no. 2345/02, **Said v NL**, [5 July 2005]
  - \* violation of **ECHR** [art. 3 (qual.)]
  - \* *Asylum seeker held to be protected against refoulement under Art. 3; the Dutch authorities had taken the failure to submit documents establishing his identity, nationality, or travel itinerary as affecting the credibility of his statements; the Court instead found the applicant's statements consistent, corroborated by information from Amnesty International, and thus held that substantial grounds had been shown for believing that, if expelled, he would be exposed to a real risk of ill-treatment as prohibited by Art. 3.*
- ☞ ECtHR Ap.no. 1948/04, **Salah Sheekh v NL**, [11 Jan. 2007]
  - \* violation of **ECHR** [art. 3 (qual.)]
  - \* *There was a real chance that deportation to 'relatively safe' areas in Somalia would result in his removal to unsafe areas, hence there was no 'internal flight alternative' viable. The Court emphasised that even if ill-treatment be meted out arbitrarily or seen as a consequence of the general unstable situation, the asylum seeker would be protected under Art. 3, holding that it cannot be required that an applicant establishes further special distinguishing features concerning him personally in order to show that he would be personally at risk.*
- ☞ ECtHR Ap.no. 14038/88, **Soering v UK**, [7 July 1989]
  - \* violation of **ECHR** [art. 3 (qual.)]
  - \* *Holding extradition from UK to USA of German national charged with capital crime and at risk of serving on death row is a violation of Art. 3 recognising the extra-territorial effect of the ECHR.*
- ☞ ECtHR Ap.no. 48866/10, **T.A. v SWE**, [19 Dec. 2013]
  - \* violation of **ECHR** [art. 3 (qual.)]
  - \* *The applicant was an Iraqi citizen, a Sunni Muslim from Baghdad. From 2003 to 2007 he had been working for security companies with connections to the US military forces in Iraq. He alleged to have been subjected to attacks and threats from two militias due to that employment, and to be at risk of treatment prohibited by Arts. 2 and 3.*  
*While considering the general situation in Iraq in a similar manner as in B.K.A. v. Sweden (see above), the ECtHR noted that targeted attacks against the former international forces in Iraq and their subcontractors as well as individuals seen to be collaborating with these forces have been widespread. Individuals who worked for a company connected to those forces must therefore, as a rule, be considered to be at greater risk in Iraq than the average population.*  
*As regards the applicant's personal situation, the Court found reasons to generally question his credibility and thus considered that he had not been able to make it plausible that there is a connection between the alleged incidents and his previous work for security companies connected to the former US troops. As many years had passed since the alleged incidents and his work for the companies, there was consequently no sufficient evidence of a real risk of treatment contrary to Arts. 2 or 3. Two judges dissented on the basis of the cumulative weight of factors pertaining to both the general situation in Iraq and the applicant's personal account.*
- ☞ ECtHR Ap.no. 1231/11, **T.H.K v SWE**, [19 Dec. 2013]
  - \* no violation of **ECHR** [art. 3 (qual.)]
  - \* *The applicant was an Iraqi citizen, a Sunni Muslim from Mosul. He had served from 2003 to 2006 in the new Iraqi army which involved working with the US military forces. In 2006 he had been seriously injured in a suicide bomb explosion killing 30 soldiers, and in 2007 he had been hit by shots from a car passing in front of his house. He also alleged to have received a letter containing death threats.*  
*The ECtHR considered the general situation in Iraq in a similar manner as in B.K.A. v Sweden.*  
*As regards the applicant's personal situation, the ECtHR stated that there was no indication that members of his family in Iraq had been subjected to attacks or other forms of ill-treatment since 2007, and considered that the applicant had not substantiated that there was a remaining personal threat of treatment contrary to Arts. 2 or 3.*
- New** ☞ ECtHR Ap.no. 71932/11, **Trabelsi v BEL**, [4 Sep. 2014]
  - \* violation of **ECHR** [art. 3 (qual.)]
  - \* *The applicant Tunisian citizen had been sentenced to ten years' imprisonment in Belgium in 2003 for attempting to blow up a military base and for instigating a criminal conspiracy. He had in 2005 been*

sentenced to ten years' imprisonment in absentia by a Tunisian military court for belonging to a terrorist organisation. In 2008, the US authorities requested his extradition on charges for offences relating to Al Qaeda-inspired terrorism, among which two charges made him liable to life imprisonment. In spite of a Rule 39 indication by the ECtHR of interim measures in 2011, the Belgian authorities extradited the applicant to the US in 2013.

While reiterating that the imposition of a sentence of life imprisonment on an adult offender is not in itself prohibited by the ECHR, provided that it is not disproportionate, the ECtHR pointed out that for it to be compatible with art. 3 such a sentence should not be irreducible de jure and de facto. In view of the gravity of the terrorist offences with which the applicant was charged, a discretionary life sentence was not considered to be grossly disproportionate.

Even though the US had, by a diplomatic note in 2010, repeated their guarantees towards Belgium in respect of the possibility of commutation of a life sentence, the ECtHR held that the US authorities had at no point provided any concrete assurance that the applicant would be spared an irreducible life sentence. The Court further noted that while US legislation provided various possibilities for reducing life sentences which gave the applicant some prospect of release, it did not lay down any procedure amounting to a mechanism for reviewing such sentences for the purposes of ECHR art. 3. The life imprisonment to which the applicant might be sentenced could therefore not be described as reducible. Consequently, his extradition to the US had amounted to a violation of Art. 3.

In addition, by the actual extradition of the applicant in spite of the Rule 39 indication, Belgium had deliberately and irreversibly lowered the level of protection of the rights in art. 3. ECHR art. 34 had therefore also been violated.

☞ ECtHR Ap.no. 58510/00, *Venkadajalasarma v NL*, [17 Feb. 2004]

\* no violation of **ECHR** [art. 3 (qual.)]

\* *Current situation in Sri Lanka makes it unlikely that Tamil applicant would run a real risk of being subject to ill-treatment after his expulsion from the Netherlands.*

☞ ECtHR Ap.no. 13163/87, *Vilvarajah v UK*, [30 Oct. 1991]

\* no violation of **ECHR** [art. 3 (qual.)]

\* *Finding no breach of Art. 3 although applicants claimed to have been subjected to ill-treatment upon return to Sri Lanka; this had not been a foreseeable consequence of the removal of the applicants, in the light of the general situation in Sri Lanka and their personal circumstances; a mere possibility of ill-treatment is not in itself sufficient to give rise to a breach of Art. 3, and there existed no special distinguishing features that could or ought to have enabled the UK authorities to foresee that they would be treated in this way.*

☞ ECtHR Ap.no. 49341/10, *W.H. v SWE*, [27 Mar. 2014]

\* no violation of **ECHR** [art. 3 (qual.)]

\* case is referred to the Grand Chamber on 8 Sep 2014

\* *The applicant was an Iraqi citizen of Mandaean denomination, originating from Baghdad. She applied for asylum invoking that she, as a divorced woman belonging to a small and vulnerable minority and without a male network or remaining relatives in Iraq, would be at risk of persecution, assault, rape and forced conversion and forced marriage.*

*The ECtHR held that the general situation in Iraq, even while it included indiscriminate and deadly attacks by violent groups, discrimination and heavy-handed treatment by authorities, is not so serious as to cause by itself a violation of Art. 3 in the event of return to that country. The general risks attached to the status of being a single woman in Iraq could also not be considered of themselves to reach the threshold prohibited by Art. 3.*

*As regards the applicant's personal circumstances, the Court noted that in addition to being a single woman she was also a member of a small religious minority, and stated that minority women face a particular security risk, being subjected to violence, discrimination and pressure to convert or change appearance. It considered that women with these characteristics in general may well face a real risk of being subjected to ill-treatment in southern and central Iraq.*

*However, the Court examined the possibility of internal relocation in the Kurdistan Region of Iraq, and concluded that the applicant could reasonably relocate to KRI where she would not face such a risk as neither the general situation in KRI nor her personal circumstances were indicating an Art. 3 risk. In reaching this conclusion, the Court took account of various sources considering KRI as a relatively safe area, and the fact that many members of the Mandaean community have taken refuge in KRI. Against the background of available information, the Court found it possible for the applicant to obtain identity documents and to enter and reside in KRI without being required to have a sponsor in*

the region. Although involving certain hardship, based on the information on socio-economic conditions in KRI the Court held that internal relocation would be a viable alternative.

The Court expressly stated that, as a precondition of relying on an internal relocation alternative certain guarantees must be in place: the person must be able to travel to the area concerned, to gain admittance there and to settle there. It was therefore stipulated that the applicant could not be returned to parts of Iraq situated outside KRI.

☞ ECtHR Ap.no. 35/10, *Zarmayev v BE*, [27 Feb. 2014]

\* no violation of *ECHR* [art. 3 (qual.)]

\* *The applicant was a Russian citizen of Chechen origin who had been granted asylum in Belgium in 2005 under false identity. As a result, his refugee status had been withdrawn in 2009, and he was convicted for a number of criminal offences. As Belgium then accepted a request for his extradition to Russia, he lodged four unsuccessful asylum applications in Belgium from 2009 to 2013.*

*The ECtHR noted that the situation in Chechnya is not so serious as to warrant the general prohibition of returns under ECHR art. 3. As regards the applicant's personal circumstances, the Court pointed to internal inconsistencies in his account of events, unexplained additions to this account, and the unreliability of letters of support that he had produced. The Court further referred to diplomatic assurances indicating that the applicant, if convicted in Russia, would be detained in an ECHR-compliant institution, and that the Belgian embassy would be permitted to visit him in prison and talk with him unsupervised. His personal circumstances therefore did not justify the finding of a violation of art. 3 in case of his extradition.*

#### 1.3.4 CAT Views on Qualification for Protection

☞ CAT 300/2006, *A.T. v FRA*, [11 May 2007]

\* violation of *CAT* [art. 3 (qual.)]

\* *Violation of the Convention when France charged dual French/Tunisian national of terrorism, revoked his French citizenship, and expelled him to Tunisia while his asylum and CAT claims were still pending.*

☞ CAT 381/2009, *Abolghasem Faragollah et al. v CH*, [21 Nov. 2011]

\* violation of *CAT* [art. 3 (qual.)]

\* *The Committee is of the opinion that in the light of all the circumstances, including the general human rights situation in Iran, the personal situation of the claimant, who continues to engage in opposition activities for the Democratic Association for Refugees and whose son has been granted refugee status, and bearing in mind its preceding jurisprudence, the Committee is of the opinion that he could well have attracted the attention of the Iranian authorities. The Committee therefore considers that there are substantial grounds for believing that he would risk being subjected to torture if returned to Iran. The Committee notes that Iran is not a State Party to the CAT and the complainant therefore would be deprived of the legal option of recourse.*

☞ CAT 233/2003, *Agiza v SWE*, [20 May 2005]

\* violation of *CAT* [art. 3 (qual.)]

\* *The non-refoulement under CAT is absolute even in context of national security concerns; insufficient diplomatic assurances were obtained by sending country.*

☞ CAT 379/2009, *Bakatu-Bia v SWE*, [3 June 2011]

\* violation of *CAT* [art. 3 (qual.)]

\* *The present human rights situation in the Democratic Republic of the Congo, is such that, in the prevailing circumstances, substantial grounds exist for believing that the complainant is at risk of being subjected to torture if returned to the Democratic Republic of the Congo.*

☞ CAT 279/2005, *C.T. and K.M. v SWE*, [22 Jan. 2007]

\* violation of *CAT* [art. 3 (qual.)]

\* *Rwandan women repeatedly raped in detention in Rwanda by state officials have substantial grounds to fear torture if returned while ethnic tensions remain high. Complete accuracy seldom to be expected of victims of torture, and inconsistencies in testimony do not undermine credibility if they are not material.*

☞ CAT 281/2005, *E.P. v AZE*, [1 May 2007]

- \* *Violation of the Convention when Azerbaijan disregarded Committee's request for interim measures and expelled applicant who had received refugee status in Germany back to Turkey where she had previously been detained and tortured.*
- ☞ CAT 336/2008, *Harjinder Singh Khalsa v CH*, [26 May 2011]
- \* violation of CAT [art. 3 (qual.)]
- \* *The Committee notes that the complainants are well known to the Indian authorities because of their political activities in Switzerland and their leadership roles in the Sikh community abroad. The Committee accordingly considers that the complainants have provided sufficient evidence that their profile is sufficiently high to put them at risk of torture if arrested. The Committee notes the State party's submission that that numerous Sikh militants are back in India, that Sikhs live in great numbers in different states and therefore the complainants have the option to relocate to another Indian state from their state of origin. The Committee, however, observes that some Sikhs, alleged to have been involved in terrorist activities have been arrested by the authorities upon arrival at the airport and immediately taken to prisons and charged with various offences. The Committee also takes note of the evidence submitted that the Indian police continued to look for the complainants and to question their families about their whereabouts long after they had fled to Switzerland. In light of these considerations, the Committee does not consider that they would be able to lead a life free of torture in other parts of India.*
- ☞ CAT 373/2009, *M.A. and L.G. v SWE*, [19 Nov. 2010]
- \* violation of CAT [art. 3 (qual.)]
- \* *Return of long-time PKK member to Turkey where he is wanted under anti-terrorism laws would constitute a breach of art. 3.*
- ☞ CAT 391/2009, *M.A.M.A. et al. v SWE*, [10 July 2012]
- \* violation of CAT [art. 3 (qual.)]
- \* *As to the State party's position in relation to the assessment of the first complainant's risk of being subjected to torture, the Committee notes that the State party has accepted that it appeared not unlikely that he would still attract the interest of the Egyptian authorities due to his family relationship with the convicted murderer of President al-Sadat, even though the events took place a long time ago. Furthermore, his Internet activities in Sweden, questioning whether the real murderers of President al-Sadat were convicted and punished, should also be taken into account in this context. Finally, the State party has accepted that it could not be excluded that the rest of the family would also attract the interest of the Egyptian authorities. It specifically pointed out that the second complainant had allegedly been subjected to harsh treatment by the Egyptian security police and the third complainant had allegedly been repeatedly raped by police officers while in Egyptian custody. Consequently, it was not possible to fully exclude that he would be exposed to similar treatment if returned to Egypt. The Committee against Torture therefore concludes that the enforcement of the order to expel complainants to Egypt would constitute a violation of Art 3 of the Convention.*
- ☞ CAT 339/2008, *Said Amini v DNK*, [30 Nov. 2010]
- \* violation of CAT [art. 3 (qual.)]
- \* *In assessing the risk of torture in the present case, the Committee notes the complainant's contention that there is a foreseeable risk that he will be torture if returned to Iran based on his claims of past detention and torture, as a result of his political activities, and the recommencement of his political activities upon arrival in Denmark. It notes his claim that the State party did not take his allegations of torture into account, and that it never formed a view on the veracity of the contents of his medical reports, which allegedly prove that he had in fact been tortured.*
- ☞ CAT 43/1996, *Tala v SWE*, [15 Nov. 1996]
- \* violation of CAT [art. 3 (qual.)]
- \* *Contradictions and inconsistencies in testimony of asylum seeker attributed to post-traumatic stress disorder resulting from torture.*

### 1.3.5 CCPR Views on Qualification for Protection

- ☞ CCPR 1763/2008, *Ernst Sigan Pillai et al. v CAN*, [25 Mar. 2011]
- \* violation of ICCPR [art. 7 (qual.)]



- \* *The Committee notes the argument invoked by the State party regarding the harm being the necessary and foreseeable consequence of the deportation to Sri Lanka. In that respect the Committee recalls its General Comment No. 31 in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm. The Committee further notes that the diagnosis of Mr. Pillai's post-traumatic stress disorder led the Immigration and Refugee Board to refrain from questioning him about his earlier alleged torture in detention. The Committee is accordingly of the view that the material before it suggests that insufficient weight was given to the authors' allegations of torture and the real risk they might face if deported to their country of origin, in the light of the documented prevalence of torture in Sri Lanka. Notwithstanding the deference given to the immigration authorities to appreciate the evidence before them, the Committee considers that further analysis should have been carried out in this case. The Committee therefore considers that the removal order issued against the authors would constitute a violation of Art 7 of the Covenant if it were enforced.*
- ☞ CCPR 1544/2007, *Mehrez Ben Abde Hamida v. CAN*, [11 May 2010]
- \* violation of **ICCPR** [art. 7 (qual.)]
- \* *The CCPR observes that the State party refers mainly to the decisions of various authorities which have rejected the author's applications essentially on the grounds that he lacks credibility, having noted inconsistencies in his statements and the lack of evidence in support of his allegations. The Committee observes that the standard of proof required of the author is that he establishes that there is a real risk of treatment contrary to article 7 as a necessary and foreseeable consequence of his expulsion to Tunisia. The CCPR notes that the State party itself, referring to a variety of sources, says that torture is known to be practised in Tunisia, but that the author does not belong to one of the categories at risk of such treatment. The Committee considers that the author has provided substantial evidence of a real and personal risk of his being subjected to treatment contrary to article 7 of the Covenant, on account of his dissent in the Tunisian police, his six-month police detention, the strict administrative surveillance to which he was subjected and the wanted notice issued against him by the Ministry of the Interior which mentions his "escape from administrative surveillance". These facts have not been disputed by the State party. The Committee gives due weight to the author's allegations regarding the pressure put on his family in Tunisia. Having been employed by the Ministry of the Interior, then disciplined, detained and subjected to strict surveillance on account of his dissent, the Committee considers that there is a real risk of the author being regarded as a political opponent and therefore subjected to torture.*

### 1.3.6 National Judgments on Qualification for Protection

- ☞ **Belgium:** 218.075, [16 Feb. 2012]
- \* interpr. of Dir. 2004/83: **Qualification** [art. 15(b)]
- \* Council of State (French)
- \* *The Council of State holds that membership of a group systematically targeted by ill-treatments can constitute substantial grounds for believing that an applicant, if returned, would face a real risk of suffering serious harms as defined in Art 15(b) of the QD. It overturns a ruling of the inferior court (the Council of Alien Law Litigation) that required the applicant to establish further individual circumstances. Before the Council of State, the Belgian administration supports the ruling of the inferior court by deducing from the Elgafaji ruling of the CJEU that the applicant's burden of proving that he is individually targeted only softens in situations of general violence (as in Art 15(c) QD). The Council of State disagrees with that interpretation of Elgafaji. It instead emphasises that Elgafaji equates Art 15(b) of the QD with Art 3 ECHR. It then goes on considering that the ECtHR, in the Saadi v. Italy case, held that membership to a group systematically targeted by ill-treatments can give rise to protection under Art 3 ECHR. Therefore the Council of State concludes that the protection of Art 15(b) of the QD shall be afforded to applicants belonging to a group systematically targeted by ill-treatments even though they do not show further individual characteristics.*
- ☞ **Germany:** BVerwGE 10 C 23.12, [20 Feb. 2013]
- \* interpr. of Dir. 2004/83: **Qualification** [art. 9(1)]
- \* Baden-Württemberg Higher Administrative Court
- \* <http://cmr.jur.ru.nl/neais/Germany/BVerwGE10C2312.pdf>



\* *The Federal Administrative Court holds that (consistently with C-71/11 of 5 Sep. 2012) the scope of protection of Art 9(1) QD also includes the practice of religion in public, including the right to propagate the faith or persuade others to accept it. Therefore the mere prohibition of practising a religion may constitute an act of persecution within the meaning of Art 9(1), irrespectively of the extent to which the applicant is religiously active. There has to be a considerable probability that the applicant's life, limb or liberty will be threatened or will face prosecution or inhuman or degrading treatment, and if the forbidden religious practice is particularly important to the applicant in order to preserve his religious identity.*

☞ **Germany:** BVerwGE 10 C 13.10, [17 Nov. 2011]

\* interpr. of Dir. 2004/83: **Qualification** [art. 2(e), 4(4), 15(c)]

\* Munich Higher Adm. Court

\* <http://cmr.jur.ru.nl/neais/Germany/BVerwGE10C1310.pdf>

\* (1) In order for a substantial individual danger to be presumed, Section 60 (7) Sentence 2 of the Residence Act requires a considerable probability that the individual concerned will be threatened with harm to the legally protected interests of life or limb.

(2) For a finding of the requisite density of danger, in addition to a quantitative determination of the risk of death or injury, a general appraisal is also required that also assesses the situation for the delivery of medical care.

## 2 Asylum Procedure

### 2.1 Asylum Procedure: Adopted Measures

#### Directive 2005/85

*On minimum standards on procedures in Member States for granting and withdrawing refugee status*

\* OJ 2005 L 326/13

\* Revised by Dir. 2013/32

*CJEU Judgments*

☞ CJEU C-175/11, **H.I.D.**

☞ CJEU C-69/10, **Samba Diouf**

☞ CJEU C-133/06, **Eur. Parliament v EU**

*CJEU pending cases*

**New** ☞ CJEU C-239/14, **Tall**

*National Judgments*

☞ Ireland: S.U.N. [2012] IEHC 338

See further: § 2.3

#### Asylum Procedure

impl. date: 1-12-2007

31 Jan. 2013 art. 23(3), 23(4), 39

28 July 2011 art. 39

6 May 2008

pending art. 39

30 Mar. 2012 art. 39

#### Directive 2013/32

*On common procedures for granting and withdrawing international protection*

\* OJ 2013 L 180/60

\* Recast of Dir. 2005/85

☞ Germany: BVerwG 10 C 7.13

☞ Germany: BVerwG 10 C 1.13

See further: § 2.3

#### Asylum Procedure II

impl. date: 20-07-2015 UK, IRL opt out

17 June 2014 art. 33(2)(a)

5 Sep. 2013 art. 2(i), 33(2)(a)

#### CAT

#### non-refoulement

*UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*

\* 1465 UNTS 85

impl. date: 1987

\* art. 3: Protection against Refoulement

*CAT Views*

☞ CAT 379/2009, **Bakatu-Bia v SWE**

8 July 2011 art. 3 (proc.)

☞ CAT 319/2007, **Nirma Singh v CAN**

30 May 2011 art. 22

See further: § 2.3

#### ECHR

#### effective remedy

*European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols*

\* ETS 005

impl. date: 1953

\* art. 3: Protection against Refoulement

art. 13: Right to Effective Remedy

*ECtHR Judgments*

☞ ECtHR Ap.no. 6528/11, <i>A.C. a.o. v SPA</i>	22 Apr. 2018	art. 13 (proc.)
☞ ECtHR Ap.no. 70055/10, <i>Josef v BEL</i>	27 Feb. 2014	art. 13 (proc.)
☞ ECtHR Ap.no. 2283/12, <i>Mohammed v AUT</i>	6 June 2013	art. 3 (proc.)
☞ ECtHR Ap.no. 50094/10, <i>M.E. v FRA</i>	6 June 2013	art. 13 (proc.)
☞ ECtHR Ap.no. 39630/09, <i>El-Masri v MKD</i>	13 Dec. 2012	art. 13 (proc.)
☞ ECtHR Ap.no. 33210/11, <i>Singh v BEL</i>	2 Oct. 2012	art. 13 (proc.)
☞ ECtHR Ap.no. 14743/11, <i>Abdulkhakov v RUS</i>	2 Oct. 2012	art. 3 (proc.)
☞ ECtHR Ap.no. 33809/08, <i>Labsi v SVK</i>	15 May 2012	art. 13 (proc.)
☞ ECtHR Ap.no. 27765/09, <i>Hirsi v ITA</i>	23 Feb. 2012	art. 3 (proc.)
☞ ECtHR Ap.no. 9152/09, <i>I.M. v FRA</i>	2 Feb. 2012	art. 13 (proc.)
☞ ECtHR Ap.no. 39472/07, <i>Popov v FRA</i>	19 Jan. 2012	art. 3 (proc.)
☞ ECtHR Ap.no. 12294/07, <i>Zontul v GRC</i>	17 Jan. 2012	art. 3 (proc.)
☞ ECtHR Ap.no. 30696/09, <i>M.S.S. v BEL + GRC</i>	21 Jan. 2011	art. 3 (proc.)
☞ ECtHR Ap.no. 30471/08, <i>Abdolkhani v TUR</i>	22 Sep. 2009	art. 13 (proc.)
☞ ECtHR Ap.no. 246/07, <i>Ben Khemais v ITA</i>	24 Feb. 2009	art. 3 (proc.)
☞ ECtHR Ap.no. 45223/05, <i>Sultani v FRA</i>	20 Sep. 2007	art. 3 (proc.)
☞ ECtHR Ap.no. 25389/05, <i>Gebremedhin v FRA</i>	26 Apr. 2007	art. 13 (proc.)
☞ ECtHR Ap.no. 13284/04, <i>Bader v SWE</i>	8 Nov. 2005	art. 3 (proc.)
☞ ECtHR Ap.no. 38885/02, <i>N. v FIN</i>	26 July 2005	art. 3 (proc.)
☞ ECtHR Ap.no. 51564/99, <i>Conka v BEL</i>	5 Feb. 2002	art. 13 (proc.)
☞ ECtHR Ap.no. 40035/98, <i>Jabari v TUR</i>	11 July 2000	art. 3 (proc.)
☞ ECtHR Ap.no. 25894/94, <i>Bahaddar v NL</i>	19 Feb. 1998	art. 3 (proc.)

See further: § 2.3

## 2.2 Asylum Procedure: Proposed Measures

- \* nothing to report

## 2.3 Asylum Procedure: Jurisprudence

## 2.3.1 CJEU Judgments on Asylum Procedure

- ☞ CJEU C-133/06, *Eur. Parliament v EU*, [6 May 2008]
  - \* interpr. of Dir. 2005/85: **Asylum Procedure**
  - \* *Under Article 202 EC, when measures implementing a basic instrument need to be taken at Community level, it is the Commission which, in the normal course of events, is responsible for exercising that power. The Council must properly explain, by reference to the nature and content of the basic instrument to be implemented, why exception is being made to that rule.*  
*In that regard, the grounds set out in recitals 19 and 24 in the preamble to Directive 2005/85 on minimum standards on procedures in Member States for granting and withdrawing refugee status, which relate respectively to the political importance of the designation of safe countries of origin and to the potential consequences for asylum applicants of the safe third country concept, are conducive to justifying the consultation of the Parliament in respect of the establishment of the lists of safe countries and the amendments to be made to them, but not to justifying sufficiently a reservation of implementing powers which is specific to the Council.*
- ☞ CJEU C-175/11, *H.I.D.*, [31 Jan. 2013]
  - \* interpr. of Dir. 2005/85: **Asylum Procedure** [art. 23(3), 23(4), 39]
  - \* ref. from 'High Court' (Ireland)
  - \* *1. Article 23(3) and (4) must be interpreted as not precluding a MS from examining by way of prioritised or accelerated procedure, in compliance with the basic principles and guarantees set out in Chapter II of the Directive, certain categories of asylum applications defined on the basis of the criterion of the nationality or country of origin of the applicant.*  
*2. Article 39 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which allows an applicant for asylum either to lodge an appeal against the decision of the determining authority before a court or tribunal such as the Refugee Appeals Tribunal (Ireland), and to bring an appeal against the decision of that tribunal before a higher court such as the High Court (Ireland), or to contest the validity of that determining authority's decision before the High*

*Court, the judgments of which may be the subject of an appeal to the Supreme Court (Ireland).*

- ☞ CJEU C-69/10, *Samba Diouf*, [28 July 2011]
- \* interpr. of Dir. 2005/85: **Asylum Procedure** [art. 39]
- \* ref. from 'Tribunal Administratif' (Luxembourg)
- \* *On (1) the remedy against the decision to deal with the application under an accelerated procedure and (2) the right to effective judicial review in a case rejected under an accelerated procedure. Art. 39 does not imply a right to appeal against the decision to assess the application for asylum in an accelerated procedure, provided that the reasons which led to this decision can be subject to judicial review within the framework of the appeal against the rejection of the asylum claim.*

### 2.3.2 CJEU pending cases on Asylum Procedure

- \* *no cases pending*
- New** ☞ CJEU C-239/14, *Tall*
- \* interpr. of Dir. 2005/85: **Asylum Procedure** [art. 39]
- \* ref. from 'Tribunal du Travail de Liège' (Belgium)
- \* *On the question whether there is - under Belgian law - an effective remedy in case of a multiple asylum claim in the absence of suspensive effect and no full jurisdiction by a Belgian Court.*

### 2.3.3 ECtHR Judgments and decisions on Asylum Procedure

- ☞ ECtHR Ap.no. 6528/11, *A.C. a.o. v SPA*, [22 Apr. 2018]
- \* violation of **ECHR** [art. 13 (proc.)]
- \* *The applicants were 30 asylum seekers of Sahrawi origin, claiming that their return to Morocco would expose them to the risk of inhuman and degrading treatment in reprisal of their participation in the Gdeim Izik camp in Western Sahara which they had fled upon its dismantling by Moroccan police. The applicants had applied for judicial review of the rejection by the Spanish Ministry of the Interior of their applications for international protection. As they had applied for the stay of execution of the orders for their deportation, the court (Audiencia Nacional) had provisionally suspended the removal procedure for the first 13 applicants, and the following day rejected the applications for stay of execution. Likewise, the decisions to reject the applications for stay of execution of the other 17 applicants' deportation orders had been adopted very shortly after the provisional suspension. The appeals on the merits of the asylum applications were still pending before the Spanish courts. The ECtHR reiterated its previous considerations of the necessity of automatic suspension of the removal in order for appeals to comply with the requirement of effectiveness of the remedy under art. 13 in cases pertaining to Arts. 2 or 3. Even while recognising that accelerated procedures may facilitate the processing of asylum applications in certain circumstances, the Court held that in this case rapidity should not be achieved at the expense of the effective procedural guarantees protecting the applicants against refoulement to Morocco. As the applicants had not had the opportunity to provide any further explanations on their cases, and their applications for asylum did not in themselves have suspensive effect, the Court found a violation of Art. 13 taken together with Arts. 2 and 3. According to Art. 46 ECHR the Court stated that Spain was to guarantee, legally and materially, that the applicants would remain within its territory pending a final decision on their asylum applications. Violation of ECHR Art. 13 in conjunction with Arts. 2 and 3.*
- ☞ ECtHR Ap.no. 30471/08, *Abdolkhani v TUR*, [22 Sep. 2009]
- \* violation of **ECHR** [art. 13 (proc.)]
- \* *Holding a violation of Art. 13 in relation to complaints under Art. 3; the notion of an effective remedy under Art. 13 requires independent and rigorous scrutiny of a claim to risk of refoulement under Art. 3, and a remedy with automatic suspensive effect.*
- ☞ ECtHR Ap.no. 14743/11, *Abdulkhakov v RUS*, [2 Oct. 2012]
- \* violation of **ECHR** [art. 3 (proc.)]
- \* *The applicant, an Uzbek national, applied for refugee status and asylum in Russia. The Russian authorities arrested him immediately upon arrival as they had been informed that he was wanted in Uzbekistan for involvement in extremist activities. The applicant claimed to be persecuted in Uzbekistan due to his religious beliefs, and feared being tortured in order to extract confession to*

offences. His application for refugee status was rejected, but his application for temporary asylum was still pending.

The Russian authorities ordered the applicant's extradition to Uzbekistan, referring to diplomatic assurances given by the Uzbek authorities. However, the extradition order was not enforced, due to an indication by the ECtHR of an interim measure under Rule 39. Meanwhile, the applicant was abducted in Moscow, taken to the airport and brought to Tajikistan.

Extradition of the applicant to Uzbekistan, in the event of his return to Russia, was considered to constitute violation of ECHR Art. 3, due to the widespread ill-treatment of detainees and the systematic practice of torture in police custody in Uzbekistan, and the fact that such risk would be increased for persons accused of offences connected to their involvement with prohibited religious organisations.

The Court found it established that the applicant's transfer to Tajikistan had taken place with the knowledge and either passive or active involvement of the Russian authorities. Tajikistan is not a party to the ECHR, and Russia had therefore removed the applicant from the protection of his rights under the ECHR. The Russian authorities had not made any assessment of the existence of legal guarantees in Tajikistan against removal of persons facing risk of ill-treatment.

As regards this issue of potential indirect refoulement, the Court noted in particular that the applicant's transfer to Tajikistan had been carried out in secret, outside any legal framework capable of providing safeguards against his further transfer to Uzbekistan without assessment of his risk of ill-treatment there. Any extra-judicial transfer or extraordinary rendition, by its deliberate circumvention of due process, was held to be contrary to the rule of law and the values protected by the ECHR.

☞ ECtHR Ap.no. 13284/04, **Bader v SWE**, [8 Nov. 2005]

\* violation of **ECHR** [art. 3 (proc.)]

\* Asylum seeker held to be protected against refoulement due to a risk of flagrant denial of fair trial that might result in the death penalty; such treatment would amount to arbitrary deprivation of life in breach of Art 2; deportation of both the asylum seeker and his family members would therefore give rise to violations of Art 2 and 3.

☞ ECtHR Ap.no. 25894/94, **Bahaddar v NL**, [19 Feb. 1998]

\* no violation of **ECHR** [art. 3 (proc.)]

\* Although prohibition of ill-treatment contained in Art 3 of Convention is also absolute in expulsion cases, applicants invoking this Art are not dispensed as a matter of course from exhausting available and effective domestic remedies and normally complying with formal requirements and time-limits laid down by domestic law.

In the instant case applicant failed to comply with time-limit for submitting grounds of appeal (failed to request extension of time-limit even though possibility open to him) no special circumstances absolving applicant from compliance – even after time-limit had expired applicant had possibility to lodge fresh applications to domestic authorities either for refugee status or for residence permit on humanitarian grounds – Court notes at no stage during domestic proceedings was applicant refused interim injunction against expulsion – thus no imminent danger of ill-treatment.

☞ ECtHR Ap.no. 246/07, **Ben Khemais v ITA**, [24 Feb. 2009]

\* violation of **ECHR** [art. 3 (proc.)]

\* Violation of Art 3 due to deportation of the applicant to Tunisia. 'Diplomatic assurances' alleged by the respondent Government could not be relied upon. Violation of Art 34 as the deportation had been carried out in spite of an ECtHR decision issued under Rule 39 of the Rules of Court.

☞ ECtHR Ap.no. 51564/99, **Conka v BEL**, [5 Feb. 2002]

\* violation of **ECHR** [art. 13 (proc.)]

\* The detention of rejected Roma asylum seekers before deportation to Slovakia constituted a violation of Art 5. Due to the specific circumstances of the deportation the prohibition against collective expulsion under Protocol 4 Art 4 was violated; the procedure followed by the Belgian authorities did not provide an effective remedy in accordance with Art 13, requiring guarantees of suspensive effect.

☞ ECtHR Ap.no. 39630/09, **El-Masri v MKD**, [13 Dec. 2012]

\* violation of **ECHR** [art. 13 (proc.)]

\* Whereas this case did not concern an asylum applicant, the ECtHR's reasoning and conclusions may be of interest in order to illustrate general principles of potential relevance to asylum cases under ECHR Arts 3 and 13 as well.

The applicant, a German national of Lebanese origin, had been arrested by the Macedonian



authorities as a terrorist suspect, held incommunicado in a hotel in Skopje, handed over to a CIA rendition team at Skopje airport, and brought to Afghanistan where he was held in US detention and repeatedly interrogated, beaten, kicked and threatened until his release four months later.

The Court accepted evidence from both aviation logs, international reports, a German parliamentary inquiry, and statements by a former Macedonian minister of interior as the basis for concluding that the applicant had been treated in accordance with his explanations. In view of the evidence presented, the burden of proof was shifted to the Macedonian government which had not conclusively refuted the applicant's allegations which were therefore considered as established beyond reasonable doubt.

Macedonia was held to be responsible for the ill-treatment and unlawful detention during the entire period of the applicant's captivity. In addition, arts. 3 and 13 ECHR had been violated due to the absence of any serious investigation into the case by the Macedonian authorities.

In two concurring opinions, ECtHR judges made further observations concerning the right to the truth as a separate aspect of Art. 13 or as inherent aspect of Art. 3 ECHR respectively.

☞ ECtHR Ap.no. 25389/05, **Gebremedhin v FRA**, [26 Apr. 2007]

\* violation of **ECHR** [art. 13 (proc.)]

\* Holding that the particular border procedure declaring 'manifestly unfounded' asylum applications inadmissible, and refusing the asylum seeker entry into the territory, was incompatible with Art. 13 taken together with Art.3; emphasising that in order to be effective, the domestic remedy must have suspensive effect as of right.

☞ ECtHR Ap.no. 27765/09, **Hirsi v ITA**, [23 Feb. 2012]

\* interpr. of **ECHR** [art. 3 (proc.)]

\* For the first time the Court applied Art 4 of Protocol no. 4 (collective expulsion) in the circumstance of aliens who were not physically present on the territory of the State, but in the high seas. Italy was also held responsible for exposing the aliens to a treatment in violation with Art 3 ECHR, as it transferred them to Libya 'in full knowledge of the facts' and circumstances in Libya.

☞ ECtHR Ap.no. 9152/09, **I.M. v. FRA**, [2 Feb. 2012]

\* violation of **ECHR** [art. 13 (proc.)]

\* The Court therefore observed, with regard to the effectiveness of the domestic legal arrangements as a whole, that while the remedies of which the applicant had made use had been available in theory, their accessibility in practice had been limited by the automatic registration of his application under the fast-track procedure, the short deadlines imposed and the practical and procedural difficulties in producing evidence, given that he had been in detention and applying for asylum for the first time.

☞ ECtHR Ap.no. 40035/98, **Jabari v TUR**, [11 July 2000]

\* violation of **ECHR** [art. 3 (proc.)]

\* Given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which it attaches to Art 3, the notion of an effective remedy under Art 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Art 3.

☞ ECtHR Ap.no. 70055/10, **Josef v BEL**, [27 Feb. 2014]

\* violation of **ECHR** [art. 13 (proc.)]

\* **Case referred to the Grand Chamber (7 July 2014)**

\* The applicant was a Nigerian woman, diagnosed with HIV, who was to be returned with her three children upon refusal of her request for asylum in Belgium.

Referring to its previous case law concerning the automatic suspensive effect of appeals in order to comply with the requirements under Art. 13 in cases concerning Art. 3, the ECtHR held that Belgian law did not provide such an effective opportunity to challenge the order for removal. As only appeals for suspension under the 'extreme urgency procedure' have automatic suspensive effect, and this type of procedure has only limited application, and the Belgian appeal system was in general considered too difficult to operate and too complex to fulfil the obligations under Art. 13, the applicant had not had access to an effective remedy. Art. 13 had therefore been violated, taken together with Art. 3.

In line with previous case law, the Court did not find the applicant's medical condition so critical as to make the considerations against her removal imperative for the purpose of prohibiting her return under art. 3. According to ECHR Art. 46, the Court indicated to Belgium the need to amend its legislation in order for the system of appeals against removal to comply with Art. 13. Violation of ECHR Art. 13 in conjunction with Art. 3. No violation of art. 3 as such.



☞ ECtHR Ap.no. 33809/08, *Labsi v SVK*, [15 May 2012]

\* violation of *ECHR* [art. 13 (proc.)]

\* *An Algerian man, convicted in France of preparing a terrorist act, and convicted in his absence in Algeria of membership of a terrorist organisation, had been expelled to Algeria upon rejection of his asylum request in Slovakia. On the basis of the existing information about the situation in Algeria for persons suspected of terrorist activities, the Court found that there had been substantial grounds for believing that he faced a real risk of being exposed to treatment contrary to Art. 3. The responding government's invocation of the security risk represented by the applicant was dismissed due to the absolute guarantee under Art. 3. Assurances given by the Algerian authorities concerning the applicant's treatment upon return to Algeria were found to be of a general nature, and they had proven insufficient since the request for a visit by a Slovak official to the applicant, held in detention upon return, had not been followed.*

*The applicant's expulsion only one working day after the Slovak Supreme Court's judgment, upholding the dismissal of his asylum request, had effectively prevented him from attempting redress by a complaint to the Slovak Constitutional Court.*

*Expulsion of the applicant in disregard of an interim measure issued by the Court under Rule 39, preventing the Court from properly examining his complaints and from protecting him against treatment contrary to Art. 3, was a violation of the right to individual application under Art. 34.*

☞ ECtHR Ap.no. 50094/10, *M.E. v FRA*, [6 June 2013]

\* no violation of *ECHR* [art. 13 (proc.)]

\* *The applicant was an Egyptian belonging to the Coptic Christian community in his country of origin where he had been exposed to a number of attacks due to his religious belief. His reports of these incidents to the police had been unsuccessful, and before leaving Egypt in 2007 he was accused of proselytizing for which he was sentenced in absentia to 3 years of imprisonment.*

*The ECtHR referred to reports on numerous instances of violence and other persecution against Coptic Christians in Egypt in 2010-11, and on reluctance of Egyptian authorities to prosecute the perpetrators, and found no evidence that the situation had improved. The Court found strong evidence that the applicant would be a potential prime target for persecution and violence as a convicted proselytizer, whether free or imprisoned, and pointed to the serious doubt about on the applicant's ability to receive adequate protection from the Egyptian authorities. Given his background and the situation of Coptic Christians in Egypt, Art. 3 would be violated in case of enforcement of the decision to deport the applicant.*

*Contrary to the judgment in I.M. v. France (9152/09), the ECtHR did not consider the examination of this case in the French 'fast-track' asylum procedure incompatible with Art. 13. The Court emphasised the very substantial delay in the applicant's lodging of his asylum request (almost 3 years) and the fact that he had been able to lodge an appeal with suspensive effect against the removal order as well as an asylum request with suspensive effect. Given his delay, the applicant could not validly argue that the reduced and very short deadlines to prepare the asylum request in the special procedure had affected the accessibility of the remedies available to him, and there was therefore no violation of Art. 13 in conjunction with Art. 3.*

☞ ECtHR Ap.no. 30696/09, *M.S.S. v BEL + GRC*, [21 Jan. 2011]

\* violation of *ECHR* [art. 3 (proc.)]

\* *A deporting State is responsible under Art. 3 ECHR for the foreseeable consequences of the deportation of an asylum seeker to another EU Member State, even if the deportation is being decided in accordance with the Dublin Regulation; the responsibility of the deporting State comprises not only the risk of indirect refoulement by way of further deportation to risk of ill-treatment in the country of origin, but also the conditions in the receiving Member State if it is foreseeable that the asylum seeker may there be exposed to treatment contrary to Art. 3.*

☞ ECtHR Ap.no. 2283/12, *Mohammed v AUT*, [6 June 2013]

\* no violation of *ECHR* [art. 3 (proc.)]

\* *The applicant Sudanese asylum seeker arrived in Austria via Greece and Hungary. The Austrian authorities rejected the application and ordered his transfer to Hungary under the Dublin Regulation. When placed in detention with a view to his forced transfer almost a year later, he lodged a second asylum application which did not have suspensive effect in relation to the transfer order.*

*The ECtHR considered the applicant's initial claim against the Dublin transfer arguable, due to the 'alarming nature' of reports published in 2011-12 in respect of Hungary as a country of asylum and in particular as regards Dublin transferees. His second application for asylum in Austria could therefore*

*not prima facie be considered abusively repetitive or entirely manifestly unfounded. In the specific circumstances of the case, the applicant had been deprived of de facto protection against forced transfer and of a meaningful substantive examination of his arguable claim concerning the situation of asylum seekers in Hungary. Accordingly, Art. 13 in conjunction with Art. 3 had been violated.*

*Despite the initially arguable claim against the Dublin transfer to Hungary, the Court noted the subsequent legislative amendments and the introduction of additional legal guarantees concerning detention of asylum seekers and their access to basic facilities. The applicant would therefore no longer be at a real and individual risk of being subjected to treatment in violation of Art. 3 upon transfer to Hungary under the Dublin Regulation.*

☞ ECtHR Ap.no. 38885/02, *N. v FIN*, [26 July 2005]

\* violation of *ECHR* [art. 3 (proc.)]

\* *Asylum seeker held to be protected against refoulement under Art. 3, despite the Finnish authorities' doubts about his identity, origin, and credibility; two delegates of the Court were sent to take oral evidence from the applicant, his wife and a Finnish senior official; while retaining doubts about his credibility on some points, the Court found that the applicant's accounts on the whole had to be considered sufficiently consistent and credible; deportation would therefore be in breach of Art. 3.*

☞ ECtHR Ap.no. 39472/07, *Popov v FRA*, [19 Jan. 2012]

\* violation of *ECHR* [art. 3 (proc.)]

\* *Although the applicants – a Kazakhstani couple and their two children aged 5 months and 3 years – had been detained in an administrative detention centre authorised to accommodate families, the conditions during their two weeks detention were held to have caused the children distress and to have serious psychological repercussions. Thus, the children had been exposed to conditions exceeding the minimum level of severity required to fall within the scope of ECHR Art. 3, and this provision had been violated in respect of the children. Since that minimum level of severity was not attained as regards the parents, there was no violation of Art. 3 in respect of these applicants.*

*ECHR Art. 5 was violated in respect of the children, both because the French authorities had not sought to establish any possible alternative to administrative detention (Art. 5(1)(f)), and because children accompanying their parents were unable to have the lawfulness of their detention examined by the courts (Art. 5(4)).*

*ECHR Art. 8 was violated due to the detention of the whole family. As there had been no particular risk of the applicants absconding, the interference with the applicants' family life, resulting from their placement in a detention centre for two weeks, had been disproportionate. In this regard the Court referred to its recent case law concerning 'the child's best interest' as well as to Art. 3 of the UN Convention on the Rights of the Child and to Directive 2003/9 on Reception Conditions.*

☞ ECtHR Ap.no. 71386/10, *Savridin v RUS*, [25 Apr. 2013]

\* violation of *ECHR* [art. 3 (proc.), 5(4), 34]

\* *The applicant, a national of Tajikistan having been granted temporary asylum in Russia, had been abducted in Moscow by a group of men, detained in a mini-van for one or two days and tortured, and then taken to the airport from where he was flown to Tajikistan without going through normal border formalities or security checks. In Tajikistan he had allegedly been detained, severely ill-treated by the police, and sentenced to 26 years' imprisonment for a number of offences.*

*Based on consistent reports about the widespread and systematic use of torture in Tajikistan, and the applicant's involvement in an organisation regarded as terrorist by the Tajik authorities, the Court concluded that his forcible return to Tajikistan had exposed him to a real risk of treatment in breach of Art. 3. Due to the Russian authorities' failure to take preventive measures against the real and imminent risk of torture and ill-treatment caused by his forcible transfer, Russia had violated its positive obligations to protect him from treatment contrary to art. 3. Additional violations of art. 3 resulted from the lack of effective investigation into the incident, and the involvement of State officials in the operation.*

*Art. 34 had been violated by the fact that the applicant had been forcibly transferred to Tajikistan by way of an operation in which State officials had been involved, in spite of an interim measure indicated by the ECtHR under Rule 39 of the Court's Rules of Procedure.*

*Pursuant to ECHR Art. 46, the Court indicated various measures to be taken by Russia in order to end the violation found and make reparation for its consequences. In addition, the State was required under Art. 46 to take measures to resolve the recurrent problem of blatant circumvention of the domestic legal mechanisms in extradition matters, and ensure immediate and effective protection against unlawful kidnapping and irregular removal from the territory and from the jurisdiction of*

Russian courts. In this connection, the Court once again stated that such operations conducted outside the ordinary legal system are contrary to the rule of law and the values protected by the ECHR.

- ☞ ECtHR Ap.no. 33210/11, *Singh v BEL*, [2 Oct. 2012]
- \* violation of *ECHR* [art. 13 (proc.)]
- \* *Having arrived on a flight from Moscow, the applicants applied for asylum but were refused entry into Belgium, and their applications for asylum were rejected as the Belgian authorities did not accept the applicants' claim to be Afghan nationals, members of the Sikh minority in Afghanistan, but rather Indian nationals. The Court considered the claim to the risk of chain refoulement to Afghanistan as 'arguable' so that the examination by the Belgian authorities would have to comply with the requirements of ECHR art. 13, including close and rigorous scrutiny and automatic suspensive effect. In the light of these requirements, the examination of the applicants' asylum case was held to be insufficient, since neither the first instance nor the appeals board had sought to verify the authenticity of the documents presented by the applicants with a view to assessing their possible risk of ill-treatment in case of deportation. In that connection the Court noted that the Belgian authorities had dismissed copies of protection documents issued by UNHCR in New Delhi, pertinent to the protection request, although these documents could easily have been verified by contacting UNHCR. The examination therefore did not fulfil the requirement of close and rigorous scrutiny, constituting a violation of ECHR Art. 13 taken together with Art. 3.*
- ☞ ECtHR Ap.no. 45223/05, *Sultani v FRA*, [20 Sep. 2007]
- \* no violation of *ECHR* [art. 3 (proc.)]
- \* *Finding no violation of Art. 3, despite the applicant's complaint that the most recent asylum decision within an accelerated procedure had not been based on an effective individual examination; the Court emphasized that the first decision had been made within the normal asylum procedure, involving full examination in two instances, and held this to justify the limited duration of the second examination which had aimed to verify whether any new grounds could change the previous rejection; in addition, the latter decision had been reviewed by administrative courts at two levels; the applicant had not brought forward elements concerning his personal situation in the country of origin, nor sufficient to consider him as belonging to a minority group under particular threat.*
- ☞ ECtHR Ap.no. 12294/07, *Zontul v GRC*, [17 Jan. 2012]
- \* violation of *ECHR* [art. 3 (proc.)]
- \* *The applicant was an irregular migrant complaining that he had been raped with a truncheon by one of the Greek coast guard officers supervising him in a detention centre upon interception of the boat on which he and 164 other migrants attempted to go from Turkey to Italy. Due to its cruelty and intentional nature, the Court considered such treatment as amounting to an act of torture under ECHR Art. 3. Given the seriousness of the treatment, the penalty imposed on the perpetrator – a suspended term of six months imprisonment that was commuted to a fine – was considered to be in clear lack of proportion. An additional violation of ECHR Art. 3 stemmed from the Greek authorities' procedural handling of the case that had prevented the applicant from exercising his rights to claim damages at the criminal proceedings.*

### 2.3.4 CAT Views on Asylum Procedure

- ☞ CAT 379/2009, *Bakatu-Bia v SWE*, [8 July 2011]
- \* violation of *CAT* [art. 3 (proc.)]
- \* *The Committee observes that, according to the Second joint report of seven United Nations experts on the situation in the Democratic Republic of the Congo (2010) and the Report of the United Nations High Commissioner for Human Rights and the activities of her Office in the Democratic Republic of the Congo (2010) on the general human rights situation in the Democratic Republic of the Congo, serious human rights violations, including violence against women, rape and gang rape by armed forces, rebel groups and civilians, continued to take place throughout the country and not only in areas affected by armed conflict. Furthermore, in a recent report, the High Commissioner for Human Rights stressed that sexual violence in DRC remains a matter of serious concern, particularly in conflict-torn areas, and despite efforts by authorities to combat it, this phenomenon is still widespread and particularly affects thousands of women and children. The Committee also notes that the Secretary-General in his report of 17 January 2011, while acknowledging a number of positive developments in DRC, expressed his concern about the high levels of insecurity, violence and human rights abuses faced by the population.*

- ☞ CAT 343/2008, *Kalonzo v CAN*, [1 June 2012]
- \* violation of CAT [art. 3]
- \* *The Committee also takes note of the State party's reference to reports dating from 2007 and 2008 that mention few cases of the torture of UPDS members or Luba from Kasai. In this regard, the Committee is of the view that, even if cases of torture are rare, the risk of being subjected to torture continues to exist for the complainant, as he is the son of a UDPS leader, is a Luba from Kasai and has already been the victim of violence during his detention in Kinshasa in 2002. In addition, the Committee considers that the State party's argument that the complainant could resettle in Kinshasa, where the Luba do not seem to be threatened by violence (as they are in the Katanga region), does not entirely remove the personal danger for the complainant. In this regard, the Committee recalls that, in accordance with its jurisprudence, the notion of "local danger" does not provide for measurable criteria and is not sufficient to entirely dispel the personal danger of being tortured. The Committee against Torture concludes that the complainant has established that he would run a real, personal and foreseeable risk of being subjected to torture if he were to be returned to the Democratic Republic of the Congo.*
- ☞ CAT 416/2010, *Ke Chun Rong v AUS*, [29 Nov. 2012]
- \* violation of CAT [art. 3]
- \* *The Committee notes that the claims and evidence have not been sufficiently verified by the Australian immigration authorities. The Committee observes that the review on the merits of the complainants' claims regarding the risk of torture that he faced, was conducted predominantly based on the content of his initial application for a Protection visa, which he filed shortly after arriving in the country, without knowledge or understanding of the system. The Committee further observes that the complainant was not interviewed in person neither by the Immigration Department, which rejected his initial application, nor by the Refugee Review Tribunal and therefore he did not have the opportunity to clarify any inconsistencies in his initial statement. The Committee is of the view that complete accuracy is seldom to be expected by victims of torture. The Committee also observes that the State party does not dispute that Falun Gong practitioners in China have been subjected to torture, but bases its decision to refuse protection to the complainant in the assessment of his credibility.*
- ☞ CAT 319/2007, *Nirma Singh v CAN*, [30 May 2011]
- \* violation of CAT [art. 22]
- \* *The complaint states that he did not have an effective remedy to challenge the decision on deportation and that the judicial review of the Immigration Board decision, denying him Convention refugee status, was not an appeal on the merits, but rather a very narrow review for gross errors of law. The Committee observes that none of the grounds above include a review on the merits of the complainant's claim that he would be tortured if returned to India. With regard to the procedure of risk analysis, the Committee notes that according to the State party's submission, PRRA submissions may only include new evidence that arose after the rejection of the refugee protection claim; further, the PRRA decisions are subject to a discretionary leave to appeal, which was denied in the case of the complainant. The Committee refers to its Concluding observations (CAT/C/CR/34/CAN, 7 July 2005, § 5(c)), that the State party should provide for judicial review of the merits, rather than merely of the reasonableness, of decisions to expel an individual where there are substantial grounds for believing that the person faces a risk of torture. The Committee accordingly concludes that in the instant case the complainant did not have access to an effective remedy against his deportation.*

### 2.3.5 National Judgments on Asylum Procedure

- ☞ **Germany:** BVerwG 10 C 7.13, [17 June 2014]
- \* interpr. of Dir. 2013/32: **Asylum Procedure II** [art. 33(2)(a)]
- \* <http://cmr.jur.ru.nl/neais/Germany/BVerwG10C713.pdf>
- \* *Refugee status granted in another country (than Germany) has a binding effect in Germany in that by law, there is a prohibition of deportation. This does not, however, give rise to an entitlement to a new decision on recognising refugee status or to the granting of a residence title in Germany. A demand for a grant of subsidiary protection under Union law is inadmissible if the foreigner has already been granted the legal status of a refugee or of a person entitled to subsidiary protection in another country.*



- ☛ **Germany:** BVerwG 10 C 1.13, [5 Sep. 2013]
- \* interpr. of Dir. 2013/32: **Asylum Procedure II** [art. 2(i), 33(2)(a)]
- \* <http://cmr.jur.ru.nl/neais/Germany/BVerwG10C113.pdf>
- \* *The German authorities are unable to collect usable fingerprints from a Somali asylum seeker. The German Federal Administrative Court ruled that, although there is no direct obligation for an asylum seeker to guarantee that his fingerprints are analysable, there is a duty of cooperation including the obligation not to frustrate the possibility of analysing fingerprints during the time before they are taken.*
  
- ☛ **Ireland:** S.U.N. [2012] IEHC 338, [30 Mar. 2012]
- \* interpr. of Dir. 2005/85: **Asylum Procedure** [art. 39]
- \* *The High Court held that in a case where a negative recommendation in a first instance application for asylum was based exclusively or primarily upon a finding of a personal lack of credibility, there is an obligation to allow an oral appeal in order to provide an "effective remedy," in the sense of Article 39 of the Asylum Procedures Directive, notwithstanding that the Applicant is from a "safe country" (South Africa) and the legislation allows for limiting an Applicant to a written appeal only in those circumstances. For the same reasons, to allow an oral appeal is also required by the right to fair procedures contained in Article 40.3 of the Constitution of Ireland.*

### 3 Responsibility Sharing

#### 3.1 Responsibility Sharing: Adopted Measures

##### Regulation 343/2003

##### Dublin II

*Establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.*

- \* OJ 2003 L 50/1 impl. date: 1-09-2003 UK, IRL opt in
- \* Implemented by Regulation 1560/2003 (OJ 2003 L 222/3)  
Revised by Reg. 604/2013

##### *CJEU Judgments*

- ☛ CJEU C-394/12, **Abdullahi** 10 Dec. 2013 art. 10(1), 18 and 19
- ☛ CJEU C-4/11, **Puid** 14 Nov. 2013 art. 3(2)
- ☛ CJEU C-158/13, **Rajaby** 25 June 2013 art. 15(2)
- ☛ CJEU C-648/11, **M.A.** 6 June 2013 art. 6
- ☛ CJEU C-528/11, **Halaf** 6 June 2013 art. 3(2)
- ☛ CJEU C-666/11, **M** 7 Jan. 2013 - deleted art. 3(2)+19(4)
- ☛ CJEU C-245/11, **K.** 6 Nov. 2012 art. 15 and 3(2)
- ☛ CJEU C-620/10, **Kastrati** 3 May 2012 art. 2(c)
- ☛ CJEU C-411+493/10, **N.S. and M.E.** 21 Dec. 2011 art. 3(2)
- ☛ CJEU C-19/08, **Petrosian** 29 Jan. 2009 art. 20(1)(d) & 20(2)

##### *National Judgments*

- New** ☛ Germany: BVerwG 10 B 35.14 6 June 2014  
See further: § 3.3

##### Regulation 604/2013

##### Dublin III

*Establishing the criteria and mechanisms for determining the MS responsible for examining an application for international protection lodged in one of the MS by a TCN or a stateless person (revised)*

- \* OJ 2013 L 180/31 impl. date: 1-01-2014 UK, IRL opt in
- \* Recast of Reg. 343/2003

##### Regulation 2725/2000

##### Eurodac

*Concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention.*

- \* OJ 2000 L 316/1 impl. date: 15-1-2003
- \* implemented by Regulation 407/2002 (OJ 2002 L 62/1)

##### Regulation 603/2013

##### Eurodac II

*Concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (recast)*

(3.1: Responsibility Sharing: Adopted Measures)

- \* OJ 2013 L 180/1 impl. date: 20-7-2015 UK, IRL opt in
- \* Recast of Reg. 2725/2000

ECHR	Conditions
<i>European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols</i>	
* ETS 005	impl. date: 1953
* art. 3+13: Degrading reception conditions	
<i>ECtHR Judgments</i>	
<b>New</b> ☞ ECtHR Ap.no. 29217/12, <i>Tarakhel v SWI</i>	4 Nov. 2014 art. 3+13
☞ ECtHR Ap.no. 2283/12, <i>Mohammed v AUT</i>	6 June 2013 art. 3+13
☞ ECtHR Ap.no. 27725/10, <i>Mohammed Hussein et al. v NL + ITA</i>	2 Apr. 2013 art. 3+13
☞ ECtHR Ap.no. 30696/09, <i>M.S.S. v BEL + GRC</i>	21 Jan. 2011 art. 3+13
☞ ECtHR Ap.no. 32733/08, <i>K.R.S. v. UK</i>	2 Dec. 2008 art. 3+13
☞ ECtHR Ap.no. 43844/98, <i>T.I. v UK</i>	7 Mar. 2000 art. 3+13
See further: § 3.3	

3.2 Responsibility Sharing: Proposed Measures

- \* nothing to report

3.3 Responsibility Sharing: Jurisprudence

**3.3.1 CJEU Judgments on Responsibility Sharing**

- ☞ CJEU C-394/12, *Abdullahi*, [10 Dec. 2013]
- \* interpr. of Reg. 343/2003: **Dublin II** [art. 10(1), 18 and 19]
- \* ref. from 'Asylgerichtshof' (Austria)
- \* *Art. 19(2) Dublin II must be interpreted as meaning that, in circumstances where a MS has agreed to take charge of an applicant for asylum on the basis of the criterion laid down in Art. 10(1) of that regulation – namely, as the MS of the first entry of the applicant for asylum into the EU – the only way in which the applicant for asylum can call into question the choice of that criterion is by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that MS, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Art. 4 of the Charter (of FREU).*
- ☞ CJEU C-528/11, *Halaf*, [6 June 2013]
- \* interpr. of Reg. 343/2003: **Dublin II** [art. 3(2)]
- \* ref. from 'Administrativen sad Sofia-grad' (Bulgaria) 12-10-2011
- \* *Art. 3(2) must be interpreted as permitting a MS, which is not indicated as “responsible”, to examine an application for asylum even though no circumstances exist which establish the applicability of the humanitarian clause in Article 15. That possibility is not conditional on the MS responsible under those criteria having failed to respond to a request to take back the asylum seeker concerned. The MS in which the asylum seeker is present is not obliged, during the process of determining the MS responsible, to request the UHCR to present its views where it is apparent from the documents of the UNHCR that the MS indicated as “responsible” is in breach of the rules of European Union law on asylum.*
- ☞ CJEU C-245/11, *K.*, [6 Nov. 2012]
- \* interpr. of Reg. 343/2003: **Dublin II** [art. 15 and 3(2)]
- \* ref. from 'Asylgerichtshof' (Austria)
- \* *Art. 15(2) must be interpreted as meaning that a MS which is not responsible for examining an application for asylum pursuant to the criteria laid down in Chapter III of Dublin II becomes so responsible. It is for the MS which has become the responsible MS within the meaning of that regulation to assume the obligations which go along with that responsibility. It must inform in that respect the MS previously responsible. This interpretation of Art. 15(2) also applies where the MS which was responsible pursuant to the criteria laid down in Chapter III of Dublin II did not make a request in that regard in accordance with the second sentence of Art. 15(1).*

- ☞ CJEU C-620/10, *Kastrati*, [3 May 2012]
  - \* interpr. of Reg. 343/2003: **Dublin II** [art. 2(c)]
  - \* ref. from 'Kammarrätten i Stockholm, Migrationsöverdomstolen' (Sweden)
  - \* *The withdrawal of an application for asylum within the terms of Art. 2(c) Dublin II, which occurs before the MS responsible for examining that application has agreed to take charge of the applicant, has the effect that that regulation can no longer be applicable. In such a case, it is for the MS within the territory of which the application was lodged to take the decisions required as a result of that withdrawal and, in particular, to discontinue the examination of the application, with a record of the information relating to it being placed in the applicant's file.*
  
- ☞ CJEU C-666/11, *M*, [7 Jan. 2013] (deleted)
  - \* interpr. of Reg. 343/2003: **Dublin II** [art. 3(2)+19(4)]
  - \* ref. from 'Oberverwaltungsgericht für das Land Nordrhein Westfalen' (Germany) 19-12-2011
  - \* *Does the asylum seeker have a right, enforceable by him in the courts, to require a MS to examine the assumption of responsibility under art. 3(2) and to inform him about the grounds for its decision?*
  
- ☞ CJEU C-648/11, *M.A.*, [6 June 2013]
  - \* interpr. of Reg. 343/2003: **Dublin II** [art. 6]
  - \* ref. from 'Court of Appeal (England & Wales)' (UK)
  - \* *Fundamental rights include, in particular, that set out in Art. 24(2) of the Charter, whereby in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests are to be a primary consideration. The second paragraph of Art. 6 Dublin II cannot be interpreted in such a way that it disregards that fundamental right (see, by analogy, *Detiček*, para. 54 and 55, and *Case C-400/10 PPU McB.* [2010] ECR I-8965, para. 60). Consequently, although express mention of the best interest of the minor is made only in the first paragraph of Art. 6, the effect of Art. 24(2) of the Charter, in conjunction with Art. 51(1) thereof, is that the child's best interests must also be a primary consideration in all decisions adopted by the Member States on the basis of the second paragraph of Art. 6.*
  - Thus, Art. 6 must be interpreted as meaning that, in circumstances such as those of the main proceedings, where an unaccompanied minor with no member of his family legally present in the territory of a MS has lodged asylum applications in more than one MS, the MS in which that minor is present after having lodged an asylum application there is to be designated the 'MS responsible'.*
  
- ☞ CJEU C-411+493/10, *N.S. and M.E.*, [21 Dec. 2011]
  - \* interpr. of Reg. 343/2003: **Dublin II** [art. 3(2)]
  - \* ref. from 'High Court' (Ireland)
  - \* *Joined cases. The decision adopted by a MS on the basis of Article 3(2) whether to examine an asylum application which is not its responsibility according to the criteria laid down in Chapter III of Dublin II, implements EU law for the purposes of Article 6 TEU and Article 51 of the Charter of Fundamental Rights of the EU.*
  - EU law precludes the application of a conclusive presumption that the MS which Article 3(1) Dublin II indicates as responsible observes the fundamental rights of the EU. Article 4 of the Charter must be interpreted as meaning that the MSs, including the national courts, may not transfer an asylum seeker to the 'MS responsible' within the meaning of Dublin II where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that MS amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision. Subject to the right itself to examine the application referred to in Article 3(2) Dublin II, the finding that it is impossible to transfer an applicant to another MS, where that State is identified as the MS responsible in accordance with the criteria set out in Chapter III of that regulation, entails that the MS which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another MS to be identified as responsible for the examination of the asylum application. The MS in which the asylum seeker is present must ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the MS responsible which takes an unreasonable length of time. If necessary, the first mentioned MS must itself examine the application. Articles 1, 18 and 47 of the Charter do not lead to a different answer.*
  - In so far as the preceding questions arise in respect of the obligations of the United Kingdom of Great Britain and Northern Ireland, the answers to the second to sixth questions referred in Case C-411/10*

do not require to be qualified in any respect so as to take account of Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and the UK.

- ☞ CJEU C-19/08, [Petrosian](#), [29 Jan. 2009]
- \* interpr. of Reg. 343/2003: **Dublin II** [art. 20(1)(d) & 20(2)]
- \* ref. from 'Kammarrätten i Stockholm, Migrationsöverdomstolen' (Sweden)
- \* *Articles 20(1)(d) and 20(2) of Dublin II are to be interpreted as meaning that, where the legislation of the requesting MS provides for suspensive effect of an appeal, the period for implementation of the transfer begins to run, not as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, but only as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent its implementation.*
- ☞ CJEU C-4/11, [Puid](#), [14 Nov. 2013]
- \* interpr. of Reg. 343/2003: **Dublin II** [art. 3(2)]
- \* ref. from 'Hessischer Verwaltungsgerichtshof' (Germany)
- \* *Where the MS cannot be unaware that systemic deficiencies in the asylum procedure and in the conditions for the reception of asylum seekers in the Member State initially identified as responsible in accordance with the criteria (set out in Chapter III) of Dublin II provide substantial grounds for believing that the asylum seeker concerned would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Art. 4 of the Charter (of FREU), which is a matter for the referring court to verify, the MS which is determining the MS responsible is required not to transfer the asylum seeker to the MS initially identified as responsible and, subject to the exercise of the right itself to examine the application, to continue to examine the criteria set out in that chapter, in order to establish whether another MS can be identified as responsible in accordance with one of those criteria or, if it cannot, under Art. 13 of the Reg.*  
*Conversely, in such a situation, a finding that it is impossible to transfer an asylum seeker to the MS initially identified as responsible does not in itself mean that the MS which is determining the MS responsible is required itself, under Art. 3(2) of Dublin II, to examine the application for asylum.*
- ☞ CJEU C-158/13, [Rajaby](#), [25 June 2013]
- \* interpr. of Reg. 343/2003: **Dublin II** [art. 15(2)]
- \* ref. from 'Rechtbank Den Haag' (Netherlands) 22-03-2013
- \* *withdrawn*

### 3.3.2 CJEU pending cases on Responsibility Sharing

- \* nothing to report

### 3.3.3 ECtHR Judgments and decisions on Responsibility Sharing

- ☞ ECtHR Ap.no. 32733/08, [K.R.S. v. UK](#), [2 Dec. 2008]
- \* no violation of **ECHR** [art. 3+13]
- \* *Based on the principle of intra-community trust, it must be presumed that a MS will comply with its obligations. In order to reverse that presumption the applicant must demonstrate in concreto that there is a real risk of his being subjected to treatment contrary to Article 3 of the Convention in the country to which he is being removed.*
- ☞ ECtHR Ap.no. 30696/09, [M.S.S. v BEL + GRC](#), [21 Jan. 2011]
- \* violation of **ECHR** [art. 3+13]
- \* *A deporting State is responsible under ECHR Art. 3 for the foreseeable consequences of the deportation of an asylum seeker to another EU Member State, even if the deportation is being decided in accordance with the Dublin Regulation; the responsibility of the deporting State comprises not only the risk of indirect refoulement by way of further deportation to risk of ill-treatment in the country of origin, but also the conditions in the receiving Member State if it is foreseeable that the asylum seeker may there be exposed to treatment contrary to Art. 3.*
- ☞ ECtHR Ap.no. 27725/10, [Mohammed Hussein et al. v NL + ITA](#), [2 Apr. 2013]
- \* no violation of **ECHR** [art. 3+13]
- \* *The case concerns the pending return of a Somali asylum seeker and her two children from the Netherlands to Italy under the Dublin Regulation. It is marked by discrepancies in issues of central*



importance between the applicant's initial complaint that she had not been enabled to apply for asylum in Italy, had not been provided with reception facilities for asylum seekers, and had been forced to live on the streets in Italy, and her subsequent information to the ECtHR. Thus, in her response to the facts submitted by the Italian Government to the ECtHR she admitted that she had been granted a residence permit for subsidiary protection in Italy, and that she had been provided with reception facilities, including medical care, during her stay in Italy.

Upholding its general principles of interpretation of ECHR art. 3, the Court reiterated that the mere fact of return to a country where one's economic position will be worse than in the expelling State is not sufficient to meet the threshold of ill-treatment proscribed by art. 3. Aliens subject to expulsion cannot in principle claim any right to remain in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State, absent exceptionally compelling humanitarian grounds against removal.

While the general situation and living conditions in Italy of asylum seekers, accepted refugees and other persons granted residence for international protection may disclose some shortcomings, the Court held that it had not been shown to disclose a systemic failure to provide support or facilities catering for asylum seekers as members of a particularly vulnerable group as was the case in *M.S.S. v. Belgium and Greece*. The Court further noted that the applicant's request for protection in Italy had been processed within five months, that accommodation had been made available to her along with access to health care and other facilities, and that she had been granted a residence permit entitling her to a travel document, to work, and to benefit from the general schemes for social assistance, health care, social housing and education under Italian law. As the applicant had failed to show that she and her children would not benefit from the same support again if returned to Italy, her complaints under ECHR art. 3 against Italy and the Netherlands were considered manifestly ill-founded, and therefore inadmissible.

☞ ECtHR Ap.no. 2283/12, *Mohammed v AUT*, [6 June 2013]

\* violation of *ECHR* [art. 3+13]

\* The applicant Sudanese asylum seeker arrived in Austria via Greece and Hungary. The Austrian authorities rejected the application and ordered his transfer to Hungary under the Dublin Regulation. When placed in detention with a view to his forced transfer almost a year later, he lodged a second asylum application which did not have suspensive effect in relation to the transfer order.

The ECtHR considered the applicant's initial claim against the Dublin transfer arguable, due to the 'alarming nature' of reports published in 2011-12 in respect of Hungary as a country of asylum and in particular as regards Dublin transferees. His second application for asylum in Austria could therefore not prima facie be considered abusively repetitive or entirely manifestly unfounded. In the specific circumstances of the case, the applicant had been deprived of de facto protection against forced transfer and of a meaningful substantive examination of his arguable claim concerning the situation of asylum seekers in Hungary. Accordingly, Art. 13 in conjunction with Art. 3 had been violated.

Despite the initially arguable claim against the Dublin transfer to Hungary, the Court noted the subsequent legislative amendments and the introduction of additional legal guarantees concerning detention of asylum seekers and their access to basic facilities. The applicant would therefore no longer be at a real and individual risk of being subjected to treatment in violation of Art. 3 upon transfer to Hungary under the Dublin Regulation.

☞ ECtHR Ap.no. 43844/98, *T.I. v UK*, [7 Mar. 2000]

\* no violation of *ECHR* [art. 3+13]

\* The Court considered that indirect removal to an intermediary country, which was also a Contracting Party, left the responsibility of the transferring State intact. Subsequently, the transferring State was required not to deport a person where substantial grounds had been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Art 3 in the receiving country. In this case the Court considered that there was no reason to believe that Germany would have failed to honour its obligations under Art 3 of the Convention and protect the applicant from removal to Sri Lanka if he submitted credible arguments demonstrating that he risked ill-treatment in that country.

**New**

☞ ECtHR Ap.no. 29217/12, *Tarakhel v SWI*, [4 Nov. 2014]

\* violation of *ECHR* [art. 3+13]

\* The applicants were an Afghan family with six minor children who had entered Italy and applied for asylum. Here they had been transferred to a reception centre where they considered the conditions poor, particularly due to lack of appropriate sanitation facilities, lack of privacy and a climate of

violence. Having travelled on to Switzerland, their transfer under the Dublin Regulation was tacitly accepted by Italy, and they complained to the Court that such transfer to Italy in the absence of individual guarantees would be in violation of the ECHR.

While the overall situation of the Italian reception system could not act as a bar to all transfers of asylum seekers to Italy, the ECtHR noted the insufficient capacity of the reception system for asylum seekers in Italy, causing the risk of being left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions. In this connection the court did not apply the 'systemic failure' test introduced in some decisions in 2013.

The Court reiterated that asylum seekers as a particularly underprivileged and vulnerable group require special protection under art. 3, and emphasised that this requirement is particularly important when the persons concerned are children, in view of the specific needs and extreme vulnerability of children seeking asylum. This applies even when the children seeking asylum are accompanied by their parents. Reception conditions for children must therefore be adapted to their age in order to ensure that those conditions do not create a situation of stress and anxiety with particularly traumatic consequences, as the conditions would otherwise attain the threshold of severity required to come within the scope of art. 3.

Although certain indications had been given from the Italian authorities about the prospective accommodation of the applicants upon transfer to Italy under the Dublin Regulation, the Court held that, in the absence of detailed and reliable information concerning the specific facility, the physical reception conditions and the preservation of the family unit, the Swiss authorities did not possess sufficient assurances that the applicants would be taken charge of in a manner adapted to the age of the children.

### 3.3.4 National Judgments on Responsibility Sharing

- New**
- ☞ **Germany:** BVerwG 10 B 35.14, [6 June 2014]
  - \* interpr. of Reg. 343/2003: **Dublin II**
  - \* *An asylum seeker may counter a transfer to the MS responsible for him or her under the Dublin II Regulation only by pleading systemic deficiencies of the asylum procedure and of the reception conditions for asylum seekers. It is not relevant, however, whether in individual cases below the threshold of systemic deficiencies, there may be inhuman or degrading treatment within the meaning of Art 4 of the Charter of Fundamental Rights or Art 3 of the European Charter of Human Rights, or whether an applicant has already been exposed to such treatment at one time in the past.*

## 4 Reception Conditions

### 4.1 Reception Conditions: Adopted Measures

<b>Directive 2003/9</b>	<b>Reception Conditions</b>	
<i>Laying down minimum standards for the reception of asylum seekers</i>		
* OJ 2003 L 31/18	impl. date: 6-2-2005	IRL opt out
* Revised by Dir. 2013/33		
<i>CJEU Judgments</i>		
☞ CJEU C-79/13, <b>Saciri</b>	27 Feb. 2014	art. 13, 14
☞ CJEU C-534/11, <b>Arslan</b>	30 May 2013	
☞ CJEU C-179/11, <b>CIMADE &amp; GISTI</b>	27 Sep. 2012	
See further: § 4.3		
<b>Directive 2013/33</b>	<b>Reception Conditions II</b>	
<i>Laying down standards for the reception of applicants for international protection</i>		
* OJ 2013 L 180/96	impl. date: 20-07-0015	UK, IRL opt out
* Recast of Dir. 2003/9		
<b>Decision 281/2012</b>	<b>Refugee Fund</b>	
<i>Establishment of a European Refugee Fund (2008-2013)</i>		
* OJ 2012 L 92/1		
* amendment of Dec. 573/2007 European Refugee Fund (2008-2013) OJ 2007 L 1441/1 and preceded by		
Coun. Dec. 2004/904 European Refugee Fund (2005-2007) OJ 2004 L 381/52		

(4.1: Reception Conditions: Adopted Measures)

Coun. Dec. 2000/596 European Refugee Fund (2000-2004) OJ 2000 L 252/12

**Regulation 514/2014**

**Asylum and Migration Fund - general rules**

*General provisions on the Asylum, Migration and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management*

\* OJ 2014 L 150/112

**Regulation 516/2014**

**Asylum and Migration Fund**

*Establishing the Asylum, Migration and Integration Fund*

\* OJ 2014 L 150/168

**ECHR**

**Reception Conditions**

*European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols*

\* ETS 005

impl. date: 1953

\* art. 3: Prohibition of degrading treatment by means of detention conditions

*ECtHR Judgments*

☞ ECtHR Ap.no. 53608/11, **B.M. v GRE** 19 Dec. 2013 art. 3 (recp.)

☞ ECtHR Ap.no. 33441/10, **C.D. a.o. v GRE** 19 Dec. 2013 art. 3 (recp.)

☞ ECtHR Ap.no. 70427/11, **Horshill v GRE** 1 Aug. 2013 art. 3 (recp.)

☞ ECtHR Ap.no. 55352/12, **Aden Ahmed v MAL** 23 July 2013 art. 3 (recp.)

☞ ECtHR Ap.no. 53709/11, **A.F. v GRE** 13 June 2013 art. 3 (recp.)

☞ ECtHR Ap.no. 30696/09, **M.S.S. v BEL + GRE** 21 Jan. 2011 art. 3 (recp.)

See further: § 4.3

4.2 Reception Conditions: Proposed Measures

**Regulation**

**Dublin III amendments**

*Determining the Member State responsible for examining the application for international protection of unaccompanied minors with no family member, sibling or relative legally present in a Member State*

\* COM (2014) 382

4.3 Reception Conditions: Jurisprudence

**4.3.1 CJEU Judgments on Reception Conditions**

☞ CJEU C-534/11, **Arslan**, [30 May 2013]

\* interpr. of Dir. 2003/9: **Reception Conditions**

\* ref. from 'Nejvyšší správní soud' (czech Republic) 22-09-2011

\* *Although this judgment is primarily about the interpretation of the Return Directive, the CJEU elaborates also on the meaning of the Reception Conditions Directive.*

*The CJEU rules that do the Dir. does not preclude a TCN who has applied for international protection (after having been detained under Art. 15 Return Directive) from being kept in detention on the basis of a provision of national law, where it appears, after an assessment on a case-by-case basis of all the relevant circumstances, that the application was made **solely** to delay or jeopardise the enforcement of the return decision and that it is objectively necessary to maintain detention to prevent the person concerned from permanently evading his return.*

☞ CJEU C-179/11, **CIMADE & GISTI**, [27 Sep. 2012]

\* interpr. of Dir. 2003/9: **Reception Conditions**

\* ref. from 'Conseil d'État' (France)

\* *1. A MS in receipt of an application for asylum is obliged to grant the minimum conditions for reception of asylum seekers laid down in Directive 2003/9 even to an asylum seeker in respect of whom it decides, under Dublin II, to call upon another MS, as the MS responsible for examining his application for asylum, to take charge of or take back that applicant.*

*2. The obligation on a MS in receipt of an application for asylum to grant the minimum reception conditions to an asylum seeker in respect of whom it decides, under Dublin II, to call upon another MS, as the MS responsible for examining his application for asylum, to take charge of or take back that applicant, ceases when that same applicant is actually transferred by the requesting MS, and the financial burden of granting those minimum conditions is to be assumed by that requesting MS, which*

is subject to that obligation.

☞ CJEU C-79/13, *Saciri*, [27 Feb. 2014]

\* interpr. of Dir. 2003/9: **Reception Conditions** [art. 13, 14]

\* ref. from 'Arbeidshof Brussel' (Belgium) 07-02-2013

\* *Where a MS has opted to grant the material reception conditions in the form of financial allowances or vouchers, those allowances must be provided from the time the application for asylum is made, in accordance with Article 13(1) and 13(2). That MS must ensure that the total amount of the financial allowances covering the material reception conditions is sufficient to ensure a dignified standard of living and adequate for the health of applicants and capable of ensuring their subsistence, enabling them in particular to find housing, having regard, if necessary, to the preservation of the interests of persons having specific needs, pursuant to Article 17. The material reception conditions laid down in Article 14(1), (3), (5) and (8) do not apply to the MSs where they have opted to grant those conditions in the form of financial allowances only. Nevertheless, the amount of those allowances must be sufficient to enable minor children to be housed with their parents, so that the family unity of the asylum seekers may be maintained.*

*Further, the Directive does not preclude, where the accommodation facilities specifically for asylum seekers are overloaded, the MSs from referring the asylum seekers to bodies within the general public assistance system, provided that that system ensures that the minimum standards as regards the asylum seekers are met.*

#### 4.3.2 CJEU pending cases on Reception Conditions

\* no pending cases

#### 4.3.3 ECtHR Judgments and decisions on Reception Conditions

☞ ECtHR Ap.no. 53709/11, *A.F. v GRE*, [13 June 2013]

\* violation of *ECHR* [art. 3 (recp.)]

\* *An Iranian entering Greece from Turkey had initially not been registered as an asylum seeker by the Greek authorities, which ordered his return to Turkey. However, the Turkish authorities refused to readmit him into Turkey, and he was then detained by the Greek police.*

*Against the background of reports from Greek and international organisations, having visited the relevant police detention facilities either during the applicant's detention or shortly after his release – including the European Committee for the Prevention of Torture, the UN Special Rapporteur on Torture, the German NGO ProAsyl and the Greek National Human Rights Commission – the ECtHR found a violation of art. 3 due to the serious lack of space available to the applicant, also taking the duration of his detention into account. It was thus unnecessary for the Court to examine the applicant's other allegations concerning the detention conditions which the Government disputed. Yet, the Court noted that the Government's statements in this regard were not in accordance with the findings of the abovementioned organisations.*

☞ ECtHR Ap.no. 55352/12, *Aden Ahmed v MAL*, [23 July 2013]

\* violation of *ECHR* [art. 3 (recp.)]

\* The case concerns an asylum applicant who had entered Malta in an irregular manner by boat. The ECtHR found a violation of art. 5(1), mainly due to the failure of the Maltese authorities to pursue deportation or to do so with due diligence, and of art. 5(4) due to absence of an effective and speedy domestic remedy to challenge the lawfulness of their detention.

A similar case (42337/11 Suso Musa v Malta) was ruled also on 23 July 2013. Therefore, according to ECHR art. 46, the ECtHR requested the Maltese authorities to establish a mechanism allowing a determination of the lawfulness of immigration detention within a reasonable time-limit.

In the *Aden Ahmed* case the Court for the first time found Malta in violation of art. 3 because of the immigration detention conditions. Those conditions in which the applicant had been living for 14½ months were, taken as a whole, amounted to degrading treatment.

☞ ECtHR Ap.no. 53608/11, *B.M. v GRE*, [19 Dec. 2013]

\* violation of *ECHR* [art. 3 (recp.)]

\* *The applicant was an Iranian journalist who alleged to have been arrested and tortured due to his involvement in protests against the government. After his arrival in Greece a decision had been taken to return him to Turkey, and he had been held in custody in a police station and in various detention*



centres. His application for asylum was first not registered by the Greek authorities, and later they dismissed the application.

The application mainly concerned the conditions of detention, in particular overcrowding, unhygienic conditions, lack of external contact, and lack of access to telephone, translators and any kind of information. Referring to its previous case law, the ECtHR held these conditions to be in violation of art. 3.

As there had been no effective domestic remedy against that situation, art. 13 in combination with art. 3 had also been violated.

☞ ECtHR Ap.no. 33441/10, *C.D. a.o. v GRE*, [19 Dec. 2013]

\* violation of *ECHR* [art. 3 (recp.)]

\* The 12 applicants were asylum seekers who had been detained for several months awaiting deportation.

While the detention conditions were found to have constituted degrading treatment in violation of art. 3, the detention as such had not been unlawful under art. 5(1). However, there had been a violation of art. 5(4) on speedy review of the lawfulness of detention.

☞ ECtHR Ap.no. 70427/11, *Horshill v GRE*, [1 Aug. 2013]

\* violation of *ECHR* [art. 3 (recp.)]

\* The applicant had entered Greece irregularly and later applied for asylum, following which he was arrested and placed in detention for 15 days. The Court found that he had been subjected to degrading treatment in violation of art. 3, due to the detention conditions in two police stations.

Referring to the Greek decree transposing EU Directive 2005/85 on Asylum Procedures, the decision from the administrative court from which it was clear that the applicant's detention had not been automatic, as well as the short period of detention and the fact that he had been immediately released when assuring that he would be accommodated in a hostel run by an NGO, the Court considered the detention lawful within the meaning of art. 5(1).

☞ ECtHR Ap.no. 30696/09, *M.S.S. v BEL + GRE*, [21 Jan. 2011]

\* violation of *ECHR* [art. 3 (recp.)]

\* A deporting State is responsible under *ECHR* Art. 3 for the foreseeable consequences of the deportation of an asylum seeker to another EU Member State, even if the deportation is being decided in accordance with the Dublin Regulation; the responsibility of the deporting State comprises not only the risk of indirect refoulement by way of further deportation to risk of ill-treatment in the country of origin, but also the conditions in the receiving Member State if it is foreseeable that the asylum seeker may there be exposed to treatment contrary to Art. 3.

## 5 Miscellaneous

### Ciara Smyth (2014)

*European Asylum Law and the Rights of the Child*

\* Oxford: Routledge

### Elsbeth Guild, Carolus Grütters, Sebastiaan de Groot (eds) (2013)

*Assessment of Credibility by Judges in Asylum Cases in the EU (seminar)*

*Includes the Credo-Document*

\* Nijmegen: Wolf Legal Publishers

### Marcelle Reneman (2013)

*EU asylum procedures and the right to an effective remedy (diss.)*

\* Leiden: BOXPRESS

### Dana Baldinger (2013)

*Rigorous Scrutiny versus Marginal Review, standards on judicial scrutiny and evidence in international and European asylum law (diss.)*

\* Nijmegen: Wolf Legal Publishers (ISBN: 978-90-5850-952-9)

### Regulation 439/2010

*European Asylum Support Office*

\* OJ 2010 L 132/11

*(5: Miscellaneous)*

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- \* The European Asylum Support Office (EASO) is established in order to help to improve the implementation of the Common European Asylum System (CEAS), to strengthen practical cooperation among MSs on asylum and to provide and/or coordinate the provision of operational support to MSs subject to particular pressure on their asylum and reception systems.