



Quarterly update on

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

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Editorial

Welcome to the first edition in 2013 of **NEAIS**: 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 we would refer the reader to the other newsletter: **NEMIS**, the Newsletter on European Migration Issues.

Views

As of this issue, NEAIS will not only present relevant views of the CAT (Committee Against Torture) but also of the Human Rights Committee (CCPR) of the International Covenant on Civil and Political Rights on the topic of asylum. In doing so we hope to provide you with a broader view on the issue of protection.

Judgments

We would like to draw your attention to some recent judgments, in particular two of the ECtHR. Both cases are concerned with the problematic issue of (extraordinary) **rendition**.

The first case (Abdulkhakov, [2 Oct. 2012]) is about an asylum seeker from Uzbekistan who applies for asylum in Russia. Right after his application is rejected and his subsequent extradition to Uzbekistan only stopped by an Interim Measure of the ECtHR, the applicant is - with knowledge of the Russian authorities - abducted and brought to Tajikistan. The ECtHR notes in particular that the applicants transfer to Tajikistan is carried out outside any legal framework and that the deliberate circumvention of due process, is held to be contrary to the rule of law and the values protected by the ECHR.

The second case (El Masri, [13 Dec. 2012]) does not concern an asylum applicant but the ECtHR's reasoning and conclusions are of great interest in order to illustrate general principles of protection. The case is about a German national who is arrested and held incommunicado by the Macedonian authorities, handed over (on the suspicion of being a terrorist) to a team of CIA agents, transferred to Afghanistan, tortured and finally brought back to Europe and released months later in Albania. The ECtHR finds violations of art. 3, 5, 8 and 13. This clear judgment of ECtHR is the very first in which the existence of the so-called CIA-prisons in Europe are confirmed. On this issue the 'Marty report' (2006) was published by the CoE; nevertheless most countries denied the existence of these facilities. It is worthwhile to note that mr El-Masri had tried to bring his case before an American judge but was prevented to do so due to the 'state-secrets privilege'. Interestingly, the US Supreme Court confirmed this decision by declining to hear an appeal.

Input from judges

The more national jurisprudence the editors receive from judges, the more relevant this newsletter will become. You are therefore more than welcome to provide us with your judgments, regarding the relevant interpretation of EU on legal instruments.

We would also like to inform you that we will start a section with relevant academic literature for which we would very much appreciate your input.

Do feel free to forward this newsletter to any colleagues you think might be interested. Please contact us if you have any inquiries.

Nijmegen, 25 January 2013, Carolus Grütters & Tineke Strik

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1 Qualification for Protection

1.1 Qualification for Protection: Adopted Measures

Directive 2011/95 (Revised Qualification)

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: Dec. 2013] UK, IRL opt out
- * Recast of Dir. 2004/83

Directive 2004/83 (Qualification)

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 Oct. 2006]
- * Revised by Dir. 2011/95
- ☞ CJEU C-277/11, *M.M.* [22 Nov. 2012] [art. 4(1)]
- ☞ CJEU C-364/11, *El Kott a.o.* [19 Dec. 2012] [art. 12(1)(a)]
- ☞ 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, *Abdullah a.o.* [2 Mar. 2010] [art. 2(c), 11 & 14]
- ☞ CJEU C-465/07, *Elgafaji* [17 Feb. 2009] [art. 2(e), 15(c)]
- ☞ CJEU C-604/12, *HN* [pending]
- ☞ CJEU C-285/12, *Diakite* [pending] [art. 15(c)]
- ☞ CJEU C-201/12, *X* [pending] [art. 9(1)(a); 2(c); 10(1)(d)]
- ☞ Germany: BVerwGE 10 C 13.10 [17 Nov. 2011] [art. 2(e), 4(4), 15(c)]
See further: § 1.3

Directive 2001/55 (Temporary Protection)

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

- * OJ 2001 L 212/12

ICCPR

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 1544/2007, *Mehrez Ben Abde Hamida v. CND* [11 May 2010] [art. 7 (qual.)]
See further: § 1.3

CAT

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 336/2008, *Harminder Singh Khalsa v. Swit.* [26 May 2011] [art. 3 (qual.)]
- ☞ CAT 339/2008, *Said Amini v. Denmark* [30 Nov. 2010] [art. 3 (qual.)]
- ☞ CAT 379/2009, *Bakatu-Bia v. Sweden* [3 June 2011] [art. 3 (qual.)]
- ☞ CAT 373/2009, *M.A. and L.G. v. Sweden* [19 Nov. 2010] [art. 3 (qual.)]
- ☞ CAT 300/2006, *A.T. v. France* [11 May 2007] [art. 3 (qual.)]
- ☞ CAT 281/2005, *E.P. v. Azerbaijan* [1 May 2007] [art. 3 (qual.)]
- ☞ CAT 279/2005, *C.T. and K.M. v. Sweden* [22 Jan. 2007] [art. 3 (qual.)]
- ☞ CAT 233/2003, *Agiza v. Sweden* [20 May 2005] [art. 3 (qual.)]
- ☞ CAT 43/1996, *Tala v. Sweden* [15 Nov. 1996] [art. 3 (qual.)]
See further: § 1.3

ECHR*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 Ap.no. 33809/08, **Labsi v. Slovakia** [15 May 2012] [art. 3 (qual.)]
 - ☞ ECtHR Ap.no. 52077/10, **S.F. v. Sweden** [15 May 2012] [art. 3 (qual.)]
 - ☞ ECtHR Ap.no. 24027/07, **Babar Ahmad v. UK** [10 Apr. 2012] [art. 3 (qual.)]
 - ☞ ECtHR Ap.no. 27765/09, **Hirsi v. Italy** [23 Feb. 2012] [art. 3 (qual.)]
 - ☞ ECtHR Ap.no. 8139/09, **Othman v. UK** [17 Jan. 2012] [art. 3 (qual.)]
 - ☞ ECtHR Ap.no. 23505/09, **N. v. Sweden** [20 July 2010] [art. 3 (qual.)]
 - ☞ ECtHR Ap.no. 25904/07, **N.A. v. UK** [17 July 2008] [art. 3 (qual.)]
 - ☞ ECtHR Ap.no. 1948/04, **Salah Sheekh v. NL** [11 Jan. 2007] [art. 3 (qual.)]
 - ☞ ECtHR Ap.no. 24245/03, **D. v. Turkey** [22 June 2006] [art. 3 (qual.)]
 - ☞ ECtHR Ap.no. 2345/02, **Said v. NL** [5 July 2005] [art. 3 (qual.)]
 - ☞ ECtHR Ap.no. 58510/00, **Venkadajalasarma v. NL** [17 Feb. 2004] [art. 3 (qual.)]
 - ☞ ECtHR Ap.no. 40035/98, **Jabari v. Turkey** [11 July 2000] [art. 3 (qual.)]
 - ☞ ECtHR Ap.no. 24573/94, **H.L.R. v. France** [27 Apr. 1997] [art. 3 (qual.)]
 - ☞ ECtHR Ap.no. 13163/87, **Vilvarajah v. UK** [30 Oct. 1991] [art. 3 (qual.)]
 - ☞ ECtHR Ap.no. 15576/89, **Cruz Varas v. Sweden** [20 Mar. 1991] [art. 3 (qual.)]
 - ☞ ECtHR Ap.no. 14038/88, **Soering v. UK** [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-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.
- New**
- ☞ 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-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.*
- ☞ 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-175/08, **Abdullah 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*

(1.3.1: Qualification for Protection: Jurisprudence: CJEU Judgments)

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-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*

1.3.2 CJEU pending cases on Qualification for Protection

New

- ☞ CJEU C-604/12, *HN*
- * interpr. of Dir. 2004/83: **Qualification**
- * ref. from 'Supreme Court' (Ireland)
- * *Reference on a preliminary ruling*
- ☞ CJEU C-285/12, *Diakite*
- * interpr. of Dir. 2004/83: **Qualification** [art. 15(c)]
- * ref. from 'Raad van State' (Belgium)
- * *On the meaning of "internal conflict"*.
- ☞ CJEU C-201/12, *X*
- * interpr. of Dir. 2004/83: **Qualification** [art. 9(1)(a); 2(c); 10(1)(d)]
- * ref. from 'Raad van State' (Netherlands)
- * *On homosexuality*

1.3.3 ECtHR Judgments on Qualification for Protection

- ☞ ECtHR Ap.no. 33809/08, *Labsi v. Slovakia*, [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.
- ☞ ECtHR Ap.no. 52077/10, *S.F. v. Sweden*, [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. 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. 27765/09, **Hirsi v. Italy**, [23 Feb. 2012]

* interpr. 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. 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. 23505/09, **N. v. Sweden**, [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. 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. 24245/03, **D. v. Turkey**, [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. 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. 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. 40035/98, **Jabari v. Turkey**, [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. 24573/94, **H.L.R. v. France**, [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. 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. 15576/89, **Cruz Varas v. Sweden**, [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. 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 Article 3 recognising the extra-territorial effect of the ECHR.*

1.3.4 CAT Views on Qualification for Protection

- New**
- ☞ CAT 336/2008, **Harjinder Singh Khalsa v. Swit.**, [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 379/2009, **Bakatu-Bia v. Sweden**, [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.*
- New**
- ☞ CAT 339/2008, **Said Amini v. Denmark**, [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 373/2009, **M.A. and L.G. v. Sweden**, [19 Nov. 2010]
 - * violation of **CAT** [art. 3 (qual.)]
 - * *Return of longtime PKK member to Turkey where he is wanted under anti-terrorism laws would constitute a breach of art. 3.*
 - ☞ CAT 300/2006, **A.T. v. France**, [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 281/2005, **E.P. v. Azerbaijan**, [1 May 2007]
 - * violation of **CAT** [art. 3 (qual.)]
 - * *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 279/2005, **C.T. and K.M. v. Sweden**, [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 233/2003, *Agiza v. Sweden*, [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 43/1996, *Tala v. Sweden*, [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

New

- ☞ CCPR 1544/2007, *Mehrez Ben Abde Hamida v. CND*, [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

- ☞ **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 (Asylum Procedure)

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

- * OJ 2005 L 326/13 [impl. date: 1 Dec. 2007]
 - ☞ CJEU C-69/10, *Samba Diouf* [28 July 2011]
 - ☞ CJEU C-133/06, *Eur. Parliament v. Eur. Union* [6 May 2008]
 - ☞ CJEU C-175/11, *H.I.D.* [pending] [art. 39]
- See further: § 2.3

ECHR

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 Ap.no. 39630/09, *El-Masri* [13 Dec. 2012] [art. 13 (proc.)]
 - ☞ ECtHR Ap.no. 14743/11, *Abdulkhakov v. Russia* [2 Oct. 2012] [art. 3 (proc.)]
 - ☞ ECtHR Ap.no. 33210/11, *Singh v. Belgium* [2 Oct. 2012] [art. 13 (proc.)]
 - ☞ ECtHR Ap.no. 33809/08, *Labsi vs Slovakia* [15 May 2012] [art. 13 (proc.)]
 - ☞ ECtHR Ap.no. 27765/09, *Hirsi v. Italy* [23 Feb. 2012] [art. 3 (proc.)]
 - ☞ ECtHR Ap.no. 9152/09, *I.M. v. France* [2 Feb. 2012] [art. 13 (proc.)]
 - ☞ ECtHR Ap.no. 12294/07, *Zontul v. Greece* [17 Jan. 2012] [art. 3 (proc.)]
 - ☞ ECtHR Ap.no. 39472/07, *Popov v. France* [19 Jan. 2012] [art. 3 (proc.)]
 - ☞ ECtHR Ap.no. 30696/09, *M.S.S. v. Belgium+Greece* [21 Jan. 2011] [art. 3 (proc.)]
 - ☞ ECtHR Ap.no. 30471/08, *Abdolkhani v. Turkey* [22 Sep. 2009] [art. 13 (proc.)]
 - ☞ ECtHR Ap.no. 246/07, *Ben Khemais v. Italy* [24 Feb. 2009] [art. 3 (proc.)]
 - ☞ ECtHR Ap.no. 45223/05, *Sultani v. France* [20 Sep. 2007] [art. 3 (proc.)]
 - ☞ ECtHR Ap.no. 25389/05, *Gebremedhin* [26 Apr. 2007] [art. 13 (proc.)]
 - ☞ ECtHR Ap.no. 13284/04, *Bader v. Sweden* [8 Nov. 2005] [art. 3 (proc.)]
 - ☞ ECtHR Ap.no. 38885/02, *N. v. Finland* [26 July 2005] [art. 3 (proc.)]
 - ☞ ECtHR Ap.no. 51564/99, *Conka v. Belgium* [5 Feb. 2002] [art. 13 (proc.)]
 - ☞ ECtHR Ap.no. 40035/98, *Jabari v. Turkey* [11 July 2000] [art. 3 (proc.)]
 - ☞ ECtHR Ap.no. 25894/94, *Bahaddar v. NL* [19 Feb. 1998] [art. 3 (proc.)]
- See further: § 2.3

CAT

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 379/2009, *Bakatu-Bia v. Sweden* [8 July 2011] [art. 3 (proc.)]
 - ☞ CAT 319/2007, *Nirma Singh v. Canada* [30 May 2011] [art. 22]
- See further: § 2.3

2.2 Asylum Procedure: Proposed Measures

Directive

Recast of Procedures Directive

- * COM (2009) 554, Oct. 2009 UK, IRL opt out
- * EP plenary vote, April 2011; amended text proposed by Commission, June 2011 (COM (2011) 319); Council agreement, May 2012; EP/Council negotiations underway

2.3 Asylum Procedure: Jurisprudence

2.3.1 CJEU Judgments on Asylum Procedure

- ☞ CJEU C-69/10, *Samba Diouf*, [28 July 2011]
- * interpr. of Dir. 2005/85: *Asylum Procedure*
- * 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.*
- ☞ CJEU C-133/06, *Eur. Parliament v. Eur. Union*, [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.*

2.3.2 CJEU pending cases on Asylum Procedure

- ☞ CJEU C-175/11, *H.I.D.* (judgment due 31 Jan. 2012)
- * interpr. of Dir. 2005/85: *Asylum Procedure* [art. 39]
- * ref. from 'High Court' (Ireland)
- * *Whether Art. 39 when read in conjunction with its Recital (27) and Article 267 TFEU to be interpreted to the effect that the effective remedy thereby required is provided for in national law when the function of review or appeal in respect of the first instance determination of applications is assigned by law to an appeal to the Tribunal established under Act of Parliament with competence to give binding decisions in favour of the asylum applicant on all matters of law and fact relevant to the application notwithstanding the existence of administrative or organisational arrangements.*

2.3.3 ECtHR Judgments on Asylum Procedure

- New** ☞ ECtHR Ap.no. 39630/09, *El-Masri*, [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 there 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, ECHR arts. 3 and 13 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 ECHR art. 13, or as inherent aspect of ECHR art. 3, respectively.

New

☞ ECtHR Ap.no. 14743/11, **Abdulkhakov v. Russia**, [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. 33210/11, **Singh v. Belgium**, [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. 33809/08, **Labsi vs Slovakia**, [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. 27765/09, **Hirsi v. Italy**, [23 Feb. 2012]

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

* 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. 9152/09, **I.M. v. France**, [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. 12294/07, **Zontul v. Greece**, [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.

☞ ECtHR Ap.no. 39472/07, **Popov v. France**, [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. 30696/09, **M.S.S. v. Belgium+Greece**, [21 Jan. 2011]
 - * violation of **ECHR** [art. 3 (proc.)]
 - * *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. 30471/08, **Abdolkhani v. Turkey**, [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. 246/07, **Ben Khemais v. Italy**, [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. 45223/05, **Sultani v. France**, [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. 25389/05, **Gebremedhin**, [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. 13284/04, **Bader v. Sweden**, [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 Articles 2 and 3.*
- ☞ ECtHR Ap.no. 38885/02, **N. v. Finland**, [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. 51564/99, **Conka v. Belgium**, [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. 40035/98, **Jabari v. Turkey**, [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 Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 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 Article 3 of Convention is also absolute in expulsion cases, applicants invoking this Article 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.

2.3.4 CAT Views on Asylum Procedure

New

☞ CAT 379/2009, **Bakatu-Bia v. Sweden**, [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.*

New

☞ CAT 319/2007, **Nirma Singh v. Canada**, [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, PRR submissions may only include new evidence that arose after the rejection of the refugee protection claim; further, the PRR 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.

3 Responsibility Sharing

3.1 Responsibility Sharing: Adopted Measures

Regulation 343/2003

Dublin II

- * OJ 2003 L 50/1 [impl. date: 1 Sep. 2003]
 - * implemented by Regulation 1560/2003 (OJ 2003 L 222/3)
 - ☞ CJEU C-245/11, **K.** [6 Nov. 2012] [art. 15 and 3(2)]
- See further: § 3.3

Regulation 2725/2000

Eurodac

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

ECHR

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

- * ETS 005 [impl. date: 1953]
 - * art. 3+13: Degrading reception conditions
 - ☞ ECtHR Ap.no. 30696/09, **M.S.S. v. Belgium+Greece** [21 Jan. 2011] [art. 3+13]
 - ☞ ECtHR Ap.no. 32733/08, **K.R.S. v. UK** [2 Dec. 2008] [art. 3+13]
 - ☞ ECtHR Ap.no. 43844/98, **T.I. v. UK** [7 Mar. 2000] [art. 3+13]
- See further: § 3.3

3.2 Responsibility Sharing: Proposed Measures

Amendment

Dublin II

- * COM (2008) 820, Dec. 2008 UK, IRL opt in
 - * EP first-reading vote, May 2009; agreed in Council, April 2012
- New** EP/Council deal, Nov 2012

Amendment

Eurodac

- * COM (2008) 825, Dec. 2008 UK, IRL opt in
 - * EP first-reading vote, May 2009; new proposal, May 2012 (COM (2012) 254); agreed by Coreper, Oct. 2012;
- New** EP adopted position, Dec 2012; EP/Council negotiations underway

3.3 Responsibility Sharing: Jurisprudence

3.3.1 CJEU Judgments on Responsibility Sharing

- New**
- ☞ 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 on 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-493/10, **M.E.**, [21 Dec. 2011]
 - * interpr. of **Reg. 343/2003 on Dublin II** [art. 3(2)]
 - * ref. from 'High Court' (Ireland)
- ☞ CJEU C-411/10, **N.S.**, [21 Dec. 2011]
 - * interpr. of **Reg. 343/2003 on Dublin II** [art. 3(2)]
 - * ref. from 'Court of Appeal (England and Wales)' (UK)
 - * *On (1) the concept of 'safe countries' and (2) Transfer of an asylum seeker to the MS responsible and (3) Rebuttable presumption of compliance, by that MS, with fundamental rights.*
- ☞ CJEU C-19/08, **Petrosian**, [29 Jan. 2009]
 - * interpr. of **Reg. 343/2003 on Dublin II** [art. 20(1)(d) & 20(2)]
 - * ref. from 'Kammarrätten i Stockholm, Migrationsöverdomstolen' (Sweden)
 - * *On (1) Taking back by a MS of an asylum seeker whose application has been refused and who is in another MS where he has submitted a fresh asylum application and (2) Start of the period for implementation of transfer of the asylum seeker and (3) Transfer procedure on the subject-matter of an appeal having suspensive effect.*

3.3.2 CJEU pending cases on Responsibility Sharing

- ☞ CJEU C-394/12, **Abdullahi**
 - * interpr. of **Reg. 343/2003 on Dublin II** [art. 10(1), 18 and 19]
 - * *on the meaning of "first Member State" and its relation with C-411/10 and C-493/10*
- ☞ CJEU C-666/11, **M**
 - * interpr. of **Reg. 343/2003 on Dublin II** [art. 3(2) and 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.** (hearing due 5 Nov. 2012)
 - * interpr. of **Reg. 343/2003 on Dublin II** [art. 6]
 - * ref. from 'Court of Appeal (England & Wales)' (UK)
 - * *On determining the MS responsible for examining an asylum application lodged in one of the MS by a TCN, where an applicant for asylum who is an unaccompanied minor with no member of his or her family legally present in another MS has lodged claims for asylum in more than one MS, which MS does the second paragraph of article 6 make responsible for determining the application for asylum?*
- ☞ CJEU C-528/11, **Halaf**
 - * interpr. of **Reg. 343/2003 on Dublin II** [art. 3(2)]
 - * ref. from 'Administrativen sad Sofia-grad' (Bulgaria)
 - * *On (1) Legislation of a MS where application is made not providing either criteria or rules of procedure for the application of the sovereignty clause, and (2) Admissible evidence of non compliance with European Union law on asylum where there is no judgment of the CJEU declaring that by reason of those infringements the MS responsible has failed to fulfil its*

obligations in relation to asylum.

- ☞ CJEU C-245/11, **K.** (judgment due 6 Nov. 2012)
- * interpr. of **Reg. 343/2003 on Dublin II** [art. 3(2) and 15]
- * ref. from 'Asylgerichtshof' (Austria)
- * *On the question whether, in the accessory interpretation and application of Art. 3 or 8 of the ECHR (Article 4 or Article 7 of the Charter), more extensive notions of 'inhuman treatment' or 'family', at variance with the interpretation developed by the European Court of Human Rights, may be applied?*
- ☞ CJEU C-4/11, **Puid**
- * interpr. of **Reg. 343/2003 on Dublin II** [art. 3(2)]
- * ref. from 'Hessischer Verwaltungsgerichtshof' (Germany)
- * *On the obligation of a MS to take responsibility for the processing of an asylum application if there is a risk of infringement of the fundamental rights of the asylum-seeker or a failure to apply the minimum standards.*

3.3.3 ECtHR Judgments on Responsibility Sharing

- ☞ ECtHR Ap.no. 30696/09, **M.S.S. v. Belgium+Greece**, [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. 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. 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 Article 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 Article 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.

4 Reception Conditions

4.1 Reception Conditions: Adopted Measures

New

Decision 281/2012 (Refugee Fund)

Amendment of Refugee Fund (2008-2013)

- * OJ 2012 L 92/1

Decision 573/2007 (Refugee Fund)

Establishing a European Refugee Fund (2008-2013)

- * OJ 2007 L 144/1
- * amended by Decision 458/2010 (OJ 2010 L 129/1)

Decision 904/2004 (Refugee Fund)

Establishing a European Refugee Fund (2005-2010)

- * OJ 2004 L 381/52

Decision 2000/596 (Refugee Fund)

Establishing a European Refugee Fund

- * OJ 2000 L 252/12

Directive 2003/9 (Reception Conditions)

Laying down minimum standards for the reception of asylum seekers

- * OJ 2003 L 31/18 [impl. date: Feb. 2005] IRL opt out

ECHR

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

- * ETS 005 [impl. date: 1953]
- ☞ ECtHR Ap.no. 30696/09, *M.S.S. v. Belgium+Greece* [21 Jan. 2011] [art. 3 (recp.)]
See further: § 4.3

4.2 Reception Conditions: Proposed Measures

Decision

Amendment of Refugee Fund

- * COM (2009) 456, 2 Sep. 2009 UK opt in
- * EP first-reading vote, May 2010; Council discussions restarted, spring 2011; EP/Council deal, Feb. 2012; first reading position adopted by Council, 8 Mar. 2012

Amendment

Amendments to Dublin-II

- * COM (2008) 815, Dec. 2008 UK, IRL opt out
- * amended text proposed by Commission, June 2011 (COM (2011) 320) amendments agreed in Council, March 2012; EP/Council deal, July 2012

4.3 Reception Conditions: Jurisprudence

4.3.1 CJEU Judgments on Reception Conditions

- ☞ CJEU C-179/11, *CIMADE & GISTI*, [27 Sep. 2012]
- * interpr. of *Dir. 2003/9 on 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.

4.3.2 CJEU pending cases on Reception Conditions

- ☞ CJEU no cases yet,

4.3.3 ECtHR Judgments on Reception Conditions

- ☞ ECtHR Ap.no. 30696/09, *M.S.S. v. Belgium+Greece*, [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

Regulation 439/2010

European Asylum Support Office

- * OJ 2010 L 132/11