



An Introduction to the Common European Asylum System for Courts and Tribunals

A Judicial Analysis

Produced by the International Association
of Refugee Law Judges European Chapter
under contract to EASO

August 2016

EASO Professional Development Series
for Members of Courts and Tribunals



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European Asylum Support Office

The European Asylum Support Office (EASO) is an agency of the European Union that plays a key role in the concrete development of the Common European Asylum System (CEAS). It was established with the aim of enhancing practical cooperation on asylum matters and helping Member States fulfil their European and international obligations to give protection to people in need.

Article 6 of the EASO founding regulation (*) (hereinafter the Regulation) specifies that the agency shall establish and develop training available to members of courts and tribunals in the Member States. For this purpose, EASO shall take advantage of the expertise of academic institutions and other relevant organisations and take into account the Union's existing cooperation in the field with full respect to the independence of national courts and tribunals.

The International Association of Refugee Law Judges

The International Association of Refugee Law Judges (IARLJ) is a transnational, non-profit association that seeks to foster recognition that protection from persecution on account of race, religion, nationality, political opinion, or membership of a particular social group is an individual right established under international law, and that the determination of refugee status and its cessation should be subject to the rule of law. From its foundation in 1997, the association has been heavily involved in the training of judges around the world dealing with asylum cases. The European Chapter of the IARLJ (IARLJ-Europe) is the regional representative body for judges within Europe. One of the IARLJ-Europe's specific objectives under its constitution is 'to enhance knowledge and skills and to exchange views and experiences of judges on all matters concerning the application and functioning of the Common European Asylum System (CEAS)'.

Contributors

This analysis has been developed by a process with two components: an editorial team (ET) of judges with overall responsibility for the final product and a drafting team of experts.

(*) Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ L 132/11, 29.5.2010, pp. 11-28.

In order to ensure the integrity of the principle of judicial independence and that the EASO professional development series for members of courts and tribunals is developed and delivered under judicial guidance, an ET composed of serving judges with extensive experience and expertise in the field of asylum law was selected under the auspices of a Joint Monitoring Group (JMG). The JMG is composed of representatives of the contracting parties, EASO and IARLJ-Europe. The ET reviewed drafts, gave detailed instructions to the drafting team, drafted amendments, and was the final decision-making body as to the scope, structure, content and design of the work. The work of the ET was undertaken through a combination of face-to-face meetings in Berlin in May 2015 and in Luxembourg in November 2015 as well as regular electronic/telephone communication.

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The members of the ET were judges **Hugo Storey** (United Kingdom, Chair), **Jakub Camrda** (Czech Republic), **Jacek Chlebny** (Poland), **Katelijne Declerck** (Belgium), **Harald Dörig** (Germany), **Florence Malvasio** (France), **Judith Putzer** (Austria), **Liesbeth Steendijk** (Netherlands), **Boštjan Zalar** (Slovenia) and (alternate judge) **Johan Berg** (Norway). The ET was supported and assisted in its task by Project Coordination Manager **Clara Odofin**.

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Comments on the draft were received from Judge **Lars Bay Larsen** of the Court of Justice of the European Union (CJEU) and Judge **Ledi Bianku** of the European Court of Human Rights (ECtHR) in their personal capacities. **Carole Simone Dahan** (Senior Legal Adviser, Judicial Engagement) and **Cornelis (Kees) Wouters** (Senior Refugee Law Adviser, Division of International Protection of the United Nations High Commissioner for Refugees) also expressed their views on the draft text.

Comments were also received from the following participants in the EASO network of court and tribunal members and from members of the EASO consultative forum, namely the **Sofia Administrative Court**, Bulgaria; the **Zagreb Administrative Court**, Croatia; the **Tallinn Court of Appeal**, Estonia; the **Debrecen Administrative and Labour Court**, Hungary; **Hana Lupačová** of the Refugee Legal Clinic, the Law Faculty of Masaryk University, Czech Republic; and **Karine Caunes** of the Academy of European Law.

All these comments were taken into consideration by the ET in finalising the text for publication. The members of the the ET, the drafting team and EASO are grateful to all those who have made comments, which have been very helpful in finalising this chapter.

The methodology adopted for the production of this analysis is set out in [Appendix B](#), pp. 104-105.

This chapter will be updated as necessary by EASO in accordance with the methodology for the EASO professional development series for members of courts and tribunals.

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List of abbreviations

APD	Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status
APD (recast)	Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
CoE	Council of Europe
Convention against Torture	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
Dublin Convention	Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (1990)
Dublin II Regulation	Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national
Dublin III Regulation	Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)
EASO	European Asylum Support Office
EASO Regulation	Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office
ECHR	European Convention on Human Rights (formally the European Convention for the Protection of Human Rights and Fundamental Freedoms) (1950)
ECtHR	European Court of Human Rights
ECRE	European Council on Refugees and Exiles
EDAL	European Database of Asylum Law
EU	European Union

EU Charter	Charter of Fundamental Rights of the European Union
Eurodac Regulation	Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention
Eurodac Regulation (recast)	Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 [...] (recast)
Family Reunification Directive	Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification
GC	Grand Chamber
IARLJ	International Association of Refugee Law Judges
ICCPR	International Covenant on Civil and Political Rights (1966)
Long-Term Residents Directive (2003)	Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents
Long-Term Residents Directive (2011)	Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection
QD	Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted
QD (recast)	Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)
RCD	Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers
RCD (recast)	Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)

Refugee Convention	Convention relating to the Status of Refugees (1951), as amended by its Protocol (1967)
Returns Directive	Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals
TEC	Treaty Establishing the European Community
Temporary Protection Directive	Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UNHCR	United Nations High Commissioner for Refugees
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East

Preface

In close cooperation with courts and tribunals of the Member States as well as other key actors, EASO has begun the development of a Professional Development Series aimed at providing courts and tribunals with a full overview of the CEAS on a step-by-step basis. Following consultations with the EASO network of court and tribunal members, including IARLJ-Europe, it became apparent that there was a pressing need to make available to courts and tribunals judicial training materials on certain core subjects dealt with in their day-to-day decision-making. It was recognised that the process for developing such core materials was one that had to facilitate the involvement of judicial and other experts in a manner fully respecting the principle of independence of the judiciary as well as also accelerating the development of the overall Professional Development Series.

This Judicial Analysis is the product of a project between IARLJ-Europe and EASO and it forms part of the EASO Professional Development Series for members of courts and tribunals.

The Analysis is primarily intended for use by members of courts and tribunals of EU Member States concerned with hearing appeals or conducting reviews of decisions on applications for international protection. It aims to assist not only those with little or no experience but also those who have more expertise. As such, it aims to be a useful point of reference for all members of courts and tribunals concerned in the hearing of cases or actions to which the CEAS applies. The structure, format, content and design have, therefore, been developed with this broad audience in mind.

The Analysis is designed to provide an introduction to the CEAS that assists courts and tribunals in the carrying out of their role and responsibilities in its implementation. It provides:

- an overview of the legal basis of the CEAS, including a short background to its establishment;
- an introductory overview of the CEAS legislative instruments; and
- an introduction to the correct approach as a matter of EU law to interpretation of the legislative provisions of the CEAS, including the important topic of when and how to make referral to the CJEU for an interpretative ruling.

The Analysis is supported by a compilation of jurisprudence and appendices having a specific bearing on the CEAS. They list not only relevant EU primary and secondary legislation and relevant international treaties of universal and regional scope but also essential case-law of the CJEU, the ECtHR and the courts and tribunals of EU Member States. To ensure that the relevant legislation and case-law is easily and quickly accessible to readers, hyperlinks have been utilised. Other Analyses, which have been or are being developed as part of the Professional Development Series, explore specific areas of the CEAS in greater detail. Hence, the sections in Part 2 which provide an overview of the CEAS legislative instruments are kept relatively short. This Analysis, therefore, also constitutes a common point of reference for all Judicial Analyses comprising the Professional Development Series.

The aim is to set out clearly and in a user-friendly format the current state of the law. This publication analyses the law of the CEAS as it stood at the end of November 2015. However, the reader will be aware that this is a rapidly evolving area of law and practice. At the time

of writing, between February and November 2015, the asylum systems of a number of EU Member States came under exceptional pressure due to the arrivals of unprecedented numbers of persons seeking international protection. It is worth emphasising in this context that, together with other judicial analyses in the Professional Development Series, this analysis will be updated periodically as necessary. However, it will be necessary for readers to check whether there have been any changes in the law. The Analysis contains a number of references to sources that will help the reader to do so.

Key questions

The present volume aims to provide an introduction to the CEAS for courts and tribunals of Member States. It strives to answer the following main questions.

1. What is the CEAS and what is the background to its establishment? (Sections 1.1. and 1.2., pp. 13-15)
2. How has the CEAS developed since its establishment? (Sections 1.3. and 1.4., pp. 15-23)
3. What instruments of EU primary law are of specific importance for the CEAS? (Section 2.1., pp. 24-34)
4. What are the scope and content of the CEAS secondary legislation? (Section 2.2., pp. 34-55)
5. Which other secondary legislation is relevant to the field of international protection? (Section 2.3., pp. 55-60)
6. What is the relationship between the CEAS and the Refugee Convention? (Section 3.1., pp. 61-63)
7. How should the CEAS secondary legislation be interpreted and applied in light of the methods of interpretation and principles of application of EU law? (Sections 3.2. and 3.3., pp. 63-69)
8. What is the interplay between the interpretation of EU law and the ECHR, international law and national law? (Section 3.4., pp. 70-80)
9. When and how should courts and tribunals of Member States make reference to the CJEU for a preliminary ruling? (Section 3.5., pp. 80-84)
10. How should the CEAS be approached by courts and tribunals of Member States? (Section 3.6., pp. 84-89)

Part 1: The legal basis of the CEAS

1.1. What is the CEAS?

The CEAS is a legislative framework established by the EU. Based on ‘accordance’ with the Convention relating to the Status of Refugees (Refugee Convention) as amended by its 1967 Protocol, the CEAS regulates and sets common standards in the field of international protection with a view to developing common concepts and criteria, and harmonising the interpretation and application of asylum law among EU Member States. International protection refers to refugee status and subsidiary protection status ⁽¹⁾. Compared to other regional asylum systems, such as those established within the African Union or in Central and Latin America, the CEAS is unique in regulating both procedural and substantive matters for international protection from entry into a Member State until final determination of protection status.

1.2. Background to the establishment of the CEAS

The CEAS was born out of the recognition that, in an area without internal frontiers, asylum needed harmonised regulation at the EU level. It was considered that a failure to do so would likely result in the secondary movement of asylum-seekers. That is, asylum-seekers might move from one State to another with a view to choosing a destination for personal reasons, or choosing a destination perceived to offer the most generous asylum policies (irrespective of the truth or otherwise of that assumption). Hence, the abolition of intra-EU borders was deemed to require the strengthening of external border controls, and cooperation in the field of asylum and immigration as compensatory measures.

The issue of secondary movement was first addressed in legislative form by the 1990 [Dublin Convention](#) which set criteria for determining the State responsible for examining asylum applications lodged in one of the Member States of the European Communities. The Dublin system presupposed similar treatment of asylum applicants and refugees in Member States. Such harmonisation of Member States’ asylum law was first pursued through intergovernmental cooperation under the 1992 [Maastricht Treaty](#) (Title VI on cooperation in the field of Justice and Home Affairs).

By the end of the 1990s, there was increasing recognition that issues concerning asylum and immigration should be brought within the framework of the EU Treaties in the context of establishing a single market without internal borders. This was particularly so in light of the problems of dealing with large numbers of those displaced by the conflicts in the Balkans and the collapse of the communist regimes in Eastern Europe. The Maastricht Treaty which came into force on 1 November 1993 had made asylum an EU matter, albeit within the framework of intergovernmental cooperation. Under the [Treaty of Amsterdam](#), which came into force in May 1999, asylum and immigration became an area of supranational EU competence thereby establishing the foundations for a CEAS.

⁽¹⁾ See Art. 2(a) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9.

The Amsterdam Treaty not only provided the legal basis for the creation of the CEAS, but also clarified the legal foundations of such a common system. Article 63 of the Treaty Establishing the European Community (TEC) provided (inter alia) that the Council was to adopt within five years a specific set of measures on asylum, refugees and displaced persons (Article 63(1) and (2)). Of particular importance, such measures were to be in accordance with the 1951 [Refugee Convention](#) and ‘other relevant treaties’.

The 1951 Refugee Convention, although for the first time recognising the individual nature of refugee status and incorporating certain minimum civic rights as flowing from its recognition, was initially subject to both geographical and temporal limits. It applied only to events occurring before 1 January 1951 and States Parties had the option of limiting such events to those occurring in Europe. It came into effect on 22 April 1954. It was not until the adoption of the 1967 Protocol, which came into effect on 4 October 1967, that the universality of the Refugee Convention was achieved by the removal of the temporal limitation. The geographic limitation was to be retained only for those Contracting States who had opted for it when originally signing the Convention provided that they could also give notice at any time to no longer apply that limitation ⁽²⁾.

All EU Member States are parties to both the 1951 Refugee Convention and the 1967 Protocol. Before the establishment of the CEAS, many Member States, as parties to the Refugee Convention and its Protocol, had developed national asylum systems to ensure the implementation of these instruments. Article 63 TEC reflected the fact that EU Member States recognised that the Refugee Convention was the cornerstone of the international legal regime for the protection of refugees ⁽³⁾.

The ‘other relevant treaties’ referred to in Article 63 TEC are not defined in EU primary law.

While the Amsterdam Treaty provided the legal basis for the creation of the CEAS, no explicit mention was, however, made of such a system. It was the 1999 [Tampere Conclusions](#) which were the first to refer to a ‘Common European Asylum System’ ⁽⁴⁾. As stated in the Conclusions, the European Council ‘agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the [Refugee] Convention’ and its Protocol ⁽⁵⁾. However, the scope of the CEAS was to be wider than the Refugee Convention and its Protocol insofar as the CEAS would not be limited to laying down criteria for qualification for refugee status and the benefits attached thereto. Instead, the aim was to establish a CEAS which would regulate all facets of asylum. As laid down in the Conclusions, the CEAS was to include, in the short term:

- a clear and workable determination of the state responsible for the examination of an asylum application;
- common standards for a fair and efficient asylum procedure;
- common minimum conditions of reception of asylum seekers; and

⁽²⁾ Only 2 of the 148 signatories to the Convention and/or Protocol, namely Madagascar and St Kitts and Nevis, have not acceded to the full provisions of the Refugee Convention.

⁽³⁾ This was subsequently affirmed by recital (3) of the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12 and recital (4) of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9. This is also regularly restated by the Court of Justice of the European Union (CJEU). See for instance: CJEU, judgment of 2 March 2010, Grand Chamber, joined cases C-175/08, C-176/08, C-178/08 and C-179/08, *Aydin Salahadin Abdulla and Others v Bundesrepublik Deutschland*, ECLI:EU:C:2010:105, paragraph 52; Judgment of 17 June 2010, Grand Chamber, Case C-31/09, *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal*, ECLI:EU:C:2010:351, paragraph 37.

⁽⁴⁾ European Council, *Presidency Conclusions*, Tampere European Council 15 and 16 October 1999, SN 200/99, Brussels, paragraph 13.

⁽⁵⁾ *Ibid.*

- the approximation of rules on the recognition and content of the refugee status ⁽⁶⁾.

These were to be supplemented with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection. In addition, the Conclusions made clear that, in the longer term, Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union. Finally, the Tampere Conclusions urged the Council to step up its efforts to reach agreement on the issue of temporary protection for displaced persons on the basis of solidarity between Member States. Thus, the way was paved for the first phase of the CEAS.

1.3. The first phase of the CEAS

Pursuant to Article 63 TEC and following the Tampere Conclusions, the first phase of the CEAS included secondary legislation enacted between 2000 and 2005 based on defining common minimum standards to which Member States were to adhere in connection with the reception of asylum-seekers; qualification for international protection and the content of the protection granted; and procedures for granting and withdrawing refugee status. Legislation was adopted establishing minimum standards for giving temporary protection in the event of a mass influx. Finally, secondary legislation to establish criteria and mechanisms for determining the Member State responsible for examining an asylum application and to establish a ‘Eurodac’ database for storing and comparing fingerprint data was also adopted.

These first phase instruments are:

First phase CEAS instruments	Date of entry into force
The Eurodac Regulation, 2000 ⁽⁸⁾	15 December 2000
The Temporary Protection Directive, 2001 ⁽⁹⁾	7 August 2001
The Dublin II Regulation, 2003 ⁽¹⁰⁾	17 March 2003
The Regulation laying down detailed rules for the application of the Dublin Regulation, 2003 ⁽¹¹⁾	6 September 2003
The Reception Conditions Directive (RCD), 2003 ⁽¹²⁾	6 February 2003
The Qualification Directive (QD), 2004 ⁽¹³⁾	20 October 2004
The Asylum Procedures Directive (APD), 2005 ⁽¹⁴⁾	2 January 2006

From its inception, it was, however, always intended that the first phase of the CEAS should be quickly followed by a second phase of development, with a change of emphasis from minimum standards to a common asylum procedure on the basis of a uniform protection status ⁽¹⁴⁾.

⁽⁶⁾ *Ibid.*, paragraph 14.

⁽⁷⁾ Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L 316/1.

⁽⁸⁾ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212/12.

⁽⁹⁾ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50/1.

⁽¹⁰⁾ Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 222/3.

⁽¹¹⁾ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18.

⁽¹²⁾ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12.

⁽¹³⁾ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13.

⁽¹⁴⁾ European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 13 December 2004, in [2005] OJ C 53/1, p. 3.

Notwithstanding, the implementation of the minimum standards set out in the first phase legislative instruments, there remained significant disparities between Member States in their reception of applicants, procedures, and assessment of qualification for international protection. This was considered to result in divergent outcomes for applicants, which went against the principle of providing equal access to protection across the EU ⁽¹⁵⁾. As acknowledged by the European Commission, the minimum standards were indeed not apt to ensure the desired degree of harmonisation among Member States. The first phase instruments thus required amendment in order to achieve a higher degree of harmonisation and improved standards. It was also considered necessary to supplement greater legal harmonisation with effective practical cooperation between national asylum administrations to improve convergence in asylum decision-making by Member States ⁽¹⁶⁾. Finally, it was agreed there was a need for measures to increase solidarity and responsibility among EU States, and between EU and non-EU States ⁽¹⁷⁾.

1.4. The second phase of the CEAS

The CEAS entered a second phase of harmonisation, which effectively began with the European Pact on Asylum by the European Commission in September 2008 ⁽¹⁸⁾. As underlined in the 2009 Stockholm Programme, its objective was that of ‘establishing a common area of protection and solidarity based on a common asylum procedure and a uniform status for those granted international protection’ on the basis of ‘high protection standards’ ⁽¹⁹⁾.

The aim and content of the second phase were detailed in the 2007 [Treaty on the Functioning of the European Union](#) (TFEU), which entered into force on 1 December 2009. With the entry into force of the TFEU, the [Charter of Fundamental Rights of the European Union](#) (EU Charter) also became legally binding on 1 December 2009 ⁽²⁰⁾. The Charter, which is considered further in [Section 2.1.3.](#) below (pp. 28-32), is now a full component of EU primary law binding upon the EU institutions and its Member States when they implement EU law.

Article 78 of the TFEU provides the legal basis for the development of the second phase of the CEAS (for further information on this provision, see [Section 2.1.1.](#) below, pp. 24-27). Article 78(1) provides the legal basis for an EU common policy on asylum, subsidiary protection and temporary protection which must be in accordance with the Refugee Convention and other relevant treaties.

Article 78(2) stipulates that the European Parliament and the Council shall adopt measures for a common European asylum system. It is to be noted that this provision is the first one in EU primary law making explicit reference to the CEAS. The provision details the measures to be adopted by the European Parliament and the Council in this second phase (see [Section 2.1.1.](#) below, pp. 24-27).

By June 2013 the second stage of the CEAS was completed with the enactment of amended or so-called recast secondary legislation, except for the Temporary Protection Directive, which

⁽¹⁵⁾ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Region, *Policy Plan on Asylum: An Integrated Approach to Protection Across the EU*, 17 June 2008, COM(2008) 360 final, p. 3.

⁽¹⁶⁾ *Ibid.*, pp. 4 and 6.

⁽¹⁷⁾ *Ibid.*, pp. 4 and 7-11.

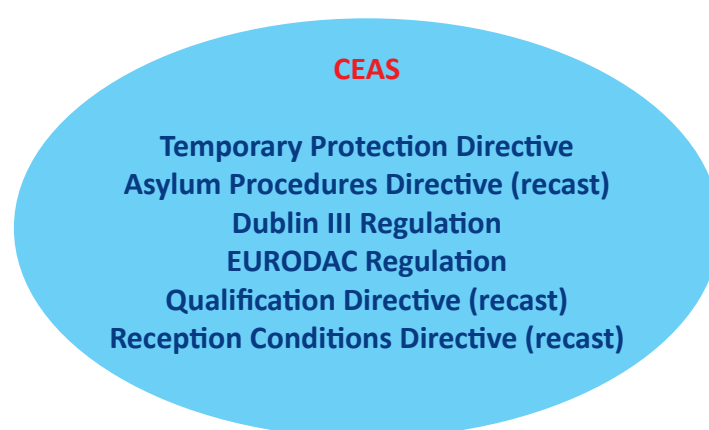
⁽¹⁸⁾ European Council, *European Pact on Immigration and Asylum*, 24 September 2008, EU Doc 13440/08.

⁽¹⁹⁾ European Council, *The Stockholm Programme: An Open and Secure Europe Serving and Protecting the Citizens*, 2 December 2009, in: [2010] OJ C 115/1, Section 6.2.

⁽²⁰⁾ See Declaration concerning the Charter of Fundamental Rights of the European Union, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, in [2012] OJ C 326/339.

was not subject to recast. The effect of a ‘recast’ is to repeal the previous regulation or directive on the same subject. The CEAS now comprises the following instruments:

CEAS Instruments	Date of entry into force
The Temporary Protection Directive, 2001 ⁽²²⁾	7 August 2001
The Commission Regulation laying down detailed rules for the application of the Dublin Regulation, 2003 ⁽²³⁾	6 September 2003
The Qualification Directive (recast) (QD (recast)), 2011 ⁽²⁴⁾	9 January 2012
The Eurodac Regulation (recast), 2013 ⁽²⁵⁾	19 July 2013
The Dublin III Regulation (recast), 2013 ⁽²⁶⁾	19 July 2013
The Reception Conditions Directive (recast) (RCD (recast)), 2013 ⁽²⁷⁾	19 July 2013
The Asylum Procedures Directive (recast) (APD (recast)), 2013 ⁽²⁸⁾	19 July 2013



The EU legislative instruments of the CEAS thus consist of primary law (the TFEU, the Treaty on European Union (TEU), and the EU Charter), and secondary legislation. Of the latter, only two (the Dublin III Regulation and the Eurodac Regulation (recast)) are EU Regulations. The rest are Directives. The form of legislative instrument will have different legal effects. This is discussed in [Section 3.3.2.](#) on the principles of application of EU law (pp. 73-75). However, as most of the EU secondary legislation comprised in the CEAS is in the form of Directives which require transposition into the national law of Member States, members of national courts and tribunals will, for the most part, initially be concerned with the application of their own national laws effecting the transposition of the Directives, subject to any issue as to whether they accurately apply the provisions of the EU Directive in question.

⁽²¹⁾ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212/12.

⁽²²⁾ Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 222/3. The Regulation is still in force in relation to the Dublin III Regulation, except Art. 11(1) and Arts 13, 14 and 17. See also Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003.

⁽²³⁾ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9 (transposition by (for most provisions): 21 December 2013).

⁽²⁴⁾ Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) [2013] OJ L 180/1 (applicability from: 20 July 2015).

⁽²⁵⁾ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin III) [2013] OJ L 180/31 (applicability from: 1 January 2014).

⁽²⁶⁾ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L 180/96 (to be transposed, for some provisions, by 20 July 2015; applicability of Arts 13 and 29 from 21 July 2015).

⁽²⁷⁾ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60 (to be transposed, for some provisions, by 20 July 2015 and, for others, by 20 July 2018; applicability of Arts 47 and 48 from 21 July 2015).

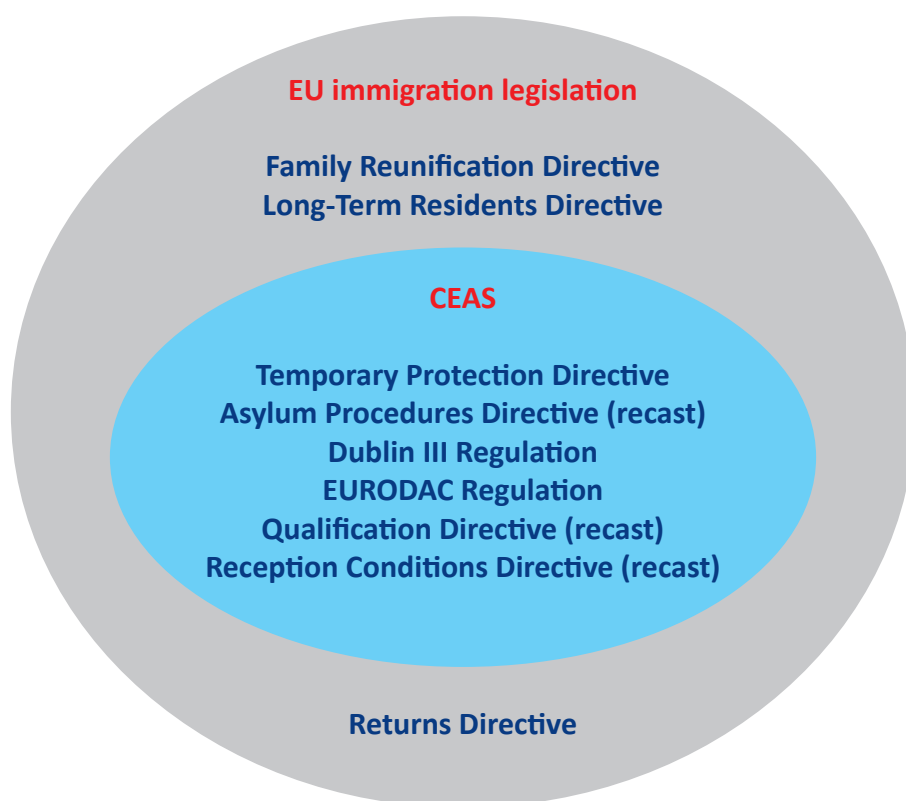
It is also appropriate to take note of the 2010 EASO Regulation ⁽²⁸⁾ which, pursuant to Article 5 TEU, established the EASO to further the implementation of the CEAS, by facilitating practical cooperation and support between Member States on asylum (recital (30)). This role is given specific recognition in, for example, recitals (8), (22) and (23) of the Dublin III Regulation and recitals (9), (26), (46) and (48) of the APD (recast).

It is further appropriate to mention other secondary legislation which, although not part of the CEAS, was adopted during its first phase and is also relevant to the field of asylum, namely:

1. The Family Reunification Directive, 2003 ⁽²⁹⁾;
2. The Long-Term Residents Directive (as amended), 2003 ⁽³⁰⁾; and
3. The Returns Directive, 2008 ⁽³¹⁾.

Although these instruments are part of the common immigration policy of the EU, EU asylum policy is closely connected to EU immigration policy, as the latter has implications for issues relating to the residence rights and benefits of refugees and beneficiaries of subsidiary protection and related family reunification policies (see diagram below) ⁽³²⁾.

EU immigration and asylum law



⁽²⁸⁾ Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office [2010] OJ L 132/11. See further Section 2.3.1., pp. 55-56.

⁽²⁹⁾ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.

⁽³⁰⁾ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L 16/44; and Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [2011] OJ L 132/1.

⁽³¹⁾ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98.

⁽³²⁾ See Article 63(2) and Article 63(4) TEC as now substituted by Article 79(1) and Article 79(2) TFEU.

The CEAS in its present form is binding on all Member States with the exception of Denmark, Ireland and the United Kingdom (UK). The table below summarises the CEAS and other relevant instruments binding upon these three Member States.

	CEAS 1st phase instruments							CEAS 2nd phase instruments					Other secondary legislation		
	Temporary Protection Directive	Dublin II Regulation	Regulation on application of Dublin	Eurodac Regulation	RCD	APD	QD	Dublin III Regulation	Eurodac Regulation (recast)	RCD (recast)	APD (recast)	QD (recast)	Family Reunification Directive	Long-Term Residents Directive	Returns Directive
Denmark															
Ireland	✓	✓	✓	✓		✓	✓	✓							
UK	✓	✓	✓	✓	✓	✓	✓	✓	✓						

As apparent in the table, Denmark consistently opted out of any Treaty provisions in the field of Justice and Home Affairs, including issues concerning asylum (Article 78 TFEU). Consequently, Denmark does not participate and is not bound by the treaty provisions or any secondary legislation relating to the CEAS.

The position of Ireland and the UK is somewhat different. They are not bound by any instrument adopted pursuant to the Treaties in the field of asylum but can opt in to any such instrument if they so decide. Ireland decided not to participate in the original Temporary Protection Directive and the RCD, but later it decided to accept the Temporary Protection Directive and is therefore bound by its provisions in accordance with Commission Decision 2003/690/EC of 2 October 2003. Neither Member State participates in the Family Reunification Directive and the Long-Term Residents Directive. They have also not opted into the RCD (recast). Both States did, however, opt into the QD, the APD and both the original and recast versions of the Dublin Regulation, but neither has opted into the QD (recast) and the APD (recast) although they will continue to be bound by the provisions of the earlier instruments ⁽³³⁾.

It must be remembered that this is an evolving system. Indeed, in September 2015 (see below [Section 2.1.1.](#), pp. 24-27) the impact of unprecedented numbers of applicants for international protection recorded in the EU resulted in the adoption of two Council Decisions entailing a temporary derogation from certain provisions of the Dublin III Regulation with respect to Italy and Greece ⁽³⁴⁾. The European Commission stated that events showed the need to review the Dublin III Regulation as well as to ensure its full implementation ⁽³⁵⁾. It is an essential duty of the European Commission to monitor the implementation and practical application of the

⁽³³⁾ Notwithstanding the differences applicable to Denmark, Ireland and the UK the analysis in this manual is prepared by reference to the completed second phase of the CEAS.

⁽³⁴⁾ Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece [2015] OJ L 239/146; and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L 248/80.

⁽³⁵⁾ European Commission, Communication to the European Parliament, the European Council and the Council, [Managing the Refugee Crisis: Immediate Operational, Budgetary and Legal Measures under the European Agenda on Migration](#), 29 September 2015, COM(2015) 490 final/2. See [Section 2.1.1.](#), pp. 24-27, on the TFEU (where the two Decisions are mentioned) and [Section 2.2.1.](#), pp. 36-43, on the Dublin III Regulation. Note: On 6 April 2016, the European Commission published a Communication launching a process of further reform of the CEAS. On 4 May 2016, the Commission published three Proposals to reform the CEAS: a Proposal to further recast the Dublin Regulation; a Proposal to further recast the Eurodac Regulation, and a Proposal to establish a European Union Agency for Asylum and repeal the Regulation establishing EASO. See also the EU-Turkey statement, 18 March 2016.

recast CEAS instruments and to consider further amendments and practical assistance in light of such monitoring. The Directives include specific provisions that Member States are to report to the Commission within an initial period so that the Commission may report to the Council as to implementation and propose any amendments that are considered necessary. Following the initial report, which is on a fairly short time scale (June 2014 in the case of the QD (recast) and July 2017 in the case of the APD (recast)), further reports must be presented to the Council at least every five years.

In the context of future developments, it should also be noted that the drafting process for the recast Directives and Regulations had commenced before Article 78 TFEU came into force. The amendments by reference to the change from the earlier minimum standards approach to that of provision of a uniform status based on common procedures had to be incorporated into the existing drafts. However, as noted in the judgment of the Bundesverwaltungsgericht (German Federal Administrative Court) of 17 June 2014, the legislation still contains no provision for uniform statuses of asylum and subsidiary protection recognised throughout the EU; statuses that could arguably be developed within the scope of application of Article 78 TFEU ⁽³⁶⁾.

Prior to the publication of this Analysis, further developments in 2016 have testified to the continuing evolution of the CEAS. The EU-Turkey Statement of 18 March 2016 noted, *inter alia*, the agreement between the EU and Turkey that as from 20 March 2016 a new extraordinary and temporary measure would be implemented to return irregular migrants arriving from Turkey to the Greek islands back to Turkey ‘in full accordance with EU and international law’. Those who apply for international protection in the Greek islands but whose applications are determined by the Greek authorities to be unfounded or inadmissible in accordance with the APD (recast) are to be returned to Turkey. For every Syrian returned to Turkey from the Greek islands, the EU agreed to resettle a Syrian refugee from Turkey in the EU. The implementation of the Statement raises important issues regarding the interpretation of provisions of the APD (recast) relating to the concepts of ‘first country of asylum’, ‘safe third country’, inadmissible applications, accelerated procedures, and the right to an effective remedy (see the forthcoming Judicial Analysis on Access to Procedures).

On 6 April 2016, the European Commission launched a process for further major reform of the CEAS. In its Communication ‘Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe’ (COM(2016) 197 final), the Commission noted significant structural weaknesses and shortcomings in the design and implementation of the CEAS which had been exposed by the large-scale arrival of asylum-seekers in 2015. The Commission considered that the following reforms to the CEAS were required:

- (i) Amendment of the Dublin III Regulation to establish a more sustainable and fairer system for determining Member State responsibility for examining applications for international protection in situations of a high number of asylum applicants.
- (ii) Amendment of the Eurodac Regulation to reflect changes to the Dublin III Regulation.
- (iii) A new Regulation establishing a single common asylum procedure in the EU to replace the Asylum Procedures Directive (recast), a new Qualification Regulation to replace the Qualification Directive (recast), and targeted modifications of the Reception Conditions Directive in order to achieve greater convergence of

⁽³⁶⁾ Federal Administrative Court (Germany), judgment of 17 June 2014, BVerwG 10 C 7.13, ECLI:DE:BVerwG:2014:170614U10C7.13.0, (see [unofficial English translation](#)) paragraph 29.

standards and prevent irregular secondary movements of asylum-seekers within the EU.

- (iv) A new mandate for the EU's asylum agency to enable it to play a new policy-implementing role and strengthened operational role.

On 4 May 2016, the Commission duly presented three legislative Proposals for a Dublin IV Regulation (recast), a recast Eurodac Regulation, and a Regulation to transform the existing European Asylum Support Office (EASO) into the European Union Agency for Asylum with an enhanced mandate. These Proposals represent a first step towards reform of the CEAS. A second raft of legislative proposals reforming the APD (recast), QD (recast) and RCD (recast) is expected to follow.

Timeline of the development of the CEAS

1950	ECHR adopted by member States of the Council of Europe to which all EU Member States are parties.
1951	Refugee Convention originally limited to persons fleeing events occurring before 1 January 1951 either in Europe (Article 1B(1)(a)); or in Europe or elsewhere (Article 1B(1)(b)).
1957	Establishment of the European Economic Community by the Treaty of Rome (Treaty establishing the European Economic Community; entry into force: 1 January 1958).
1967	Protocol relating to the Status of Refugees providing for removal of temporal limitation (Article 1(2)) and removal of territorial limitation (Article 1(3)) subject to right of existing States Parties to retain territorial limitation if previously applied.
1985 onwards	Discussions from this date between Member States (principally Germany, France, the Netherlands, Belgium, Luxembourg, Ireland and the United Kingdom) concerning: (a) abolition of internal border controls (Schengen Agreement) and (b) determination of the Member State responsible for processing asylum claims (Dublin Convention). Additionally, there were other areas of practical cooperation concerning a common approach to the meaning of safe third countries and dealing with manifestly unfounded claims. Although these steps had been taken outside the European Economic Community Treaty framework, there was increasing recognition that issues concerning asylum and immigration should be brought within the framework of the Treaty, particularly in light of the problems of dealing with large numbers of those displaced by the conflicts in the Balkans and the collapse of the communist regimes in Eastern Europe.
1985	Schengen Agreement (which finally came into effect in 1995) for the abolition of internal border controls between Germany, France, the Netherlands, Belgium and Luxembourg which was seen to require strengthening of external border controls and cooperation in the field of asylum and immigration as compensatory measures.

1990	The Dublin Convention.
1992	Maastricht Treaty (Treaty on European Union (TEU)), amending inter alia the Treaty Establishing the European Economic Community with the View to Establishing the European Community (as from now on Treaty Establishing the European Community (TEC)) which established the European Union (entry into force: 1 November 1993).
1997	Treaty of Amsterdam amending the TEU, the TEC, and Certain Related Acts and transferring immigration and asylum issues to the first pillar of cooperation between Member States concerning the functioning of the European Communities, (entry into force: 1 May 1999). Article 63 TEC required adoption of measures on asylum (in accordance with the 1951 Refugee Convention and its 1967 Protocol) which were subsequently incorporated in the first phase of the CEAS.
1999	The Tampere Conclusions October 1999 specified the content of the CEAS (enacted as a first phase by secondary legislation between 2000 and 2008) based upon the principles of solidarity and fair sharing of responsibility between Member States.
2000	Charter of Fundamental Rights of the European Union was proclaimed on 7 December 2000 (but was not yet legally binding).
2000	Eurodac Regulation.
2001	Temporary Protection Directive.
2003	The Dublin II Regulation, Reception Conditions Directive and Family Reunification Directive.
2004	Qualification Directive.
2004	The Hague Programme listing the ten priorities for the next five years in the area of freedom, security and justice.
2005	Asylum Procedures Directive.
2007	Lisbon Treaty amending the TEC (renamed the Treaty on the Functioning of the European Union (TFEU)). Articles 77-80 of the TFEU relate to asylum and immigration including the second phase of CEAS. With the entry into force of the Lisbon Treaty on 1 December 2009, the Charter of Fundamental Rights became legally binding on the EU institutions and Member States.
2008	Returns Directive.
2008	European Pact on Immigration and Asylum was issued by the European Commission and EC Green Paper of October 2008, which was prepared after extensive consultation, identified the objects which were to be pursued in the second phase of the CEAS.

2009	Stockholm Programme detailing requirements of second phase of CEAS (enacted between 2011 and 2013).
2010	EASO Regulation.
2011	Qualification Directive (recast).
2013	Eurodac Regulation (recast), Dublin III Regulation, Asylum Procedures Directive (recast) and Reception Conditions Directive (recast).
2015	Council Decisions 2015/1523 and 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

Part 2: Overview of the CEAS legislative instruments

This part of the Analysis provides the core material for understanding the scope and application of the CEAS following completion of its second phase in June 2013. As noted earlier, the legal basis for the creation of the secondary legislation is derived from Article 78 TFEU.

Before surveying the body of secondary legislation which makes up the legislative elements of the CEAS, and other secondary instruments relevant to it, it is, however, pertinent to refer to the primary law which identifies and imposes both principles and rights relevant to the general application of EU law, as well as those of more specific relevance to the application of the CEAS.

2.1. EU primary law

In addition to the TFEU (Section 2.1.1., pp. 24-27) and TEU (Section 2.1.2., pp. 27-28), EU primary law of specific importance for the CEAS includes the EU Charter (Section 2.1.3., pp. 28-32), Protocol No 24 (Section 2.1.4., p. 33) and Protocol No 30 (Section 2.1.5., pp. 33-34).

2.1.1. The TFEU

In parallel with work on the secondary phase of the CEAS, the EU enacted important changes to the EU treaties which are now embodied in the TFEU of 2007 ⁽³⁷⁾, as established by the Lisbon Treaty, which came into force on 1 December 2009.

The general authority for constituting ‘an area of freedom, security and justice’, which is to respect ‘fundamental rights and the different legal systems and traditions of the Member States’ is contained in Chapter I, General Provisions, at Article 67(1). The authority to ‘ensure the absence of internal border controls for persons’ and ‘frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals’ is contained in Article 67(2). But, these general provisions do not affect Member States in the exercise of their responsibilities for law and order and safeguarding internal security (Article 77).

Certain general provisions of Section 5 relating to the jurisdiction of the CJEU are also relevant. Article 267 confers jurisdiction on the CJEU to give preliminary rulings concerning (a) the interpretation of the Treaties; and (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Where such a question of interpretation or validity is raised before any court or tribunal of a Member State ⁽³⁸⁾ and it is considered that a decision on the question is necessary to enable the making of a judgment, that court or tribunal may

⁽³⁷⁾ I.e., the Treaty on the Functioning of the European Union.

⁽³⁸⁾ Previously under ex-Art. 68 only courts and tribunals of final instance could make references.

request the CJEU to give a ruling. Where the Member State court or tribunal is one of final jurisdiction, it must refer the matter to the CJEU ⁽³⁹⁾.

In implementing the provisions of the CEAS, including the application of national law transposing EU secondary legislation, both the body responsible for making the decision at first instance and the reviewing court or tribunal will be applying EU law.

The specific legal basis for EU asylum law is now contained in Chapter 2 TFEU at Article 78, with Articles 77 and 79-80 providing the legal basis for related areas.

Article 77(1)(a) and (b) is concerned with provisions relating to ‘ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders’; and ‘carrying out checks on persons and efficient monitoring of the crossing of external borders’. Article 77(2)(c) provides that for the purposes of Article 77(1), the European Parliament and Council shall adopt measures concerning inter alia the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period and the absence of any controls on persons, whatever their nationality, when crossing internal borders. Furthermore, Article 80 provides that the policies of the Union ‘set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States.’

Articles 78 and 79 are directly relevant to asylum and immigration issues and provide as follows:

Article 78

1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.
2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:
 - (a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
 - (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
 - (c) a common system of temporary protection for displaced persons in the event of a massive inflow;
 - (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;
 - (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
 - (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;

⁽³⁹⁾ See Section 3.5. below, pp. 80-84, ‘Referral to the CJEU pursuant to Article 267 TFEU’.

- (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.
3. In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

Article 79

1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.
2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure ⁽⁴⁰⁾, shall adopt measures in the following areas:
 - (a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;
 - (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;
 - (c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;
 - (d) combating trafficking in persons, in particular women and children.
3. The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.
4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States.
5. This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.

Article 78(1) provides that the common policy on asylum must be in accordance with the Refugee Convention and other relevant treaties. While the recitals to both the QD and its recast refer to the Refugee Convention as ‘the cornerstone of the international legal regime for the protection of refugees’ (recitals (3) QD and (4) QD (recast)), Article 78(1) does not, however,

⁽⁴⁰⁾ Ordinary legislative procedure is a process in which the Council and the Parliament act as co-legislators in the adoption of secondary legislation as provided in Art. 294 TFEU. In areas where the ordinary legislative procedure applies, such as asylum and migration, decisions by the Council are adopted by qualified majority voting in accordance with Art. 238 TFEU.

mean that any of those treaties are thereby incorporated into EU law ⁽⁴¹⁾. It means rather that relevant legislation of the EU must be interpreted ‘in the light of its general scheme and purpose, while respecting the Refugee Convention and the other relevant treaties’ (see [Section 3.1. below](#), pp. 61-63) ⁽⁴²⁾.

It should also be noted that Article 78(2) provides for the adoption of a ‘uniform status’ which extends both to asylum and subsidiary protection, the establishment of a ‘common system’ of temporary protection, and ‘common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status’. The scheme of the CEAS has not, however, yet achieved all these aims since recognition of international protection status pursuant to the QD (recast) by one Member State does not lead to its recognition throughout the EU ⁽⁴³⁾, and the autonomy of national procedural forms is not fully regulated in the APD (recast) ⁽⁴⁴⁾. Although provision for temporary protection in the event of mass influx is made in the Temporary Protection Directive ⁽⁴⁵⁾, its application is dependent upon a Council decision based on a qualified majority. This Directive has never been invoked in practice. However, in accordance with Article 78(3) which permits the Council to adopt provisional measures for the benefit of Member States confronted by an emergency situation characterised by a sudden inflow of nationals of third countries and Article 80 on the principle of solidarity and fair sharing of responsibility between Member States, the Council adopted its Decision 2015/1523 of 14 September 2015 and Decision 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece ⁽⁴⁶⁾.

2.1.2. The TEU

Apart from the general provisions of Articles 2 and 3, the provisions of Article 6 [TEU](#) are those of greatest relevance to the CEAS.

Article 6(1) is the provision which makes the EU Charter binding on Member States as part of the primary law of the EU. It is declaratory of the EU recognition of the rights, freedoms and principles set out in the EU Charter with the proviso that the Charter ‘shall not extend in any way the competences of the Union as defined in the Treaties’. It follows that Article 6(1) confirms that the Charter does not confer any positive rights which are not otherwise recognised by Union law. The effect of the Charter (in conjunction with Article 6(1)) is, rather, to make those rights more visible because the CJEU has clarified that the interpretation of specific provisions of EU law is to be in conformity with the rights, freedoms and principles embodied in the Charter ⁽⁴⁷⁾.

Article 6(2) contains a mandate for the EU to accede to the [European Convention on Human Rights](#) (ECHR) but that has not yet taken place despite negotiations. In December 2014, the CJEU issued its Opinion that accession on the terms proposed would be incompatible with

⁽⁴¹⁾ See CJEU, judgment of 17 July 2014, Case C-481/13, *Mohammad Ferooz Qurbani v Germany*, ECLI:EU:C:2014:2101, paragraph 25.

⁽⁴²⁾ See CJEU, *Bolbol* judgment, op. cit., fn. 3, paragraph 38. See also paragraphs 36-37.

⁽⁴³⁾ Federal Administrative Court (Germany), 10 C 7.13 judgment, op. cit., fn. 36, paragraph 29.

⁽⁴⁴⁾ See UNHCR, *Comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for the granting and withdrawing international protection status (Recast) COM(2011) 319 final*, January 2012.

⁽⁴⁵⁾ See [Section 2.2.6. below](#), pp. 54-55.

⁽⁴⁶⁾ Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece [2015] OJ L 239/146; and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L 248/80. See [Section 2.2.1. below](#), pp. 34-40.

⁽⁴⁷⁾ See CJEU, judgment of 21 December 2011, Grand Chamber, joined cases C-411/10 and C-493/10, *NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, ECLI:EU:C:2011:865, paragraph 119.

EU law ⁽⁴⁸⁾. If and when accession does take place the position will, of course, fundamentally change because the ECHR will then be a treaty to which the EU is a party.

Article 6(3) provides that ‘fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law’. It does not, however, have the effect of incorporating the provisions of the ECHR into EU law. Article 6(3) codifies the CJEU’s case-law that such standards of human rights protection are to be treated by the CJEU as sources of inspiration of EU law relevant to the interpretation of EU legislation. Read in conjunction with Article 52(3) of the Charter (see below [Section 2.1.3.](#), pp. 28-32), the ECHR and the case-law of the European Court of Human Rights (ECtHR) constitute an important source of such inspiration. It follows from Article 52(3) of the Charter that, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, their meaning and scope are to be the same as those laid down by the ECHR, as interpreted by the case-law of the ECtHR. However, that provision does not preclude the grant of wider protection by EU law ⁽⁴⁹⁾.

2.1.3. The Charter of Fundamental Rights of the European Union

The [EU Charter](#) was incorporated into the primary law of the EU by Article 6(1) of the TEU with effect from 1 December 2009. This means that its provisions are binding not only on the EU institutions but also on Member States when they are implementing EU law (Article 51(1)). The fundamental rights guaranteed by the Charter must be complied with where national legislation falls within the scope of EU law. The applicability of EU law entails the applicability of the fundamental rights guaranteed by the Charter ⁽⁵⁰⁾. Hence, any action which engages the provisions of the CEAS (whether by direct applicability, including provisions which accord Member States discretionary powers, or indirectly pursuant to national provisions transposing the provisions of EU Directives) is potentially justiciable from the standpoint of the Charter before national courts and tribunals. This may require consideration not only of the secondary legislation concerned but also of primary law including the Charter. Indeed, as will be apparent from the analysis of its articles below, the CJEU refers to provisions of the Charter in its judgments concerning the interpretation of EU secondary legislation.

It is settled case-law that a national court which is called upon to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary by refusing to apply any conflicting provision of national legislation ⁽⁵¹⁾. The CJEU has ruled that EU law:

precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the EU Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter ⁽⁵²⁾.

⁽⁴⁸⁾ See CJEU, opinion 2/13 of 18 December 2014, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:2014:2454.

⁽⁴⁹⁾ See, e.g., CJEU, judgment of 5 October 2010, Case C-400/10 PPU, *J McB v LE*, ECLI:EU:C:2010:582, paragraph 53.

⁽⁵⁰⁾ CJEU, judgment of 26 February 2013, Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105, paragraph 21.

⁽⁵¹⁾ See below [Section 3.1.](#), pp. 61-63. But note the provisions of Protocol No 30 (see [Section 2.1.5.](#) below, pp. 33-34) in relation to the position of Poland and the UK (see CJEU, *NS, ME and Others* judgment, op. cit., fn. 47, paragraphs 116-122).

⁽⁵²⁾ CJEU, *Åkerberg Fransson* judgment, op. cit., fn. 50, paragraph 49.

It should be noted that the Charter's preamble contains the following passage in relation to its purpose and interpretation:

This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.

Article 52, concerning the scope and interpretation of rights and principles, is also relevant. In particular, Article 52(3) provides that rights recognised by the Charter which correspond to rights guaranteed by the ECHR shall have the same meaning and scope as those laid down by the ECHR, notwithstanding the fact that EU law can provide more extensive protection.

Of particular significance in relation to the CEAS is Article 18 which provides that '[t]he right to asylum shall be guaranteed with due respect for the rules of the [Refugee Convention] in accordance with the [TEU] and the [TFEU] [...]'. This is the first time in the EU that a legally binding supranational instrument to which EU Member States are parties recognises the right to asylum. The right to asylum embodied in Article 18 of the Charter is given expression, in particular, in Article 6 (access to the procedure), Article 9 (right to remain in the Member State pending the examination of the application) and recital (27) of the APD (recast), as well as the QD (recast).

The Charter is specifically referred to in some instruments of the CEAS secondary legislation as of relevance to interpretation of their meaning. This for instance is the case in recital (16) QD (recast), recital (60) APD (recast), recital (35) RCD (recast) and recital (39) of Dublin III Regulation which each makes reference to a different set of Charter's rights as summarised in the following table:

recitals of CEAS instruments		QD (recast) ⁽⁵⁴⁾	APD (recast) ⁽⁵⁵⁾	RCD (recast) ⁽⁵⁶⁾	Dublin III ⁽⁵⁷⁾
EU Charter's rights					
Art. 1	Human dignity	✓	✓	✓	✓
Art. 4	Prohibition of torture and inhuman or degrading treatment or punishment		✓	✓	✓
Art. 6	Right to liberty and security			✓	
Art. 7	Respect for private and family life	✓		✓	✓
Art. 11	Freedom of expression and information	✓			
Art. 14	Right to education	✓			
Art. 15	Freedom to choose an occupation and right to engage in work	✓			
Art. 16	Freedom to conduct a business	✓			
Art. 18	Right to asylum	✓	✓	✓	
Art. 19	Protection in the event of removal, expulsion or extradition		✓		
Art. 21	Non-discrimination	✓	✓	✓	
Art. 23	Equality between men and women		✓		
Art. 24	The rights of the child	✓	✓	✓	✓
Art. 34	Social security and social assistance	✓			
Art. 35	Health care	✓			
Art. 47	Right to an effective remedy and to a fair trial		✓	✓	✓

These specific references underline the way in which the EU legislator considers that reference to the principles embodied in the charter is pertinent to the understanding of the objects of the CEAS.

The list of articles cited is not exhaustive. Other provisions of the charter which are also of particular relevance to the CEAS include:

- Article 2: right to life;
- Article 3(1): right to physical and mental integrity;
- Article 5(3): prohibition of trafficking in human beings;
- Article 10: freedom of thought, conscience and religion;
- Article 41: right to good administration;
- Article 51: field of application;
- Article 52: scope and interpretation of rights and principles; and
- Article 53: level of protection.

A number of these articles have already been cited in CJEU case-law by reference to the general principles of EU law which they embody and which may, accordingly, be of relevance to

⁽⁵³⁾ Recital 16 QD (recast). Clearly, a number of these rights have more relevance to the civic status following from recognition of international protection status.

⁽⁵⁴⁾ Recital 60 APD (recast).

⁽⁵⁵⁾ Recital 35 APD (recast).

⁽⁵⁶⁾ Recital 39 Dublin III Regulation.

the interpretation of the specific provisions of the CEAS instrument in issue. The following examples illustrate the interpretative importance of the Charter.

Article 1, which provides that ‘human dignity is inviolable’ and ‘must be respected and protected’, was cited in *A, B, and C* which concerned methods for assessing the credibility of the declared sexual orientation of an applicant. The Court held that Article 1 precluded acceptance by the national authorities of certain evidence which would by its nature infringe human dignity ⁽⁵⁷⁾. The CJEU has also held that, further to the general scheme and purpose of the RCD and observance of fundamental rights, in particular Article 1 of the Charter, an asylum-seeker may not be deprived — even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State — of the protection of the RCD ⁽⁵⁸⁾.

The effect of Article 4 (prohibition of inhuman or degrading treatment) was considered in *NS, ME and Others* ⁽⁵⁹⁾. There the issue was whether the transfer of the applicants to Greece pursuant to the Dublin II Regulation would be in breach of Article 4 by reason of the conditions under which asylum applicants in Greece were living and were detained. The CJEU held that the Member States, including the national courts, may not transfer an asylum-seeker to the Member State responsible within the meaning of the Regulation where they ‘cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions [...] in that Member State amount to substantial grounds for believing’ that the asylum-seeker would face a real risk of being subjected to inhuman or degrading treatment in breach of Article 4 of the Charter. Articles 1, 18 and 47 were considered not to have any impact on the answer to the questions posed so that it was not necessary to consider their effect.

Article 10(1) of the Charter was cited in relation to the interpretation of Article 9(1) QD (now Article 9(1) QD (recast)) concerning the criteria for determining acts of persecution in *Y and Z* ⁽⁶⁰⁾. The issue in this case was whether forms of interference with religious freedom, other than those affecting the essential elements of the religious identity of the person concerned, which infringe Article 9 ECHR, constitute acts of persecution within the meaning of Article 9(1). The CJEU held that not every interference with the right to freedom of thought, conscience and religion provided for in Article 10(1) of the Charter constitutes an ‘act of persecution’ within the meaning of Article 9(1) QD ⁽⁶¹⁾.

In the judgment *M’Bodj* ⁽⁶²⁾, the CJEU noted the requirement to interpret Article 15(b) QD (now Article 15(b) QD (recast)) in a manner consistent with Article 19(2) of the Charter. The applicant had been granted leave to reside in the territory of the Member State under national legislation as he was suffering from an illness occasioning a real risk to his life or physical integrity and there was no appropriate medical treatment in his country of origin. The question before the CJEU was whether he was entitled to social welfare and

⁽⁵⁷⁾ CJEU, judgment of 2 December 2014, joined cases C-148/13 to C-150/13, Grand Chamber, *A, B, C v Staatssecretaris van Veiligheid en Justitie*, ECLI:EU:C:2014:2406, paragraph 65.

⁽⁵⁸⁾ CJEU, judgment of 27 September 2012, Case C-179/11, *Cimade and GISTI v Ministre de l’Intérieur, de l’Outre-mer, des Collectivités territoriales et de l’Immigration*, ECLI:EU:C:2012:594, paragraph 56.

⁽⁵⁹⁾ CJEU, *NS, ME and Others* judgment, op. cit., fn. 47, paragraphs 94, 106 and 113-114. See also CJEU, judgment of 10 December 2013, Grand Chamber, Case C-394/12, *Shamso Abdullahi v Bundesasylamt*, ECLI:EU:C:2013:813.

⁽⁶⁰⁾ CJEU, judgment of 5 September 2012, Grand Chamber, joined cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v Y and Z*, ECLI:EU:C:2012:518.

⁽⁶¹⁾ *Ibid.*, paragraphs 56-66.

⁽⁶²⁾ CJEU, judgment of 18 December 2014, Case C-542/13, *Mohamed M’Bodj v Etat belge*, ECLI:EU:C:2014:2452, paragraphs 31-38. This case, read in conjunction with *Bundesrepublik Deutschland v B and D* (judgment of 9 November 2010, Grand Chamber, joined cases C-57/09 and C-101/09, ECLI:EU:C:2010:661) and *Centre public d’action sociale d’Ottignies-Louvain-la-Neuve v Moussa Abdida* (judgment of 18 December 2014, Grand Chamber, Case C-562/13, ECLI:EU:C:2014:2453) also give guidance as to the meaning of the provisions of the EU Charter in the interpretation of secondary EU legislation and the breadth of approach of the CJEU in dealing with questions of interpretation referred to it. These issues will be further considered in Part 3 below, pp. 61-89.

healthcare benefits under the QD. The CJEU found that the applicant did not qualify for subsidiary protection under Article 15(b) QD which defines serious harm as consisting of torture or inhuman or degrading treatment or punishment in the country of origin. This was because serious harm must take the form of conduct on the part of a third party and cannot simply be the result of general shortcomings in the health system of the country of origin. As there was no risk of intentional deprivation of healthcare in the country of origin, the applicant did not fall within the scope of the Article 15(b) QD and consideration of Article 19(2) of the Charter did not call that interpretation into question.

The scope of Article 41 concerning the right to good administration, which includes ‘the right of every person to be heard, before any individual measure which would affect him or her adversely is taken’ (Article 41(2)(a)), has also been considered in relation to interpretation of CEAS legislation in two cases. Both cases concerned the Irish system of having two consecutive but separate procedures concerning first the determination of refugee status and then, if rejected, subsidiary protection status (as permissible under the APD) ⁽⁶³⁾. In *MM* ⁽⁶⁴⁾ the issue was whether the applicant, who had been heard in the asylum procedure for refugee status but who had received a negative decision, was entitled to be heard in the subsequent proceedings on his application for subsidiary protection. The CJEU stated that observance of the right of defence is a fundamental principle of EU law ⁽⁶⁵⁾. It noted that the right to be heard in all proceedings is inherent in that fundamental principle, as affirmed not only in Articles 47 and 48 of the Charter, but also in Article 41 thereof ⁽⁶⁶⁾. The CJEU held that it was 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 ⁽⁶⁷⁾. In *HN*, the CJEU confirmed that Article 41 of the Charter reflects a general principle of EU law ⁽⁶⁸⁾. However, given Article 41 of the Charter is not addressed to Member States but solely to the institutions, bodies, offices and agencies of the European Union, Article 41 in itself does not apply to EU Member States ⁽⁶⁹⁾.

Article 47 was considered in *Samba Diouf* ⁽⁷⁰⁾ regarding the interpretation of Article 39 APD. In this case, the CJEU considered that the question concerned not just the right of an applicant for asylum to an effective remedy before a court or tribunal in accordance with Article 39 APD, but it also concerned the principle of effective judicial protection, a general principle of EU law, to which expression is given by Article 47 of the Charter.

The above examples of the degree to which the CJEU has recourse to the provisions of the Charter in discharging its interpretative jurisdiction, serve to clarify the approach to be taken to interpretation issues by national courts and tribunals when applying EU law.

⁽⁶³⁾ Ireland is not a party to the APD (recast) so that the APD remains relevant there.

⁽⁶⁴⁾ CJEU, judgment of 22 November 2012, Case C-277/11, *MM v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, ECLI:EU:C:2012:744, paragraph 95.

⁽⁶⁵⁾ *Ibid.*, paragraph 81.

⁽⁶⁶⁾ *Ibid.*, paragraph 82.

⁽⁶⁷⁾ *Ibid.*, paragraph 95.

⁽⁶⁸⁾ CJEU, judgment of 8 May 2014, Case C-604/12, *HN v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, ECLI:EU:C:2014:302, paragraph 49.

⁽⁶⁹⁾ CJEU, judgment of 17 July 2014, joined cases C-141/12 and C-372/12, *YS v Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel v M and S*, ECLI:EU:C:2014:2081, paragraph 68.

⁽⁷⁰⁾ CJEU, judgment of 28 July 2011, Case C-69/10, *Brahim Samba Diouf v Ministre du Travail, de l’Emploi et de l’Immigration*, ECLI:EU:C:2011:524.

2.1.4. Protocol No 24

Protocol No 24 on Asylum for Nationals of Member States of the European Union, also known as the Aznar or Spanish Protocol, forms part of EU primary law. It provides that ‘Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters’. A national of a Member State is not eligible to make an application for international protection pursuant to the provisions of the CEAS (Article 1 QD (recast)) which is restricted to third-country nationals and stateless persons. However, an application under the Refugee Convention, outside the CEAS, by a national of a Member State cannot be excluded. An EU national who fears persecution in the Member State of nationality and seeks protection against *refoulement* to that Member State may apply for recognition as a refugee under the Refugee Convention in another Member State. Although very rarely arising as a relevant issue in cases, the Protocol provides that any such application may be ‘taken into consideration or declared admissible for processing by another Member State’ only in the following four cases ⁽⁷¹⁾:

- (a) Where the Member State of which the applicant is a national takes measures derogating in its territory from its obligations under the ECHR.
- (b) Where suspension proceedings under Article 7(1) TEU have been initiated by the Council ⁽⁷²⁾.
- (c) Where the Council has adopted a decision under Article 7(1) or 7(2) (serious and persistent breach by the Member State concerned of the values referred to in Article 2 TEU).
- (d) If the Member State to whom the application is made should decide unilaterally to accept the application for processing, the Council must be informed and the application dealt with on the basis that it is manifestly unfounded.

2.1.5. Protocol No 30

Protocol No 30 is concerned with the application of the EU Charter provisions to Poland and the UK ⁽⁷³⁾.

Article 1(1) provides first that the provisions of the Charter do not extend the ability of either the CJEU or the national courts or tribunals of Poland or the UK to find that their respective ‘laws, regulations or administrative procedures, practices or actions’ are inconsistent with the fundamental rights, freedoms and principles reaffirmed by the Charter. Secondly, Article 1(2) affirms that ‘nothing in Title IV of the Charter [on solidarity] creates justiciable rights’ in either country except as provided for in their respective national laws.

Article 2 provides that when a provision of the EU Charter refers to national laws and practices, it shall apply in those countries only to the extent that the rights or principles concerned are recognised in their respective national laws or practices.

⁽⁷¹⁾ See for example Council of State (France), judgment of 30 December 2009, *OFRA c MC*, No 305226; and National Asylum Court (France), SR, judgment of 30 March 2011, *ML*, No 10013804, in *Contentieux des réfugiés, Jurisprudence du Conseil d’Etat et de la Cour nationale du droit d’asile, Année 2011*, 2012, pp. 17-18.

⁽⁷²⁾ This is a complex and extreme process requiring a reasoned proposal supported by one-third of Member States and a four-fifths majority of the Council members, with the consent of the European Parliament, in cases of clear risk of serious breach of the area of freedom, security and justice pursuant to Art. 2 TEU. It has never been invoked in practice.

⁽⁷³⁾ I.e., Protocol No 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.

In *NS, ME and Others* ⁽⁷⁴⁾, in the domestic proceedings at first instance, the UK Government's submission was that by reason of this Protocol the provisions of the EU Charter did not apply in the UK. On referral, the CJEU was asked (inter alia) whether questions of alleged breach of the Charter should be modified by reason of the Protocol. Although the UK Government no longer maintained that position on appeal, the CJEU pointed out that in the third recital to the Protocol it was recorded that Article 6 TEU required the Charter to be applied and interpreted by national courts strictly pursuant to its provisions. The sixth recital recorded that 'the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles'. Accordingly, Article 1(1) of Protocol No 30 clarified Article 51 of the Charter with regard to its scope. It confirms that it did not intend to exempt either State from the obligation to comply with the provisions of the Charter or to prevent their national courts from ensuring compliance with those provisions. Since the rights provided for in Title IV of the Charter were not in issue, the Court did not rule on the interpretation of Article 1(2).

2.2. CEAS secondary legislation

Notwithstanding the principle of subsidiarity and the fact that legislative competence in the field of asylum is shared between the EU and the Member States, the CEAS legislation is intended to provide a common system for dealing with applications for international protection under the provisions of the QD (recast). The CEAS legislation thus applies from the point of entry into the EU until a final decision on each application has been reached and international protection status either recognised or refused. As already noted, most of the CEAS legislation is in the form of Directives (which require transposition into national law), but it is convenient to begin by outlining the CEAS legislation in the form of Regulations (which apply directly without the need for transposition: see below [Section 3.3.2.](#), pp. 66-67). When outlining the Directives, this Analysis shall follow the order of relative importance in the daily work of national courts and tribunals in international protection cases.

2.2.1. The 2013 Dublin III Regulation

The so-called Dublin III Regulation ⁽⁷⁵⁾ is the third generation instrument that establishes the criteria and mechanisms for determining the Member State responsible for examining an application for international protection. The scope of this Regulation now encompasses applicants for subsidiary protection and persons eligible for subsidiary protection (Article 2, recital (10)). The key feature of the Regulation is that it provides that an application for international protection shall be examined by a single Member State. It imposes obligations on Member States responsible under this Regulation to 'take charge' of an applicant who has lodged an application in a different Member State or to 'take back', inter alia, applicants whose application is under examination and who made an application in another Member State or who are on the territory of another Member State without a residence document (Article 18). The determination of which Member State is responsible to examine an application must be ascertained

⁽⁷⁴⁾ CJEU, *NS, ME and Others* judgment, op. cit., fn. 47, paragraphs 116-122.

⁽⁷⁵⁾ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin III) [2013] OJ L 180/31. It should be noted that on 4 May 2016, the Commission published its Proposal for a further recast of this Regulation. See Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM (2016) 270 final.

in accordance with the provisions of Chapter III which sets out the applicable criteria and their hierarchy. The Dublin III Regulation is supplemented by Regulation (EC) No 1560/2003, as amended by Article 48 of the Dublin III Regulation, which sets out detailed rules and arrangements in order to facilitate cooperation between the competent authorities in the Member States responsible for implementing the Dublin III Regulation ⁽⁷⁶⁾.

The Dublin system applies not only to EU Member States (including Ireland and the UK), but also to other European States on the basis of formal agreements between the Union and the respective country. Currently those States are Denmark (who is not directly bound by the Regulation — recital (42)), Iceland, Liechtenstein, Norway, and Switzerland ⁽⁷⁷⁾.

Determination of the Member State responsible for the examination of an application for international protection must be in accordance with the hierarchy of eight criteria set out in the Regulation:

⁽⁷⁶⁾ Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 222/3; and Commission Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2014] OJ L 39/1.

⁽⁷⁷⁾ See Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention [2006] OJ L 66/38; Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway [2001] OJ L 93/40; Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland [2008] OJ L 53/5; Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community, and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland [2009] OJ L 161/8.

Criterion 1
Article 8

Where the applicant is an unaccompanied minor, the responsible Member State is that where a family member or a sibling is legally present, provided it is in the best interests of the minor.

Criterion 2
Article 9

Where the applicant has a family member who has been allowed to reside as a beneficiary of international protection in a Member State, that Member State is responsible, provided the persons concerned expressed their desire in writing.

Criterion 3
Article 10

If the applicant has a family member in a Member State whose application for international protection in that Member State has not yet been the subject of a first decision regarding the substance, that Member State is responsible, provided the persons concerned expressed their desire in writing.

Criterion 4
Article 11

Where several family members and/or minor unmarried siblings apply for international protection in the same Member State simultaneously or on dates close enough for the procedures to determine Member State responsibility to be conducted together, the responsible Member State is that which is responsible for the applications of the largest number of family members according to the criteria, or failing this, the Member State responsible for examining the application of the oldest family member.

Criterion 5
Article 12

Where the applicant is in possession of a valid residence document or a valid visa, the responsible Member State is that which issued the residence document or visa.

Criterion 6
Article 13

Where it is established that an applicant irregularly crossed the border into a Member State from a third country, the Member State thus entered is responsible. That responsibility ceases 12 months after the date on which the irregular border crossing took place. In the latter case, where it is established that the applicant has been living for a continuous period of at least five months in a Member State before lodging the application for international protection, that Member State is responsible.

Criterion 7
Article 14

If the applicant entered the territory of a Member State which waived the need for a visa, that Member State is responsible.

Criterion 8
Article 15

Where the application for international protection is made in the international transit area of an airport of a Member State, that Member State is responsible.

In accordance with Article 3(2), ‘When no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it.’

The Regulation makes provision for when the Member State determined to be responsible is not compliant with certain obligations under the CEAS:

Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible [...]. (Article 3(2))

Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State is deemed responsible for examining the application (Article 3(2)).

The Regulation enshrines some procedural guarantees, such as the right to information (Article 4) and the right to a personal interview (Article 5). Article 4 requires the applicant to be informed of the intended application of the Regulation together with full information as to the implications for the applicant. Article 5 includes a new provision in the Dublin system, namely, the requirement for Member States to conduct a personal interview. The prescribed requirements for the personal interview are set out in Article 5(4) to (6) and include the requirement to make a written record of the interview which must be made available to the applicant.

The Dublin III Regulation contains discretionary clauses (a so-called ‘**sovereignty**’ **clause** and a ‘**humanitarian**’ **clause**), allowing Member States to examine asylum applications which are not their responsibility under the criteria laid out in Chapter III. Article 17(1) enshrines the ‘sovereignty’ clause which establishes that:

By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation.

Article 17(2) enshrines the ‘humanitarian’ clause, which allows the determining or responsible Member State to request that another Member State assume responsibility in order to bring together family relations:

The Member State [...] which is carrying out the process of determining the Member State responsible, or the Member State responsible, *may*, at any time before a first decision regarding the substance is taken, request another Member State to take charge of an applicant in order to bring together any family relations, on humanitarian grounds

based in particular on family or cultural considerations, even where that other Member State is not responsible ⁽⁷⁸⁾.

When such request is made, the requested Member State is under an obligation to consider the humanitarian grounds: '[t]he requested Member State *shall* carry out any necessary checks to examine the humanitarian grounds cited, and shall reply to the requesting Member State within two months [...] A reply refusing the request *shall* state the reasons on which the refusal is based' ⁽⁷⁹⁾.

Article 28(1) enshrines the fundamental principle that 'Member States shall not hold a person in detention for the sole reason that he or she is subject to the procedure established by this Regulation.' The only exception is when there are reasons in an individual case, which are based on objective criteria defined by law, for believing that the person subject to transfer may abscond (Article 2(n)) ⁽⁸⁰⁾. In such circumstances, Member States may detain the person concerned in order to secure transfer procedures, on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively (Article 28(2) and (3)). Article 28(4) establishes that the conditions of detention shall be those established by the RCD ⁽⁸¹⁾.

It should be noted that Council Decision 2015/1523 of 14 September 2015 and Council Decision 2015/1601 of 22 September 2015 establish provisional measures in the area of international protection for the benefit of Italy and Greece ⁽⁸²⁾. The Decisions provide for the temporary and exceptional mechanism for the relocation of 160 000 persons in clear need of international protection from Italy and Greece to other Member States. The Decisions, therefore, entail a temporary derogation from the criterion set out in Article 13(1) of the Dublin III Regulation according to which Italy and Greece would otherwise have been responsible for the examination of an application for international protection based on the criteria set out in Chapter III of the Regulation, as well as a temporary derogation from the procedural steps, including time limits, laid down in Articles 21, 22 and 29 of the Regulation. The other provisions of the Dublin III Regulation, including the implementing rules set out in Regulation 1560/2003 as amended by Regulation 118/2014, remain applicable.

2.2.1.1. CJEU case-law on the Dublin Regulation ⁽⁸³⁾

<i>Petrosian</i>	C-19/08	29 January 2009	Dublin II Regulation	Suspensive effect of Dublin appeals: Start of the period for implementation of transfer of the asylum-seeker and transfer procedure on appeal having suspensive effect (paras 30, 34, 38, 46, and 53).
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⁽⁷⁸⁾ Emphasis added.

⁽⁷⁹⁾ Emphasis added.

⁽⁸⁰⁾ See Federal Court of Justice (Germany), judgment of 26 June 2014, *V ZB 31/14*; Administrative Court of Justice (Austria), judgment of 19 February 2015, *Ro 2014/21/0075-5*; and Supreme Administrative Court (Czech Republic), decision of 24 September 2015, *10 Azs 122/2015 88* (see the English unofficial translation of the question referred to the CJEU).

⁽⁸¹⁾ See below Section 2.2.5., pp. 52-54.

⁽⁸²⁾ Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece [2015] OJ L 239/146; and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L 248/80.

⁽⁸³⁾ As apparent in the table, all CJEU judgments so far relate to the Dublin II Regulation. They can nevertheless be relevant for the interpretation of the Dublin III Regulation.

<i>NS, ME and Others</i>	C-411/10 and C-493/10	21 December 2011	Dublin II Regulation	The 'sovereignty clause'; the concept of 'safe countries'; the obligation to examine asylum applications; and the rebuttable presumption of compliance with fundamental rights (paras 68-69, 77, 83, 86, 88, 89, 94, 96, 98, 106-108, and 119-120).
<i>Kastrati</i>	C-620/10	3 May 2012	Dublin II Regulation	Termination of Dublin procedures: withdrawal of asylum application before acceptance to take charge and termination of Dublin Regulation procedures (paras 43, 45-47, and 49).
<i>K</i>	C-245/11	6 November 2012	Dublin II Regulation	The 'humanitarian clause' (paras 27, 30, 33, 38, 41, 46, 51, and 54).
<i>Halaf</i>	C-528/11	30 May 2013	Dublin II Regulation	The 'sovereignty clause' and the obligation of Member States to request UNHCR to present its views (paras 36-37, 39, and 45-47).
<i>MA, BT and DA</i>	C-648/11	6 June 2013	Dublin II Regulation	Unaccompanied minor and successive applications for asylum lodged in two Member States (paras 43, 47, 50, 54-55, 60, and 66).
<i>Puid</i>	C-4/11	14 November 2013	Dublin II Regulation	Criteria for determining the Member State responsible and the 'take-back clause' (paras 30-31, 33, and 35-37).
<i>Abdullahi</i>	C-394/12	10 December 2013	Dublin II Regulation	Scope of judicial review: review of compliance with the criteria for determining responsibility for examining the asylum application (paras 48, 50-52, 57, and 60-62).

2.2.1.2. CJEU pending case-law on the Dublin III Regulation

<i>Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie</i>	C-63/15	pending	Dublin III Regulation	Questions referred by the Rechtbank Den Haag, sitting in 's-Hertogenbosh (Netherlands) on 12 February 2015 on the scope of the right to an effective legal remedy against the (incorrect) application of the criteria determining the responsible Member State.
<i>George Karim v Migrationsverket</i>	C-155/15	pending	Dublin III Regulation	Questions referred by the Kammarrätten i Stockholm — Migrationsöverdomstolen (Sweden) on 1 April 2015 on the applicability of effective legal remedies for challenging the criteria on Dublin transfer.
<i>Al Chodor v Police of the Czech Republic, Directory of Czech Police of the Usti Region</i>	C-528/15	pending	Dublin III Regulation	Questions referred (see English unofficial version) by the Supreme Administrative Court (Czech Republic) on 24 September 2015 on the legal definition of the criteria to evaluate a risk of absconding in relation to detention in Dublin cases.

2.2.1.3. Relevant ECtHR case-law

<i>TI v the United Kingdom</i>	43844/98	7 March 2000	States not absolved from their responsibility under the ECHR when implementing Dublin transfers (admissibility decision).
<i>MSS v Belgium and Greece</i>	30696/09	21 January 2011	Rebuttable character of the presumption that participating States in the 'Dublin' system respect fundamental rights laid down in the ECHR if substantial grounds have been shown that the person would face a real risk of being subject to treatment contrary to Article 3 in the responsible State under the Dublin system (paras 338-360).
<i>Mohammed Hussein and Others v the Netherlands and Italy</i>	27725/10	2 April 2013	Limitations of medical and economic factors to prevent forced removal (paras 68 and 70-71) (admissibility decision).
<i>Mohammed v Austria</i>	2283/12	6 June 2013	Effective remedy and suspensive effects of appeals (paras 71-72, 93 and 109).
<i>Sharifi v Austria</i>	60104/08	5 December 2013	Responsibility of a State under Article 3 ECHR to not send asylum-seekers to another State in application of the Dublin Regulation if the sending State knows or should have known that serious deficiencies in asylum procedures and living and detention conditions in the receiving State reached Article 3 threshold; mere awareness of serious deficiencies being insufficient (para. 38).
<i>Safai v Austria</i>	44689/09	7 May 2014	Responsibility of a State under Article 3 ECHR to not send asylum-seekers to another State in application of the Dublin Regulation if the sending State knows or should have known that serious deficiencies in asylum procedures and living and detention conditions in the receiving State reached Article 3 threshold; mere awareness of serious deficiencies being insufficient (paras 45-50).
<i>Sharifi et autres c Italie et Grèce</i>	16643/09	2 October 2014	Asylum-seekers as members of an underprivileged and particularly vulnerable group (paras 172, 224 and 232).
<i>Tarakhel v Switzerland</i>	29217/12	4 November 2014	Assessment of a real risk of treatment contrary to Article 3 ECHR to take into account the individual circumstances of the asylum-seeker regardless of systemic deficiencies (paras 94, 104 and 120) and importance of the requirement of 'special protection' in case of children asylum-seekers due to their specific needs and extreme vulnerability (para. 119).
<i>AME v the Netherlands</i>	51428/10	15 February 2015	Although members of an underprivileged and particularly vulnerable group, this did not assist able young men with no dependants to show that their Dublin return (to Italy) would breach Article 3 ECHR.
<i>VM et autres c Belgique</i>	60125/11	7 July 2015	Right to an effective legal remedy with suspensive effects for challenging an expulsion order on the basis of <i>non-refoulement</i> (paras 187-220).

2.2.2. The 2013 Eurodac Regulation (recast)

The Eurodac Regulation ⁽⁸⁴⁾ is an instrument of secondary EU law which aims to facilitate the application of the Dublin III Regulation (Article 1) by setting up:

a system known as ‘Eurodac’, consisting of a Central System, which will operate a computerised central database of fingerprint data, as well as of the electronic means of transmission between the Member States and the Central System, hereinafter the ‘Communication Infrastructure’. (Recital (6) Eurodac Regulation (recast)).

Although the original Eurodac Regulation ⁽⁸⁵⁾ was only concerned with the effective implementation of the Dublin system, in its recast version, its objective has expanded also to laying down the conditions for national authorities and Europol to access the fingerprint data stored (Article 1). The Eurodac Regulation emphasises the necessity of Eurodac’s information ‘for the purposes of the prevention, detection or investigation of terrorist offences [...] or of other serious criminal offences’ (recital (8)).

Chapter II relates to applicants for international protection. The Regulation imposes an obligation on Member States to promptly ‘take the fingerprints of all fingers of every applicant for international protection’ who is not less than 14 years old and to transmit that data to the Central System no later than 72 hours after the lodging of application for protection (Article 9(1)). According to Article 9(3), ‘[f]ingerprint data [...] transmitted by any Member State [...] shall be compared automatically with the fingerprint data transmitted by other Member States and already stored in the Central System’, which will then ‘automatically transmit the hit or the negative result of the comparison to the Member State of origin’ (Article 9(5)).

2.2.3. The 2011 Qualification Directive (recast)

The QD (recast) is a central instrument of the CEAS. It details the ‘standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted’ (Article 1) ⁽⁸⁶⁾. Reference to ‘uniform status’ replaces focus in the original QD on ‘minimum standards’ ⁽⁸⁷⁾. The original Directive noted at recital (7) that the approximation of rules on the recognition and content of refugee and subsidiary protection status should help to limit the secondary movements of applicants for asylum between Member States, where such movement is purely caused by differences in legal frameworks. The QD (recast) repeats this point (recital (13)) but adds that in light of subsequent evalua-

⁽⁸⁴⁾ Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) [2013] OJ L 180/1. Note: On 4 May 2016, the Commission published a Proposal for the amendment of this Regulation. See Proposal for a Regulation of the European Parliament and of the Council on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes (recast), COM(2016) 272 final.

⁽⁸⁵⁾ Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L 316/1.

⁽⁸⁶⁾ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9.

⁽⁸⁷⁾ However, as noted in Section 1.4. (pp. 16–23), ‘uniform status’ remains an aspiration.

tions, it was appropriate ‘to seek to achieve a higher level of approximation of the rules on the recognition and content of international protection on the basis of higher standards’ (recital (10); see also recital (8)). In that context, the QD (recast) seeks to further advance the main objective of applying ‘common criteria for the identification of persons genuinely in need of international protection’ (recital (12)). It should be noted that not all of the provisions in the QD (recast) are mandatory as some remain facultative. Compared to the QD which establishes a differentiated treatment for the two types of international protection (refugee status and subsidiary protection status), the QD (recast) also approximates (but does not fully unify) the rights and benefits granted to subsidiary protection beneficiaries with those of refugees ⁽⁸⁸⁾.

International protection refers to refugee status and subsidiary protection status for which only third-country nationals or stateless persons are eligible, thereby excluding EU citizens (Article 2) (see [Section 2.1.4.](#), p. 33, on Protocol 24). It does not extend to those who are allowed to remain in the territories of Member States ‘on a discretionary basis on compassionate or humanitarian grounds’ (recital (15)).

The Directive’s definition of a **refugee** reflects Article 1 of the Refugee Convention, with the exception that it is restricted to third-country nationals or stateless persons. According to the Directive, a refugee means:

a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, [and to whom the exclusion clauses do not apply] (Article 2(d) QD (recast)).

Inspired by international obligations under human rights instruments and practices existing in Member States, subsidiary protection is established as ‘complementary and additional to the refugee protection enshrined in the Geneva [Refugee] Convention’ (recital (33)). As a result, subsidiary protection is only granted to individuals who do not qualify for refugee status ⁽⁸⁹⁾. **Beneficiaries of subsidiary protection** are those persons in respect of whom substantial grounds have been shown for believing that if they are returned to the country of origin, or the country of former habitual residence in the case of stateless persons, they would face a real risk of suffering serious harm as defined by the Directive, and to whom the grounds for exclusion do not apply (Article 2(f) QD (recast)).

The QD (recast) is divided into nine chapters:

Chapter I	General provisions, including definitions at Article 2 and the more favourable standards clause at Article 3.
Chapter II	Assessment of applications for international protection.
Chapter III	Qualification for refugee status.
Chapter IV	Refugee status detailing the granting of such status but also the criteria for revoking, ending or refusing to renew it.
Chapter V	Qualification for subsidiary protection.

⁽⁸⁸⁾ No such approximation has however been undertaken under the Family Reunification Directive which still does not apply to beneficiaries of subsidiary protection. See [Section 2.3.2.](#) below, pp. 56-57.

⁽⁸⁹⁾ See the definition of subsidiary protection in Art. 2(f), in accordance with Art. 78(2)(b) TFEU. See also CJEU, *HN* judgment, op. cit., fn. 68, paragraph 35.

Chapter VI	Subsidiary protection status detailing the granting of such status but also the criteria for revoking, ending or refusing to renew it.
Chapter VII	Content of international protection laying down the rights and benefits to be granted to refugees and beneficiaries of subsidiary protection.
Chapter VIII	Administrative cooperation.
Chapter IX	Final provisions.

The first six chapters are of direct relevance to status recognition. Of particular importance is Article 4 on the assessment of facts and circumstances ⁽⁹⁰⁾. As explained by the CJEU in its 2012 *MM* judgment, such a case-by-case assessment follows a two-stage process ⁽⁹¹⁾. The first stage is reflected in Article 4(1)-(3) and aims to establish the accepted factual circumstances which may constitute evidence that supports the application, having regard to matters affecting the credibility of the evidence (see Article 4(5)). The second stage then ‘relates to the legal appraisal of that evidence’ against the background of the eligibility criteria for international protection ⁽⁹²⁾. This assessment is a prospective one with a view to determining whether there exists a risk of persecution or serious harm upon return.

The central criteria for qualification for international protection are provided respectively in Articles 9-10 for refugee status and in Article 15 for subsidiary protection status. Article 9 defines acts of persecution as acts which are sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights or an accumulation of various measures of severe consequences (Article 9(1)). Concerning subsidiary protection, the serious harms justifying such a status are detailed in Article 15 and encompass (a) death penalty or execution, (b) torture or inhuman or degrading treatment or punishment in the country of origin, and (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict ⁽⁹³⁾.

In respect of qualification for both refugee and subsidiary protection status, Article 6 defines who can be actors of persecution or serious harm, and Article 7 defines who can be actors of protection against persecution or serious harm emanating from such actors. According to Article 7(2) protection against persecution or serious harm must be effective and of a non-temporary nature. It is stated that such protection is generally provided when the actors of protection take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection. Under Article 8(1) Member States may, but are not required to, determine that an applicant is not in need of international protection if in a part of the country of origin he or she (a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or (b) has access to protection against persecution or serious harm and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there.

One of the conditions for qualification for refugee status is the existence of a causal link between the act(s) of persecution or the absence of protection against such acts and at least one of the reasons for persecution stated in Article 10, namely race, religion, nationality,

⁽⁹⁰⁾ For further details, refer to IARLJ, *Assessment of Credibility in Refugee and Subsidiary Protection Claims under the EU Qualification Directive: Judicial Criteria and Standards*, prepared by J. Barnes and A. Mackey, 2013. A forthcoming chapter in the Professional Development Series will deal in detail with Evidence Assessment and Credibility.

⁽⁹¹⁾ CJEU, *MM* judgment, op. cit., fn. 64, paragraph 64.

⁽⁹²⁾ *Ibid.*

⁽⁹³⁾ See EASO, *Article 15(c) Qualification Directive (2011/95/EU): Judicial Analysis*, December 2014.

political opinion or membership of a particular social group. By Article 9(3) there must be a connection between the reasons mentioned in Article 10 and the acts of persecution or the absence of protection against such acts.

The limits to eligibility for international protection are provided in Articles 12 and 17 governing respectively exclusion from refugee status and subsidiary protection ⁽⁹⁴⁾. The benefit of international protection is also contingent on there being no application of the cessation clauses (Articles 11 and 16 respectively) or revocation of, ending of or refusal to renew refugee status or subsidiary protection (Articles 14 and 19 respectively) ⁽⁹⁵⁾.

Chapter 7 identifies the rights and benefits enjoyed by beneficiaries of refugee and subsidiary protection status respectively including in respect of residence permits, access to education, health, measures in respect of unaccompanied minors, access to accommodation, freedom of movement within the Member State, access to integration facilities and repatriation assistance.

It is also noteworthy that Member States have the obligation to maintain the family unity of beneficiaries of international protection (Article 23(1)). The duty to maintain family unity relates to members of the family in so far as the family already existed in the country of origin and who are present in the same Member State in relation to the application for international protection. It is limited to the spouse or unmarried partner in a stable relationship, their minor children (under 18 years-old) if unmarried and the father, mother or other adult responsible for the beneficiary of international protection if the latter is a minor and unmarried (Article 2(j)). However, Member States may decide to apply Article 23 to other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were wholly or mainly dependent on the beneficiary of international protection at that time (Article 23(5)). If they do not individually qualify for international protection, these family members are entitled to a set of benefits laid down in Chapter VII of the Directive (Article 23(2)). However, Member States are not required to grant the family member the same protection status as the beneficiary of international protection, but they must ensure that the family member is entitled to claim the benefits set out in Articles 24 to 35, which include the issuance of a residence permit (Article 24).

2.2.3.1. CJEU case-law on the Qualification Directive ⁽⁹⁶⁾

<i>Elgafaji</i>	C-465/07	17 February 2009	QD	Qualification for subsidiary protection: Article 15(c) in conjunction with Article 2(e) QD 2004 on serious and individual threat by reason of indiscriminate violence.
<i>Abdulla and others</i>	C-175/08, C-176/08, C-178/08 and C-179/08	2 March 2010	QD	Cessation of refugee status: Article 11(1)(e) on change of circumstances in the country of origin.

⁽⁹⁴⁾ See EASO, *Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU) — A Judicial Analysis*.

⁽⁹⁵⁾ See CJEU, judgment of 24 June 2015, Case C-373/13, *HT v Land Baden-Württemberg*, ECLI:EU:C:2015:413.

⁽⁹⁶⁾ As apparent in the table, all CJEU judgments so far relate to the QD. They can nevertheless be relevant for the interpretation of the QD (recast).

<i>Bolbol</i>	C-31/09	17 June 2010	QD	Exclusion from refugee status: Article 12(1)(a) on protection or assistance provided to Palestinian stateless persons by UNRWA.
<i>B and D</i>	C-57/09 and C-101/09	9 November 2010	QD	Exclusion from refugee status: Article 12(2)(b) and (c) on the notion of ‘serious non-political crime’ and membership of a terrorist organisation; and Article 3 on more favourable standards of qualification for individuals excluded from refugee status.
<i>Y and Z</i>	C-71/11 and C-99/11	5 September 2012	QD	Qualification for refugee status: Article 2(c) and Article 9(1)(a) on persecution in the context of freedom of religion.
<i>MM</i>	C-277/11	22 November 2012	QD	Assessment of facts and circumstances: Article 4 on cooperation of Member States with applicants (Article 4(1)).
<i>El Kott and others</i>	C-364/11	19 December 2012	QD	Exclusion from refugee status: Article 12(1)(a) in case of cessation of protection or assistance from UN organ or agencies.
<i>X, Y and Z</i>	C-199/12 to C-201/12	7 November 2013	QD	Qualification for refugee status: Article 9(1)(a) (in conjunction with Article 9(2)(c) and Article 10(1)(d)) on persecution in the context of homosexual orientation.
<i>Diakité</i>	C-285/12	30 January 2014	QD	Qualification for subsidiary protection: Article 15(c) regarding the interpretation of an internal armed conflict.
<i>A, B and C</i>	C-148/13 to C-150/13	2 December 2014	QD	Assessment of facts and circumstances: Article 4 (in conjunction with Article 13(3)(a) APD 2005) on limits to investigation of claim based on homosexual orientation and effect of failure to disclose that fear initially.
<i>M’Bodj</i>	C-542/13	18 December 2014	QD	Qualification for subsidiary protection: Article 2(e) and (f) and Article 15(b) on eligibility on medical grounds.
<i>Abdida</i>	C-562/13	18 December 2014	QD	Qualification for subsidiary protection: Article 15(b) on eligibility on medical grounds (para. 33).
<i>Shepherd</i>	C-472/13	26 February 2015	QD	Qualification for refugee status: Article 9(2)(b), (c) and (e) on persecution following refusal to perform military service in a conflict where international crimes would be committed and disproportionate punishment and denial of judicial redress.

HT	C-373/13	24 June 2015	QD	Content of international protection: Articles 21(2) and (3) and Article 24(1) on revocation of residence permits on ground of national security or public order (membership of terrorist organisation).
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2.2.3.2. CJEU pending case-law on the Qualification Directive

<i>Kreis Warendorf v Ibrahim Alo</i>	C-443/14	pending see opinion of Advocate General Cruz Villalón on 6 October 2015 (case joined with <i>Osso</i> , C-44/14)	QD (recast)	Questions referred by the Bundesverwaltungsgericht (Germany) on 25 September 2014 on the compatibility of a place of residence imposed on beneficiaries of subsidiary protection with free movement and social welfare.
<i>Amira Osso v Region Hannover</i>	C-444/14	pending see opinion of Advocate General Cruz Villalón on 6 October 2015 (case joined with <i>Alo</i> , C-443/14)	QD (recast)	Questions referred by the Bundesverwaltungsgericht (Germany) on 25 September 2014 on the compatibility of a place of residence imposed on beneficiaries of subsidiary protection with free movement and social welfare.
<i>Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani</i>	C-573/14	pending	QD	Questions referred by the Conseil d'Etat (Belgium) on 11 December 2014 on the interpretation of acts contrary to the purposes and principles of the United Nations in case of terrorism for the purpose of exclusion from refugee status.
<i>Evelyn Danqua v The Minister of Justice and Equality Ireland and the Attorney General</i>	C-429/15	pending	QD	Questions referred by the Court of Appeal (Ireland) on 5 August 2015 on application for asylum as an appropriate comparator in respect of an application for subsidiary protection for the purposes of the principle of equivalence and time-limit for ensuring that applications for international protection are dealt with within a reasonable time.

It should be noted that there is a significant difference between on the one hand the grant of refugee or subsidiary protection status (which, as mentioned above, confers a range of rights and benefits on beneficiaries, including protection from *refoulement*, under the QD (recast)) and on the other hand protection against *refoulement* under the ECHR. This is explained more fully in [Section 3.4.1.](#) (pp. 71-75). The following case-law of the ECtHR, which is not exhaustive, relates to protection against *refoulement* under the ECHR.

2.2.3.3. Relevant ECtHR case-law

<i>Soering v the United Kingdom</i>	14038/88	7 July 1989	Article 3 ECHR on <i>non-refoulement</i> in case of extradition where the applicant would face the death row phenomenon and definition of torture or inhuman or degrading treatment.
<i>Cruz Varaz and Others v Sweden</i>	15576/89	20 March 1991	Article 3 ECHR on <i>non-refoulement</i> in case of expulsion and assessment of the risk upon return.
<i>Chahal v the United Kingdom</i>	22414/93	15 November 1996	Absolute nature of the principle of <i>non-refoulement</i> under Article 3 ECHR irrespective of the alleged danger posed by an individual to the national security of the host country.
<i>HLR v France</i>	24573/94	29 April 1997	Article 3 ECHR on <i>non-refoulement</i> in case of inhuman or degrading treatment or punishment by non-State actors.
<i>D v the United Kingdom</i>	30240/96	2 May 1997	Article 3 ECHR on <i>non-refoulement</i> on medical grounds.
<i>Salah Sheekh v the Netherlands</i>	1948/04	11 January 2007	Article 3 ECHR on <i>non-refoulement</i> for risk stemming from generalised violence facing members of a minority clan (the Ashraf).
<i>Saadi v Italy</i>	37201/06	28 February 2008	Absolute nature of the principle of <i>non-refoulement</i> under Article 3 ECHR irrespective of the alleged danger posed by an individual to the national security of the host country or the crimes he/she committed.
<i>N v the United Kingdom</i>	26565/05	27 May 2008	Article 3 ECHR on <i>non-refoulement</i> on medical grounds.
<i>NA v the United Kingdom</i>	25904/07	17 July 2008	Article 3 ECHR on <i>non-refoulement</i> for risk stemming from generalised violence.
<i>Al-Saadoon Mufdhi v the United Kingdom</i>	61498/08	2 March 2010	Article 3 ECHR on <i>non-refoulement</i> ; and Article 2 ECHR and Article 1 Protocol No 13 on <i>non-refoulement</i> to death penalty.
<i>Sufi and Elmi v the United Kingdom</i>	8319/07 and 11449/07	28 June 2011	Article 3 ECHR on <i>non-refoulement</i> for risk stemming from generalised violence and relationship with Article 15(c) QD.
<i>Othman (Abu Qatada) v the United Kingdom</i>	8139/09	17 January 2012	<i>Non-refoulement</i> on the basis of Article 6 ECHR in case of flagrant denial of justice and on the basis of Article 3 and the quality of diplomatic assurances.

2.2.4. The 2013 Asylum Procedures Directive (recast)

The APD (recast) ⁽⁹⁷⁾, together with Article 4 of the QD (recast) and the Dublin III Regulation, provides the mechanisms to be applied in the processing of applications for refugee and subsidiary protection status under the CEAS. Its purpose ‘is to establish common procedures for granting and withdrawing international protection pursuant to’ the QD (recast) (Article 1). Whilst the purpose of the Directive is to establish common procedures, not all of its provisions are mandatory. Some provisions are facultative. The Directive applies to all applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States (Article 3(1)). It does not apply to requests for diplomatic or territorial asylum submitted to representations of Member States (Article 3(2)). Member States may also apply it to any other kind of protection offered by them so as to

⁽⁹⁷⁾ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60.

create a ‘one stop’ procedure (Article 3). They may also apply more favourable standards so far as compatible with the Directive (Article 3(2) and Article 5). Particular emphasis is placed upon reflecting the needs of vulnerable applicants and unaccompanied minors (recitals (29) to (33) and Articles 24 and 25). The Directive gives detailed provisions as to the procedures to be followed in making a decision on the application which are of relevance to the judiciary in so far as they relate to the procedural lawfulness of the decision of the determining authority at first instance. Article 46, considered below, is of direct relevance to the appeals procedure providing the right to an effective remedy.

The Directive is divided into six chapters as follows:

Chapter I	General provisions including, of particular importance, definitions (Article 2), provisions on the scope of the Directive (Article 3) and provisions concerning the designation, role and competence of responsible authorities (Article 4).	
Chapter II	Basic principles and guarantees providing for access to procedures (Article 6), dependants and minors (Article 7), access to information, counselling, and legal assistance and representation (Articles 8 and 19 to 23) and the role of the United Nations High Commissioner for Refugees (UNHCR) (Article 29), right to remain pending a final decision by the determining authority in the first instance procedure (Article 9), requirements for the examination of the application including the rights and obligations of applicants (Articles 10 to 13) and provisions as to the personal interview as a central component of the process (Articles 14 to 17), rules as to medical examinations (Article 18), applicants in need of special procedural guarantees (Article 24) and guarantees for unaccompanied minors (Article 25), detention (Article 26), procedures on withdrawal or abandonment of applications (Articles 27 and 28), and restrictions to the collection of information based on the confidential nature of the asylum application (Article 30).	
Chapter III	Section I	Procedural provisions as to conduct of the examination procedure (Article 31) and treatment of unfounded applications (Article 32).
	Section II	Treatment of applications as inadmissible (Articles 33 and 34).
	Section III	Potential removal of an applicant to a safe country other than the Member State seized of the application and defines such countries under the following concepts: first country of asylum (Article 35), safe country of origin (Article 36) and requirements for national designation as such (Article 37), safe third country (Article 38), and European safe third country (Article 39). Where these concepts are applicable, Member States must allow applicants to distinguish their own position from the norm.
	Section IV	Subsequent applications (Article 40), including exception to the right to remain pending a decision (Article 41), and procedural rules applicable to preliminary examination of such applications (Article 42).
	Section V	Border or transit zone procedures (Article 43).
Chapter IV	Procedures for the withdrawal of international protection, which must be subject to an examination procedure and must provide procedural rules (Articles 44 and 45).	
Chapter V	Appeals procedures and the right to an effective remedy including procedural elements (Article 46) and legal aid (Article 20).	
Chapter VI	General and final provisions (Articles 47 to 55).	

The essential scheme of the APD (recast) is simple. At first instance, it provides for a designated ‘determining authority’ (Article 2(f) and Article 4), the personnel of which are to be competent and appropriately trained (Article 4(3) and Article 10(3)(c)). In addition, access to up-to-date country of origin information from various sources must be ensured (Article 10(3)(b)), as well as the possibility to seek expert advice whenever necessary (Article 10(3)(d)). The determining authority must examine each application ‘individually, objectively and impartially’ (Article 10(3)(a)). A core component of the process is conducting a personal interview (Article 14) in

circumstances conducive to presentation of the applicant's case in a comprehensive manner (Article 15). Its decision must be in writing (Article 11(1)), and, if negative as to either form of status, reasons in fact and law for that decision must be set out together with written information on how to challenge the negative decision (Article 11(3)). The table below summarises the main rights and guarantees afforded to applicants during the examination procedure.

Applicants' rights during the examination procedure	Right to remain (Article 9).	
	Procedural guarantees (Articles 12 and 46)	Right to be informed
		Right to an interpreter
		Right to counselling
		Right to be given notice in reasonable time of the decision and to be informed of decision in a language they understand in absence of legal adviser or counsellor
		Right to an effective remedy
	Right to legal and procedural information and assistance (Articles 19-23)	
	Personal interview (Articles 14-17)	
	Right to protection of confidentiality (Article 15(2) and Articles 30 and 48)	
Right not to be detained (Article 26)		
Additional guarantees for applicants in need of special protection (Article 24)		
Additional guarantees for unaccompanied minors (Article 25)	Right to a representative	
	Interviews to be conducted by a person having the necessary knowledge of the needs of minors	
	Best interests of the child	

Chapter V is of prime importance to the judiciary. It provides an applicant the right 'to an effective remedy before a court or tribunal' against the decisions specified in Article 46(1) which, effectively, comprise all final decisions at first instance concerning the grant and withdrawal of international protection. The key provision as to the scope of this effective remedy is set out in Article 46(3) as follows:

In order to comply with paragraph 1, Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to [the QD (recast)], at least in appeal procedures before a court or tribunal of first instance.

National courts will also need to take into account the general principles of EU law as to access to justice (notably Articles 2 and 6 TEU and Articles 18, 20, 21, 47 and 51 to 53 of the EU Charter). In addition, more favourable provisions of Member States' national law may be relevant to determining the principles applicable to the provision of an effective remedy provided they are compatible with the Directive.

2.2.4.1. CJEU case-law on the Asylum Procedures Directive ⁽⁹⁸⁾

<i>Samba Diouf</i>	C-69/10	28 July 2011	APD	Accelerated procedures: application of rules leading to accelerated procedures precluding a challenge to the decision to apply that procedure was lawful provided that the reasons for that procedural decision are justiciable in any appeal against the final decision.
<i>MM</i>	C-277/11	22 November 2012	APD	Right to be heard but non-application of the APD to applications for subsidiary protection except in case of single procedure to assess international protection.
<i>HID and BA</i>	C-175/11	31 January 2013	APD	Accelerated procedures: accelerated procedures by reference to nationality or country of origin; and right to an effective remedy in light of judicial independence of one available reviewing tribunal.
<i>A, B and C</i>	C-148/13, C-149/13 and C-150/13	2 December 2014	APD	Requirements for a personal interview: Article 13(3)(a) on interviews taking into account the personal and general circumstances surrounding the application (stereotyped notions in the context of sexual orientation) and the applicant's vulnerability.
<i>Abdida</i>	C-562/13	18 December 2014	APD	Right to judicial remedy with suspensive effect.
<i>Abdoulaye Amadou Tall v Centre public d'action sociale de Huy (CPAS de Huy)</i>	C-239/14	17 December 2015	APD	Right to an effective remedy: non-suspensory effect of an appeal against a decision of the competent authority not to further examine a subsequent application for asylum is not precluded by the APD.

2.2.4.2. CJEU pending case-law on the Asylum Procedures Directive

<i>MM v Minister for Justice and Equality, Ireland and the Attorney General</i>	C-560/14	pending	APD	Questions referred by the Supreme Court (Ireland) on 5 December 2014 on the application of the right to be heard to applications for subsidiary protection in the context of a separate procedure for examining applications for international protection.
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2.2.4.3. Relevant ECtHR case-law

<i>Bahaddar v the Netherlands</i>	25894/94	19 February 1998	Article 26 ECHR on need to exhaust all remedies in host State (paras 43-49).
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⁽⁹⁸⁾ As apparent in the table, all CJEU judgments so far relate to the APD. They can nevertheless be relevant for the interpretation of the APD (recast).

<i>Jabari v Turkey</i>	40035/98	11 July 2000	Article 13 ECHR on effective remedy requiring independent rigorous scrutiny (para. 50).
<i>Čonka v Belgium</i>	51564/99	5 February 2002	Article 5(1) and Article (4) on accessible and effective remedies (paras 38-46 and 53-55) and Article 13 in conjunction with Article 4 Protocol No 4 on effective remedies with suspensive effects (paras 75-85).
<i>N v Finland</i>	38885/02	26 July 2005	Article 3 ECHR on <i>non-refoulement</i> with resolving doubt in favour of applicant (paras 158-167).
<i>Gebremedhin v France</i>	25389/05	26 April 2007	Article 13 in conjunction with Article 3 on the right to an effective remedy requiring rigorous scrutiny and suspensive effects (paras 53-67).
<i>Sultani v France</i>	45223/05	20 September 2007	Article 4 Protocol No 4 on prohibition of collective expulsion in context of shortened procedure on subsequent application (paras 81-84).
<i>Saadi v Italy</i>	37201/06	28 February 2008	Material used to assess the risk of exposure to treatment contrary to Article 3 (paras 128-133) and assessment of that risk in case of an applicant posing a terrorist threat to the host country (paras 137-149).
<i>Ben Khemais c Italie</i>	246/07	24 February 2009	Article 3 ECHR on <i>non-refoulement</i> and ‘diplomatic assurances’ of country of origin (paras 53-64).
<i>MSS v Belgium and Greece</i>	30696/09	21 January 2011	Article 13 in conjunction with Article 2 ECHR in the context of shortcomings in the asylum procedure of a responsible State under the Dublin system (paras 286-322) and because of lack of an effective remedy against a Dublin transfer (paras 385-396).
<i>Othman (Abu Qatada) v the United Kingdom</i>	8139/09	17 January 2012	Article 3 ECHR <i>non-refoulement</i> and the quality of diplomatic assurances (paras 187-189) and <i>non-refoulement</i> on the basis of Article 6 ECHR in case of flagrant denial of justice (paras 258-287).
<i>IM c France</i>	9152/09	2 February 2012	Article 13 ECHR on procedural requirements that must not render effective remedies illusory and accelerated asylum procedures (paras 127-135).
<i>Hirsi Jamaa and Others v Italy</i>	27765/09	23 February 2012	Article 1 ECHR on responsibility for return of migrants intercepted on high seas (paras 70-82).
<i>Labsi v Slovakia</i>	33809/08	15 May 2012	Article 3 ECHR on absolute nature of <i>non-refoulement</i> even in case of security risk for the host State (para. 128) and Article 13 ECHR concerning the absence of an effective remedy in respect of such complaint (paras 133-140).
<i>Singh et autres c Belgique</i>	33210/11	2 October 2012	Article 13 on the right to an effective remedy and the duty to evaluate documents capable of verification (paras 102-104).
<i>Abdulkhakov v Russia</i>	14743/11	2 October 2012	Article 3 ECHR on <i>non-refoulement</i> in context of extra-judicial transfer/extraordinary rendition contrary to rule of law (paras 138-157).
<i>El-Masri v The Former Yugoslav Republic of Macedonia</i>	39630/09	13 December 2012	Article 3 ECHR on <i>non-refoulement</i> in circumstances in which burden of proof shifts to the State (paras 165-167 and 199).
<i>AC et autres c Espagne</i>	6528/11	22 April 2014	Article 13 ECHR in conjunction with Articles 2 and 3 on the necessity of suspension of removal pending review on appeal (paras 87 and 94-105).

2.2.5. The 2013 Reception Conditions Directive (recast)

The RCD (recast) ⁽⁹⁹⁾ aims to establish ‘a dignified standard of living and comparable living conditions for applicants for international protection in all Member States’ (recital (11)) ⁽¹⁰⁰⁾ with the view to ‘limit [their] secondary movements [...] influenced by the variety of conditions for their reception’ (recital (12)).

Contrary to the RCD which covers applicants for refugee status ⁽¹⁰¹⁾, the RCD (recast) has an expanded personal scope and applies to ‘all third-country nationals and stateless persons who make an application for international protection [...] as long as they are allowed to remain on the territory as applicants’ (Article 3(1)), as well as to family members if covered by such application (Article 3(1)). Its provisions are applicable as soon as the individual lodges his/her application for international protection ⁽¹⁰²⁾ and until final decision thereon ⁽¹⁰³⁾, or, if the Dublin III Regulation is applied, until the applicant is actually transferred to the responsible Member State ⁽¹⁰⁴⁾.

The RCD (recast) is structured into seven chapters which can be summarised as follows:

Chapter I	Purpose, definitions and scope of the Directive, including more favourable provisions (Article 4).
Chapter II	General provisions on reception conditions, covering obligations relating to information (Article 5), documentation (Article 6), residence and free movement (Article 7), detention (Articles 8-11), family unity (Article 12), medical screening (Article 13), schooling and education of minors (Article 14), employment (Article 15), vocational training (Article 16), material reception conditions and healthcare (Article 17), modalities for material reception conditions (Article 18) and healthcare (Article 19).
Chapter III	Reduction or withdrawal of material reception conditions.
Chapter IV	Provisions for vulnerable persons.
Chapter V	Appeals.
Chapter VI	Actions to improve the efficiency of the reception system.
Chapter VII	Final provisions.

Among the general provisions on reception conditions, those on the detention of applicants for international protection are particularly noteworthy. The rule is that an applicant for international protection shall not be detained for the sole reason that he or she is an applicant (Article 8(1)). Member States retain a permissive power to do so, on the basis of an individual assessment, to the extent that detention is proportionate as a measure of last resort in the absence of effective but less coercive alternatives (Article 8(2)) and necessary for:

- (a) determining or verifying the identity or nationality of an applicant;
- (b) determining elements of the application when these cannot be obtained without detention, in particular when there is a risk the applicant will abscond;
- (c) deciding on the applicant’s right to enter the territory;
- (d) in order to prepare or carry out return by virtue of the 2008 Returns Directive;

⁽⁹⁹⁾ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L 180/96.

⁽¹⁰⁰⁾ See also Art. 1 RCD (recast).

⁽¹⁰¹⁾ Recital (16) RCD nonetheless states that ‘Member States are also invited to apply the provisions of this Directive in connection with procedures for deciding on applications for forms of protection other than that emanating from the Geneva Convention for third country nationals and stateless persons’.

⁽¹⁰²⁾ CJEU, *Cimade and GISTI* judgment, op. cit., fn. 58, paragraph 39. See also, CJEU, judgment of 27 February 2014, Case C-79/13, *Federaal agentschap voor de opvang van asielzoekers v Saciri and Others*, ECLI:EU:C:2014:103, paragraph 33.

⁽¹⁰³⁾ See the definition of ‘applicant’ in Art. 2(b) RCD (recast).

⁽¹⁰⁴⁾ CJEU, *Cimade and GISTI* judgment, op. cit., fn. 58, paragraph 61.

- (e) for national security or public order; or
- (f) in accordance with the Dublin III Regulation (Article 8(3)).

These grounds must be laid down in national law. Moreover, an applicant must be detained only for so long as the grounds are applicable and for as short a period as possible (Article 9(1)). Article 9 lays down guarantees for detained applicants concerning the length of detention, the applicant's notification of the reasons for his/her detention and remedies, speedy judicial review of the lawfulness of detention and legal assistance. The conditions of detention are then detailed in Article 10 which prescribes that applicants shall be detained, as a rule, in specialised detention facilities or at least be separated from ordinary prisoners (Article 10(1)). Other conditions of detention covered by the article include contact with the outside world, access by family members and advisers or counsellors, and the obligation to inform applicants of their rights, obligations and the rules in the detention facility. Additional guarantees and obligations are given in case of detention of vulnerable persons with special reception needs under Article 11.

Applicants have the right to appeal pursuant to the provisions of national law against decisions relating to the granting, withdrawal or reduction of benefits or relating to their place of residence and their freedom of movement in the Member States (Article 26). This must include, at least in the final instance, an appeal or review in fact and law before a judicial authority (Article 26(1)) and, provision of free legal assistance and representation in so far as such aid is necessary to ensure effective access to justice (Article 26(2)).

2.2.5.1. CJEU case-law on the Reception Conditions Directive ⁽¹⁰⁵⁾

<i>Cimade and GISTI</i>	C-179/11	27 September 2012	RCD	Application of the RCD during Dublin procedures.
<i>Saciri and Others</i>	C-79/13	27 February 2014	RCD	Article 13(5) RCD in conjunction with Article 13(1) and (2) and Article 14(1), (3), (5) and (8) on reception conditions in the form of financial allowances or vouchers and overloaded accommodation facilities.

2.2.5.2. CJEU pending case-law on the Reception Conditions Directive

<i>JN v the State Secretary of Security and Justice</i>	C-601/15 PPU	pending	RCD (recast)	Questions referred by the Raad van State (Netherlands) on 17 November 2015 on the compatibility with Article 6 of the EU Charter of detention of applicants for international protection without the purpose of deportation on the basis Article 8(3)(e).
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⁽¹⁰⁵⁾ As apparent in the table, all CJEU judgments so far relate to the RCD. They can nevertheless be relevant for the interpretation of the RCD (recast).

2.2.5.3. Relevant ECtHR case-law

<i>Mubilanzila Mayeka and Kaniki Mitunga v Belgium</i>	13178/03	12 October 2006	Article 3 ECHR (paras 50-59), Article 8 ECHR (paras 75-87) and Article 5 ECHR (paras 96-105) on detention of a minor in a facility for adults.
<i>SD c Grèce</i>	53541/07	11 June 2009	Article 5 ECHR on detention conditions (paras 43-54), lawfulness of detention (paras 57-67) and review thereof (paras 70-77).
<i>Tabesh c Grèce</i>	8256/07	26 November 2009	Article 5 ECHR on detention conditions (paras 34-44), lawfulness of detention (paras 49-57) and review thereof (paras 61-63).
<i>AA c Grèce</i>	12186/08	22 July 2010	Article 5 ECHR on detention conditions (paras 49-65), lawfulness of detention (paras 84-94) and review thereof (paras 70-79).
<i>MSS v Belgium and Greece</i>	30686/09	21 January 2011	Article 5 ECHR on detention conditions (paras 216-234) and living conditions (paras 249-264).
<i>Tarakhel v Switzerland</i>	29217/12	4 November 2014	Article 3 ECHR on <i>non-refoulement</i> because of reception conditions for a family with six children (paras 87-122).

2.2.6. The 2001 Temporary Protection Directive

The Temporary Protection Directive ⁽¹⁰⁶⁾ is an instrument of secondary EU law which aims

to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin and to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons (Article 1).

The temporary protection regime is an EU-wide measure of ‘exceptional character’ to provide immediate and temporary protection to persons in a mass influx situation when, in particular, there is also a risk that the asylum system will be unable to process the influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection (Article 2(a)) ⁽¹⁰⁷⁾. Activation of the Directive would grant persons belonging to the designated eligible group an immediate short-term protection status without the need for individual assessment of their qualification for international protection, thus alleviating pressure on the asylum procedure of Member States. In addition, as the measure is EU-wide, it aims to reduce disparities between the protection policies of Member States towards the eligible group. Further, it provides a voluntary but structured burden-sharing mechanism whereby Member States indicate their capacity to receive persons who are eligible for temporary protection (Article 25(1)). It then allows for the transfer of beneficiaries, from third States into the EU and/or between EU Member States, based on a voluntary offer and the consent of the persons concerned (Article 26(1) and (2)). Beneficiaries of temporary protection are entitled to make an application for asylum at any time which, if rejected, shall not affect continuance of that temporary protection (Articles 17 and 19).

⁽¹⁰⁶⁾ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212/12.

⁽¹⁰⁷⁾ See recital (2) refers to ‘exceptional schemes’ to offer displaced persons in a mass influx immediate temporary protection.

In accordance with Article 5, the implementation of temporary protection is a collective decision of the Council of Ministers of the EU and, therefore, Member States may not resort to it individually. The temporary protection regime established in the 2001 Directive has never been used.

2.3. Other secondary legislation relevant to the field of international protection

Finally in this Section it is appropriate to refer briefly to other instruments of secondary legislation which, although not forming part of the CEAS, are nevertheless relevant to its implementation. The first is the EASO Regulation which is directly concerned with establishing an EU Agency dedicated to supporting the implementation of the system. The other three are Directives which have implications for the treatment of beneficiaries of international protection and those who do not qualify for international protection following an examination of their application.

2.3.1. The 2010 EASO Regulation

The EASO Regulation ⁽¹⁰⁸⁾ is the instrument of secondary EU Law that establishes EASO (European Asylum Support Office). The role of EASO is:

to help to improve the implementation of the Common European Asylum System (the CEAS), to strengthen practical cooperation among Member States on asylum and to provide and/or coordinate the provision of operational support to Member States subject to particular pressure on their asylum and reception systems (Article 1).

EASO's legal status is that of a body of the Union with its own legal personality (Article 40). It functions as an independent source of expertise on all issues relating to EU policy and legislation relative to asylum (Article 2(3)) but has no power in relation to the taking of decisions on individual applications for international protection (Article 2(6)). Among its duties, there is specific provision to organise, promote and coordinate activities relating to information on countries of origin (Article 4). This includes in particular, gathering relevant, reliable, accurate and up-to date information; drafting reports; managing, developing and maintaining a portal for gathering information; developing a common format and a common methodology for presenting, verifying and using information; and analysing information in a transparent manner with a view to fostering convergence of assessment criteria which shall not purport to give instructions to Member States about the determination of asylum applications. Moreover, in order to enable Member States to be better prepared for coping with changing flows of asylum-seekers, the EU has set up an Early Warning and Preparedness System that feeds into a Mechanism for Early Warning, Preparedness and Crisis Management.

EASO also provides operational support to Member States subject to particular pressure on their asylum and reception systems. In addition, training is provided, primarily in the form of the EASO Training Curriculum, to staff of national asylum determination bodies. EASO's

⁽¹⁰⁸⁾ Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office [2010] OJ L 132/11. Note: On 4 May 2016, the Commission published its Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, COM(2016) 271 final.

quality activities aim to support EU Member States in the continuous improvement of the quality standards of their asylum systems and in achieving common quality standards within the CEAS. It facilitates the exchange of information among Member States, allowing for the identification and sharing of good practices, quality tools and mechanisms, as well as specific initiatives. In its work on quality, EASO also focuses on particular issues, including unaccompanied minors and other categories of vulnerable persons.

For members of courts and tribunals, provisions of particular importance are Article 6(1) and (5):

1. The Support Office shall establish and develop training available to members of all national administrations and courts and tribunals, and national services responsible for asylum matters in the Member States. Participation in training is without prejudice to national systems and procedures.

[....]

5. The training offered shall be of high quality and shall identify key principles and best practices with a view to greater convergence of administrative methods and decisions and legal practice, in full respect of the independence of national courts and tribunals.

2.3.2. The 2003 Family Reunification Directive

The Family Reunification Directive ⁽¹⁰⁹⁾ is an instrument of secondary EU law aimed at establishing the ‘right to family reunification for third country nationals’ (recital (16)). The Directive applies to third-country nationals residing lawfully in the territory of the Member States, including persons with refugee status. It explicitly excludes applicants for refugee status, temporary protection, and a subsidiary form of protection (in accordance with international obligations, national legislation or the practice of Member States) as well as beneficiaries of subsidiary protection and temporary protection (Article 3(2)). At the time when the Family Reunification Directive was adopted, the subsidiary protection regime in the QD had not yet been adopted. Therefore, the right of beneficiaries of subsidiary protection to family reunification is a matter for national law.

The Directive includes more favourable provisions for the family reunification of refugees in three respects:

- 1) where a refugee’s child is aged over 12 years and arrives independently of the family, the Member State may not make family reunification conditional upon the child meeting integration criteria (Article 10(1));
- 2) Member States are under an obligation to authorise the family reunification of the first-degree relatives in the direct ascending line of a refugee who is an unaccompanied minor (Article 10(3)(a)) and, when no such relatives exist, Member States may authorise family reunification of his/her legal guardian or any other member of the family (Article 10(3)(b));

⁽¹⁰⁹⁾ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.

- 3) Member States may also authorise family reunification of other family members insofar as they are dependent on the refugee (Article 10(2)).

Article 11 takes into account that refugees may not be in a position to provide official documentary evidence of the family relationship. The provision imposes an obligation on Member States to ‘take into account other evidence, to be assessed in accordance with national law, of the existence of such relationship. A decision rejecting an application may not be based solely on the fact that documentary evidence is lacking’.

The Directive requires sponsors to provide evidence that they have suitable accommodation, sickness insurance, as well as stable and regular resources (Article 7(1)). These requirements, however, do not apply in the case of refugees, although Member States have a permissive power to impose such requirements if family reunification is possible in a third country and/or if the application for family reunification is not submitted within three months after the granting of refugee status (Article 12(1)). Article 12(2) establishes that ‘Member States shall not require the refugee to have resided in their territory for a certain period of time, before having his/her family members join him/her’.

2.3.3. The 2003 and 2011 Long-Term Residents Directives

The 2003 Long-Term Residents Directive ⁽¹¹⁰⁾, as amended by the 2011 Long-Term Residents Directive ⁽¹¹¹⁾, is an instrument of secondary EU law which aims at ensuring the integration of third-country nationals who are long-term residents in EU Member States by recognising their entitlement to ‘equality of treatment with citizens of the Member State in a wide range of economic and social matters’ (recital (12)) and conferring the right to reside in other Member States, subject to conditions. The 2011 Long-Term Residents Directive extends the scope of application of the 2003 Directive to include refugees and beneficiaries of subsidiary protection. Therefore, beneficiaries of international protection can apply for long-term resident status if they have resided continuously within the territory of a Member State for five years immediately prior to the submission of the application for the resident status. Acquisition of the long-term resident status means that the recipient can enjoy equal treatment with nationals as regards certain stipulated economic and social matters as well as enjoy the right of freedom of movement within the EU. As amended, the Directive explicitly affirms that such equality of treatment ‘should be without prejudice to the rights and benefits guaranteed under the [QD] and under the [Refugee Convention]’ (recital (7)).

2.3.4. The 2008 Returns Directive

The Returns Directive is an instrument of EU secondary law which

set[s] common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as

⁽¹¹⁰⁾ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L 16/44.

⁽¹¹¹⁾ Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [2011] OJ L 132/1.

general principles of community law as well as international law, including refugee protection and human rights obligations (Article 1) ⁽¹¹²⁾.

The Directive applies ‘to third-country nationals staying illegally on the territory of a Member State’ (Article 2(1)) who ‘do not or who no longer fulfil the conditions for entry, stay or residence in a Member State’ (recital (5)) with the possible exceptions regulated in Article 2(2)(a) and (b).

Recital (9) states that a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum-seeker has entered into force. The CJEU has made clear that the Returns Directive does not apply to individuals who have applied for refugee status or subsidiary protection until a final negative determination of their claim. There is a limited exception being a possibility to continue detention under the Returns Directive of a third-country national who has applied for international protection after having been detained, if the application was made solely to delay or jeopardise the enforcement of the return decision and if it is objectively necessary to maintain detention to prevent the person concerned from permanently evading his return ⁽¹¹³⁾. Otherwise, the CJEU has made it very clear that detention for the purpose of removal under the Returns Directive and the detention of an asylum-seeker in accordance with the CEAS legislation fall under different legal rules ⁽¹¹⁴⁾.

Hence, albeit the Returns Directive is not a CEAS instrument, it emphasises in recital (1) that the Tampere European Council 1999 established a coherent approach in the field of immigration and asylum, dealing together with the creation of a CEAS, a legal immigration policy and the fight against illegal immigration. Thus, the Returns Directive may cover individuals who have been refused refugee status and subsidiary protection or whose international protection status has ceased, been revoked, terminated or refused to be renewed pursuant to the QD (recast) ⁽¹¹⁵⁾ but who have nevertheless remained on the territory of the Member State in breach of immigration law.

The Directive governs termination of illegal stay which can be schematised as a three-step process entailing the obligations for Member States to: (1) issue a return decision (Article 6); (2) provide a period of voluntary departure (7-30 days) which may not be granted or may be reduced in a limited set of situations (Article 7); and (3) take all necessary measures to enforce the return decision by removal which shall, however, be postponed if it were to result in a violation of the principle of *non-refoulement* or in case of appeal against the return decision (Articles 8-9). During such process, third-country nationals can be detained for the purpose of removal if necessary and proportionate (Article 15). The conditions of detention are detailed in Article 16 and the particular situation of detained minors and families regulated by Article 17. Exceptions are laid down in Article 18 in case of emergency situations involving ‘an exceptionally large number of third-country nationals’ to be removed.

As mentioned above, the Returns Directive does not apply to applicants for international protection. As such the table below includes cases which do not relate to asylum applicants.

⁽¹¹²⁾ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98.

⁽¹¹³⁾ CJEU, judgment of 30 May 2013, Case C-534/11, *Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie*, ECLI:EU:C:2013:343, paragraphs 49 and 63.

⁽¹¹⁴⁾ CJEU, judgment of 30 November 2009, Grand Chamber, Case C-357/09 PPU, *Said Shamilovich Kadzoev (Huchbarov)*, ECLI:EU:C:2009:741, paragraph 45.

⁽¹¹⁵⁾ See above Section 2.2.3., pp. 41-47.

However, these cases may be relevant with regard to those persons whose application for international protection has been finally refused or whose international protection status has ceased, been revoked, terminated or refused to be renewed pursuant to the QD (recast) but who remain illegally on the territory of the Member State within the meaning of Article 3(2) of the Returns Directive.

2.3.4.1. Relevant CJEU case-law on the Returns Directive

<i>Kadzoev</i>	C-357/09 PPU	30 November 2009	Article 15(4)-(6) on length of detention.
<i>El Dridi</i>	C-61/11 PPU	28 April 2011	Articles 15 and 16 on grounds of detention.
<i>Achughbabian</i>	C-329/11	6 December 2011	Criminal penalties for non-compliance with return decision and detention.
<i>Sagor</i>	C-430/11	6 December 2012	Application of fines for illegally staying third-country nationals and home detention orders.
<i>Mbaye</i>	C-522/11	21 March 2013	Criminal penalties for non-compliance with return decision and the application of fines for illegally staying third-country nationals (order).
<i>Arslan</i>	C-534/11	30 May 2013	Non-application of the Directive to applicants for international protection without prejudice to a possibility to continue detention of persons abusing international protection procedure (paras 40-63).
<i>MG and NR</i>	C-383/13 PPU	10 September 2013	Article 15(2) and (6) on the right to be heard and review of the lawfulness of detention.
<i>Filev and Osmani</i>	C-297/12	19 September 2013	Article 11(2) on limitation of the length of an entry ban; and Article 2(2)(b) on criminal law sanctions.
<i>Mahdi</i>	C-146/14 PPU	5 June 2014	Article 15(1), (3), (4) and (6) on extension of detention and identity documents.
<i>Bero and Bouzalmate</i>	C-473/13 and C-514/13	17 July 2014	Article 16(1) on detention in specialised detention facilities.
<i>Pham</i>	C-474/13	17 July 2014	Article 16(1) on prohibition of detention in prison accommodation with ordinary prisoners.
<i>Mukarubega</i>	C-166/13	5 November 2014	Article 6 on the right to be heard.
<i>Boudjilida</i>	C-249/13	11 December 2014	Article 6 on the right to be heard.
<i>Abdida</i>	C-562/13	18 December 2014	Articles 5 and 13 on suspensive effect of appeals against a return decision in case of seriously ill third-country nationals and provision of emergency healthcare.
<i>Zaizoune</i>	C-38/14	23 April 2015	Articles 6(1) and 8(1) in conjunction with Article 4(2) and (3) on the mutually exclusiveness of the imposition of a fine and removal for third-country nationals illegally staying in the territory of a Member State.
<i>Skerdjan Celaj</i>	C-290/14	1 October 2015	Article 11(1) on entry ban and imposition of a prison sentence in case of unlawful re-entry in breach of an entry ban.

2.3.4.2. CJEU pending case-law on the Returns Directive

<i>Sélina Affum (Amissah by marriage) v Préfet du Pas de Calais, Procureur général de la Cour d'appel de Douai</i>	C-47/15	pending	Questions referred by the Cour de cassation (France) on 6 February 2015 on Article 3(2) on the interpretation of illegally staying third-country nationals in the context of transit at airport and Article 6(3) on right of Member States to refrain from issuing a return decision.
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Part 3: Interpretation and application of the legislative provisions of the CEAS

The ultimate jurisdiction for the interpretation of EU legislative provisions is the CJEU (Article 267 TFEU) but it is essential to the administration of EU law to understand the role of the national judges of Member States in this regard. When national courts or tribunals are required to interpret the provisions of EU law, whether by direct reference to EU legislation or to national transposing legislation or binding judgments of the CJEU, the national judge is required to act as an 'EU judge'. He/she should adopt the same interpretative approach as the CJEU and adhere to the principles of application of EU law. Familiarity with the general approach of the CJEU, as illustrated by its jurisprudence, is therefore an essential tool for the national judge in the discharge of these duties.

In Part 3, questions of interpretation and application will be considered under six principal heads:

- The CEAS and the Refugee Convention (Section 3.1., pp. 61-63);
- Methods of interpretation of EU law (Section 3.2., pp. 63-65);
- Principles of application of EU law (Section 3.3., pp. 65-69);
- The interplay between the interpretation of EU law and the ECHR, international and national law (Section 3.4., pp. 70-80);
- Referral to the CJEU pursuant to Article 267 TFEU (Section 3.5., pp. 80-84); and
- The approach of national courts and tribunals (Section 3.6., pp. 84-89).

3.1. The CEAS and the Refugee Convention ⁽¹¹⁶⁾

The content of the CEAS is inspired by international treaties as they affect issues concerning international protection needs as defined by the QD (recast). This applies particularly with regards to the Refugee Convention and its 1967 Protocol which are the only instruments explicitly referred to in Article 78 TFEU (repeating the earlier provision in Article 63 TEC to the same effect) which provides that '[t]his policy must be in accordance with the Geneva [Refugee] Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties'. According to the 1999 Tampere Conclusions, the CEAS was to be established 'based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement' ⁽¹¹⁷⁾. Hence, the importance of the Refugee Convention and its Protocol is underlined in all CEAS instruments, save for the Eurodac Regulation ⁽¹¹⁸⁾.

The QD (recast) further underlines that '[t]he Geneva Convention and the protocol provide the cornerstone of the international legal regime for the protection of refugees' (recital (4)). It follows that the Refugee Convention is the touchstone from which the QD (recast) derives its qualification for refugee status but it does not directly inform the provisions of the APD

⁽¹¹⁶⁾ I.e. Convention relating to the Status of Refugees.

⁽¹¹⁷⁾ 1999 Tampere Conclusions, op. cit., fn. 4, paragraph 13.

⁽¹¹⁸⁾ See recital (4) of the EASO Regulation (EU); recital (10) of the Temporary Protection Directive; recital (3) of Dublin III Regulation; recital (3) of the RCD (recast); recital (3) of the APD (recast); recital (3) of the QD (recast).

(recast) or the RCD (recast) because the Refugee Convention is silent on such matters. UNHCR, the body charged with its administration, has always left questions of procedure relating to recognition of refugee status and reception of applicants to be dealt with in accordance with the laws and practices of States Parties ⁽¹¹⁹⁾.

The QD (recast) lays down standards for the definition and content of refugee status in order to guide the competent national bodies of Member States in the application of the Refugee Convention and provides common criteria for recognising applicants as refugees within the meaning of Article 1 of the Refugee Convention (recitals (23) and (24) QD (recast)).

In *Abdulla v Germany*, the CJEU reminded itself of the relevance of the Refugee Convention under Article 63 TEC (now Article 78 TFEU) and as the cornerstone of the international legal regime for the protection of refugees. It noted that the provisions of the QD ‘were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria’ ⁽¹²⁰⁾. The CJEU concluded that ‘the provisions of the Directive must for that reason be interpreted in the light of its general scheme and purpose, while respecting the [Refugee] Convention and the other relevant treaties referred to in’ Article 78(1) TFEU ⁽¹²¹⁾.

Where the CEAS legislation makes direct *renvoi* to the Refugee Convention ⁽¹²²⁾, the relevant provisions of EU law must be interpreted by using the EU approach to interpretation. Nevertheless, it seems that, according to the case-law of the CJEU on other international conventions, the Refugee Convention should, in such a situation, be interpreted by using the normal approach under the Vienna Convention on the Law of Treaties ⁽¹²³⁾.

It is worth noting that not all of the Member States’ obligations stemming from the Refugee Convention and its Protocols towards third-country nationals are implemented by the CEAS instruments. The wider effect of Member States’ international obligations under the Refugee Convention is left primarily as a matter for Member States’ national law ⁽¹²⁴⁾. Members of courts and tribunals in Member States will also need to consider the application of their own national laws implementing the Refugee Convention where they provide more favourable standards than apply under the CEAS ⁽¹²⁵⁾.

The role of UNHCR in relation to the CEAS was provided by Declaration 17 to the Treaty of Amsterdam: ‘Consultations shall be established with [UNHCR] and other relevant international organisations on matters relating to asylum policy’. UNHCR’s role in relation to the CEAS flows from its competence in relation to the Refugee Convention, and in particular under its Article 35, which imposes an obligation for States Parties to cooperate with UNHCR. Recital (22) to the QD (recast) makes clear that consultations with UNHCR may provide valuable guidance for Member States when determining refugee status. Furthermore, Member States must allow

⁽¹¹⁹⁾ The UNHCR Executive Committee made recommendations in October 1997 as to the basic requirements which should be met by national procedures (*Safe-guarding Asylum*, ExCom Conclusion No 82 (XLVIII), 17 October 1997, paragraph (d)(ii)). Although generally observed, they have no binding force but their thrust is generally reflected in the provisions of the APD. They are set out at paragraph 192 of the UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 1979, reissued December 2011 (UNHCR Handbook).

⁽¹²⁰⁾ CJEU, *Abdulla and Others* judgment, op. cit., fn. 3 paragraph 52.

⁽¹²¹⁾ *Ibid.*, paragraph 53. See also CJEU, judgment of 19 December 2012, Grand Chamber, Case C-364/11, *Mostafa Abed El Karem El Kott, Chadi Amin A Radi and HazemKamel Ismail v Bevándorlási és Állampolgársági Hivatal*, ECLI:EU:C:2012:826, paragraph 43.

⁽¹²²⁾ See CJEU, *Qurbanji* judgment, op. cit., fn. 41.

⁽¹²³⁾ See CJEU, judgment of 25 February 2010, Case C-368/08, *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen*, ECLI:EU:C:2010:91, paragraph 39. See also Section 3.2. below, pp. 63-65, and J. McAdam, ‘Interpretation of the 1951 Convention’, in A. Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (OUP, 2011), pp. 75-115.

⁽¹²⁴⁾ In relation to obligations towards EU nationals, see Section 2.1.4. above, p. 33, on Protocol No 24.

⁽¹²⁵⁾ As to the issue of compatibility of more favourable national law provisions with the objects of the CEAS, see for instance, CJEU, *M’Bodj* judgment, op. cit., fn. 62, paragraphs 43-46.

UNHCR to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Refugee Convention, to any competent authorities regarding individual applications for international protection at any stage of the procedure (Article 29(1)(c) APD (recast)). In this regard, UNHCR's Handbook and subsequent Guidelines on International Protection may provide valuable guidance to national courts and tribunals, although they are not binding ⁽¹²⁶⁾. National courts and tribunals may also wish to take into account UNHCR's views on the interpretation of CEAS provisions which do not derive from the Refugee Convention, including subsidiary protection ⁽¹²⁷⁾.

3.2. Methods of interpretation of EU law

The provisions of the CEAS have to be interpreted according to the methods of interpretation of EU law. In contrast to the rules of interpretation of international treaties enshrined in the 1969 [Vienna Convention on the Law of Treaties](#), the methods for interpreting EU law are not laid down in any EU instrument. They have been developed over the years by the CJEU in its jurisprudence.

The first decision to refer to the interpretation of EU law is the 1963 *Van Gend en Loos* judgment. There the CJEU recalled the importance of 'the spirit, the general scheme and the wording' of provisions for their interpretation ⁽¹²⁸⁾. These three interpretative features were further refined in subsequent case-law, most notably in the 1982 *CILFIT* judgment. In this case, the CJEU ruled that, should the wording of an EU law provision be unclear:

every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied ⁽¹²⁹⁾.

On the basis of these two seminal judgments, and for methodological purposes, the methods of interpretation developed by the CJEU are most often categorised as threefold:

- 1) literal;
- 2) contextual/systematic; and
- 3) teleological/purposive.

These three different methods of interpretation remain, however, an ad hoc doctrinal construction and are not clearly delineated in practice. Hence, they often overlap and are sometimes hard to distinguish from one another. 'Where the EU law provision in question is ambiguous, obscure or incomplete, all the methods of interpretation employed by the [CJEU] may operate in a mutually reinforcing relationship' ⁽¹³⁰⁾. A teleological/purposive approach often plays an important role in the area of asylum, but the other methods are also utilised ⁽¹³¹⁾.

⁽¹²⁶⁾ For the full list of UNHCR Guidelines on International Protection, see Section 2.2 of [Appendix C](#) below, pp. 106-111.

⁽¹²⁷⁾ UNHCR Handbook, op. cit., fn. 119.

⁽¹²⁸⁾ CJEU, judgment of 5 February 1963, case 26/62, *Van Gend en Loos v Netherlands*, ECLI:EU:C:1963:1, p. 12.

⁽¹²⁹⁾ CJEU, judgment of 6 October 1982, case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, ECLI:EU:C:1982:335, paragraph. 20.

⁽¹³⁰⁾ K. Lenaerts and J.A. Gutierrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice', EUI Working Papers AEL 2013/9, European University Institute, 2013, p. 48.

⁽¹³¹⁾ See for instance CJEU, judgment of 4 December 1974, Case C-41/74, *Yvonne van Duyn v Home Office*, ECLI:EU:C:1974:133, paragraph 12 leading the Court to conclude that provisions of directives can have direct effect (see Section 3.3. below, pp. 65-69).

A literal interpretation is only of relevance in the absence of a definition in the text subject to interpretation. The literal interpretation refers to the meaning of a provision in ordinary language ⁽¹³²⁾. As underlined by the CJEU in its *CILFIT* judgment, ‘Community law uses terminology which is peculiar to it’ ⁽¹³³⁾. In the *Diakité* judgment on Article 15(c) QD, for instance, the CJEU defined an internal armed conflict ‘by considering its usual meaning in everyday language’ ⁽¹³⁴⁾, rather than on the basis of international humanitarian law. As established by the CJEU, it must also be borne in mind that EU law is drafted in several official languages and that the different language versions are all equally authentic ⁽¹³⁵⁾: ‘The different language versions of a Community text must be given a uniform interpretation and hence in the case of divergence between the versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.’ ⁽¹³⁶⁾ Today, 24 language versions are equally authentic ⁽¹³⁷⁾.

The contextual/systematic method aims to interpret the provision in light of the context to which it pertains in order to ensure legal coherence within a given provision, a specific instrument and the whole EU legal order. This method of interpretation is illustrated in the 2009 *Elgafaji* judgment of the CJEU. In order to determine the scope of Article 15(c) QD, the CJEU referred to the other two types of serious harm defined in subparagraphs (a) and (b) and to the logic of Article 15 ⁽¹³⁸⁾ in order to ensure ‘a coherent interpretation in relation with the other two situations referred to in Article 15 of the Directive [...]’ ⁽¹³⁹⁾. The CJEU moreover noted that this interpretation was not invalidated by recital (26) ⁽¹⁴⁰⁾. This reasoning also demonstrates the importance of ensuring the ‘effet utile’ of EU law provisions (principle of effectiveness) as, through its interpretation, the CJEU aimed ‘to ensure that Article 15(c) of the Directive has its own field of application’ compared to subparagraphs (a) and (b) ⁽¹⁴¹⁾. Moreover, for the CJEU, the ‘context’ is not necessarily restricted to the specific Directive being interpreted and can encompass the TEU, TFEU and the Charter, as illustrated in the 2013 judgment *X, Y and Z* in which the Court reiterated that the Directive in question must be interpreted in a manner consistent with the rights recognised by the Charter ⁽¹⁴²⁾.

The teleological/purposive method of interpretation relies on the purpose of the provision of EU law, of the act of which it forms part ⁽¹⁴³⁾ and of EU law more generally. It was for instance applied by the CJEU in its 2014 *M’Bodj* judgment where the Court had to determine whether Article 15(b) QD could apply to seriously ill individuals risking premature death upon removal to their country of origin. In this respect, the CJEU referred to the broader purpose of the QD and its subsidiary protection status in relation to refugee status to conclude that such seriously ill individuals were not covered by Article 15(b) ⁽¹⁴⁴⁾.

⁽¹³²⁾ K. Lenaerts and J.A. Gutierrez-Fons, op. cit., fn. 130, pp. 5 and 6.

⁽¹³³⁾ CJEU, *CILFIT* judgment, op. cit., fn. 129, paragraph 19.

⁽¹³⁴⁾ CJEU, judgment of 30 January 2014, Case C-258/12, *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides*, ECLI:EU:C:2014:39, paragraph 27. See also paragraph 28.

⁽¹³⁵⁾ CJEU, *CILFIT* judgment, op. cit., fn. 129, paragraph 18.

⁽¹³⁶⁾ CJEU, judgment of 27 October 1977, case 30/77, *Regina v Pierre Bouchereau*, ECLI:EU:C:1977:172, paragraph 14. See also CJEU, judgment of 9 January 2003, Case C-257/00, *Givane and Others v Secretary of State for the Home Department*, ECLI:EU:C:2003:8, paragraph 37.

⁽¹³⁷⁾ 23 language versions by virtue of Art. 55 TEU and Croatian.

⁽¹³⁸⁾ CJEU, judgment of 17 February 2009, Case C-465/07, *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie*, ECLI:EU:C:2009:94, paragraphs 31-35 and 38.

⁽¹³⁹⁾ *Ibid.*, paragraph 38.

⁽¹⁴⁰⁾ *Ibid.*, paragraph 36.

⁽¹⁴¹⁾ *Ibid.*

⁽¹⁴²⁾ CJEU, judgment of 7 November 2013, joined cases C-199/12, C-200/12 and C-201/12, *Minister voor Immigratie en Asiel v X and Y, and Z v Minister voor Immigratie en Asiel*, ECLI:EU:C:2013:720, paragraph 40.

⁽¹⁴³⁾ See for instance, CJEU, judgment of 21 February 1973, case 6/72, *Europemballage Corporation and Continental Can Company Inc v Commission of the European Communities*, ECLI:EU:C:1973:22, paragraphs 22-26.

⁽¹⁴⁴⁾ CJEU, *M’Bodj* judgment, op. cit., fn. 62, paragraph 37: ‘That interpretation is also supported by recitals 5, 6, 9 and 24 in the preamble to Directive 2004/83, from which it is apparent that, while the directive is intended to complement and add to, by means of subsidiary protection, the protection of refugees enshrined in the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951, through the identification of persons genuinely in need of international protection (see, to that effect, judgment in *Diakité*, op. cit., fn. 134, paragraph 33), its scope does not extend to persons granted leave to reside in the territories of the Member States for other reasons, that is, on a discretionary basis on compassionate or humanitarian grounds.’

Finally, it should be noted that, while the CJEU sometimes gives weight to the will of the legislator and the travaux préparatoires ⁽¹⁴⁵⁾; this depends to a large extent on the travaux préparatoires materials being on point and relatively clear and consistent, which is not always the case ⁽¹⁴⁶⁾.

3.3. Principles of application of EU law

As for the methods of interpretation of EU law, the CJEU has over the years developed principles governing the application of EU law. These are central to clarifying the relationship between national law and EU asylum law in order to ensure the effectiveness of the latter and, for the purpose of the present Analysis, the extent to which Member States are bound by the CEAS instruments. This Section outlines (inexhaustively) seven principles of application of EU law:

- supremacy of EU law (Section 3.3.1., pp. 65-66);
- direct effect and direct applicability (Section 3.3.2., pp. 66-67);
- indirect effect (Section 3.3.3., pp. 67-68);
- state liability (Section 3.3.4., p. 68);
- procedural autonomy (Section 3.3.5., p. 68-69);
- duty to apply EU law of its own motion (Section 3.3.6., p. 69); and
- provision of effective judicial protection for rights under EU law (Section 3.3.7., p. 69).

For the purpose of this Analysis, the principle of referral to the CJEU for a preliminary ruling is discussed separately in Section 3.5. (pp. 80-84).

3.3.1. Supremacy of EU law

Cases of conflict between provisions of EU law and the law of Member States are to be resolved according to the principle of supremacy of EU law which provides that EU law takes precedence over any inconsistent national legislation of Member States. This principle flows from the distinct nature of the EU legal order ‘for whose benefit the Member States have limited their sovereign rights, albeit within limited fields’ ⁽¹⁴⁷⁾. In case of conflict of norms, EU law thus prevails over pre-existing and subsequent legislation of Member States which becomes automatically inapplicable (rather than void) ⁽¹⁴⁸⁾. When a rule of national law is found incompatible with EU law, courts or tribunals of Member States are obliged to set aside the provision concerned and apply EU law until the national legislation is amended in accordance with EU law ⁽¹⁴⁹⁾. The principle of supremacy of EU law thus aims to maintain ‘the effectiveness of

⁽¹⁴⁵⁾ See for instance CJEU, *M’Bodj* judgment, op. cit., fn. 62, paragraph 33. The will of the legislator is however a subsidiary means of interpretation as underlined in the Opinion of the Advocate General Cosmas of 16 March 1999, Case C-378/97, *Florus Ariël Wijzenbeek*, ECLI:EU:C:1999:144, paragraph 54. The travaux préparatoires taken into consideration by the CJEU encompass explanatory memoranda to proposals (e.g. CJEU, judgment of 4 October 2001, Case C-326/99, *Stichting ‘Goed Wonen’ v Staatssecretaris van Financiën*, ECLI:EU:C:2001:506, paragraph 51; and CJEU, judgment of 11 January 2001, Case C-1/99, *Kofisa Italia Srl v Ministero delle Finanze*, ECLI:EU:C:2001:10, paragraph 40) or opinions by the European Parliament and the Economic and Social Committee (CJEU, judgment of 28 February 2002, Court of First Instance, case T-86/95, *Compagnie générale maritime and Others v Commission of the European Communities*, EU:T:2002:50, paragraph 248). See further H. Battjes, *European Asylum Law and International Law* (Nijhoff, 2006), p. 45.

⁽¹⁴⁶⁾ K. Lenaerts and J.A. Gutierrez-Fons, op. cit., fn. 130, p. 19.

⁽¹⁴⁷⁾ CJEU, judgment of 15 July 1964, case 6/64, *Flaminio Costa v ENEL*, ECLI:EU:C:1964:66, p. 593, which builds on the CJEU *Van Gend en Loos* judgment, op. cit., fn. 128, p. 12.

⁽¹⁴⁸⁾ CJEU, judgment of 17 December 1970, case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114, paragraph 3; and CJEU, judgment of 9 March 1978, case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SPA*, ECLI:EU:C:1978:49, paragraph 17. It should be noted that a distinction needs to be drawn here between those provisions which are mandatory and those which are simply permissive.

⁽¹⁴⁹⁾ CJEU, judgment of 21 June 2007, joined cases C-231 to C-233/06, *Office national des pensions v Emilienne Jonkman*, ECLI:EU:C:2007:373, paragraph 41.

obligations undertaken unconditionally and irrevocably by Member States pursuant to the treaty and [...] the very foundations of the Community (now Union)’ ⁽¹⁵⁰⁾.

3.3.2. Direct effect and direct applicability

EU primary law that has entered into force is always directly applicable, which means that it must be applied not only by Union institutions but also within the Member States’ legal orders ⁽¹⁵¹⁾. Article 288 TFEU states that EU Regulations have general application. They are binding in their entirety, are directly applicable in all Member States, and take precedence over national legislation. They do not require any further implementing legislation into Member States’ legal orders, although amendments or enactment of national legislation may be necessary to deliver on the obligations that they impose. In practice, some Member States do nevertheless transpose EU Regulations into national law. Article 288 TFEU does not mean that any national measure enacted with the intention of giving effect to a Regulation is invalid. It is only if a national measure alters, obstructs or obscures the nature of the EU Regulation that it will constitute a breach of EU law ⁽¹⁵²⁾.

By contrast, EU Directives are not directly applicable within Member States. Each Directive includes provision requiring that they shall be transposed into the national law of each Member State by a date specified in the Directive. Directives are binding as to the result to be achieved upon each Member State to which it is addressed, but the choice of form and methods is left to the national authorities (Article 288 TFEU).

It is a different matter whether a Regulation or Directive has direct effect, that is, ‘whether it can be invoked by an individual as the sole source of a right that would not otherwise exist’ ⁽¹⁵³⁾. The principle of direct effect provides that a specific provision of the treaties, secondary legislation, decisions or international agreement, when properly interpreted, confers rights that may be invoked by individuals before the courts or tribunals of Member States, thereby ensuring a uniform application of EU law where a specific provision has not or not properly been incorporated or applied at the national level ⁽¹⁵⁴⁾. This does not mean that a particular provision of EU law is not enforceable before national courts where the provision is not designed to confer rights on an individual ⁽¹⁵⁵⁾. The direct effect of a provision can be pleaded by someone other than an individual seeking to enforce rights conferred on that individual by the provisions ⁽¹⁵⁶⁾. The direct effect of an EU law provision can, and in certain circumstances should, be raised by the national court or tribunal even where none of the parties to the case has done so (but see [Section 3.3.6.](#), p. 69) ⁽¹⁵⁷⁾.

In the absence of the necessary transposing legislation, whenever the provisions of a Directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State

⁽¹⁵⁰⁾ CJEU, *Simmenthal* judgment, op. cit., fn. 148, paragraph 18. See similarly CJEU, *Internationale Handelsgesellschaft mbH* judgment, op. cit., fn. 148, paragraph 3; and CJEU, *Costa* judgment, op. cit., fn. 147, p. 594.

⁽¹⁵¹⁾ A. Rosas and L. Armati, *EU Constitutional Law. An Introduction* (2nd revised edn., Hart, 2012), p. 76.

⁽¹⁵²⁾ CJEU, judgment of 2 February 1977, case 50/76, *Amsterdam Bulb BV v Produktschap voor Siergewassen*, ECLI:EU:C:1977:13.

⁽¹⁵³⁾ A. Rosas and L. Armati, op. cit., fn. 151, p. 76.

⁽¹⁵⁴⁾ N. Fennelly, ‘The National Judge as Judge of the European Union’, in CJEU (ed.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (Asser Press, 2013), pp. 64-65.

⁽¹⁵⁵⁾ CJEU, judgment of 30 April 1996, Case C-194/94, *CIA Security International SA v Signalson SA and Securitel SPRL*, ECLI:EU:C:1996:172, paragraphs 42-44.

⁽¹⁵⁶⁾ See CJEU, judgment of 11 July 1991, joined cases C-87/90, C-88/90 and C-89/90, *A Verholen, THM van Wetten-van Uden and GH Heiderijk v Sociale Verzekeringsbank*, ECLI:EU:C:1991:314.

⁽¹⁵⁷⁾ CJEU, judgment of 24 October 1996, Case C-72/95, *Aannemersbedrijf PK Kraaijeveld BV ea v Gedeputeerde Staten van Zuid-Holland*, ECLI:EU:C:1996:404, paragraphs 57-60; CJEU, judgment of 7 March 1996, Case C-192/94, *El Corte Inglés SA v Cristina Blázquez Rivero*, ECLI:EU:C:1996:88, paragraph 15. For more on this, see P. Craig and G. De Burca, *EU Law: Text, Cases and Materials* (2nd edn., OUP, 1998).

where the latter has failed to implement the Directive in domestic law by the end of the period prescribed or where it has failed to implement the Directive correctly ⁽¹⁵⁸⁾.

These criteria are applicable in the case of both EU primary and secondary law. In the latter case, the CJEU ruled that, even though only Regulations are directly applicable in Member States and all their provisions meeting the above-mentioned criteria are thus directly effective ⁽¹⁵⁹⁾, provisions of Directives can also have vertical direct effects provided the three criteria listed above are fulfilled and the Directive has not been transposed into national law in a timely or correct way ⁽¹⁶⁰⁾. This is of considerable importance for the CEAS which, with the exception of two Regulations, consists of Directives. The principle of direct effect moreover ensures the uniform application of EU law in cases where a Member State fails to implement a Directive in its national legislation by the stated time-limit ⁽¹⁶¹⁾ or fails to implement it correctly ⁽¹⁶²⁾. Provisions of a Directive cannot, however, be directly effective before the deadline for implementation ⁽¹⁶³⁾. During that period, Member States are nonetheless under the obligation to ‘refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by [the] directive’ ⁽¹⁶⁴⁾.

Directives are only capable of vertical direct effect, that is, individuals can assert their rights in relation to Member States (vertical direct effect) but not in relation to other individuals (horizontal direct effect). In other words, while the direct effect of a Directive can be invoked in order to guarantee rights of individuals, it cannot, in general, be invoked against individuals ⁽¹⁶⁵⁾. Moreover, in the absence of transposing legislation, Directives may not be cited by a Member State against an individual ⁽¹⁶⁶⁾.

3.3.3. Indirect effect

The effectiveness of EU law is also secured by the obligation for courts or tribunals of Member States to interpret national law in line with the relevant EU law ⁽¹⁶⁷⁾. This is sometimes known as the principle of indirect effect. This obligation flows from the principle of cooperation enshrined in Article 4(3) TEU which provides that ‘Member States shall take any appropriate measures, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union’ ⁽¹⁶⁸⁾. Indeed, courts or tribunals will normally first seek to achieve an interpretation of national law in accordance with EU law (using indirect effect) before seeking to apply direct effect. Hence, courts or tribunals ‘are required to interpret their national law [as far as possible] in the light of the wording and

⁽¹⁵⁸⁾ CJEU, judgment of 15 January 2014, Grand Chamber, Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT and Others*, ECLI:EU:C:2014:2, paragraph 31.

⁽¹⁵⁹⁾ CJEU, *Amsterdam Bulb BV* judgment, op. cit., fn. 152, paragraph 5. But see CJEU, judgment of 11 January 2001, Case C-403/98, *Azienda Agricola Monte Arcosu Srl v Regione Autonoma della Sardegna [...]*, ECLI:EU:C:2001:6, paragraphs 26-28.

⁽¹⁶⁰⁾ See CJEU, *van Duyn v Home Office* judgment, op. cit., fn. 131, paragraph 12; CJEU, judgment of 5 April 1979, Case C-148/78, *Publico Ministero v Tullio Ratti*, ECLI:EU:C:1979:10, paragraphs 19-23; and CJEU, judgment of 13 April 1994, Case C-128/92, *HJ Banks and Company Limited v British Coal Corporation*, ECLI:EU:C:1994:130, paragraph 15.

⁽¹⁶¹⁾ See CJEU, judgment of 14 July 1994, Case C-91/92, *Paola Faccini Dori v Recrebel Srl*, ECLI:EU:C:1994:292, paragraph 14; CJEU, judgment of 12 July 1990, Case C-188/89, *A Foster, GAHM Fulford-Brown, J Morgan, M Roby, EM Salloway and P Sullivan v British Gas plc*, ECLI:EU:C:1990:313, paragraph 16.

⁽¹⁶²⁾ See CJEU, judgment of 26 February 1986, case 152/84, *MH Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, ECLI:EU:C:1986:84, paragraph 46.

⁽¹⁶³⁾ See CJEU, *Ratti* judgment, op. cit., fn. 160, paragraphs 19-23.

⁽¹⁶⁴⁾ CJEU, judgment of 22 November 2005, Grand Chamber, Case C-144/04, *Werner Mangold v Rüdiger Helm*, ECLI:EU:C:2005:70, paragraph 67; and CJEU, judgment of 18 December 1997, Case C-129/96, *Inter-Environnement Wallonie ASBL v Région Wallonne*, ECLI:EU:C:1997:628, paragraph 45.

⁽¹⁶⁵⁾ See for instance, CJEU, judgment of 19 January 2010, Grand Chamber, *Seda Küçükdeveci v Swedex GmbH and Co KG*, ECLI:EU:C:2010:21, paragraph 46. However, note that there may be exceptions to this general rule: paragraphs 47-51.

⁽¹⁶⁶⁾ CJEU, *Ratti* judgment, op. cit., fn. 160, paragraph 22.

⁽¹⁶⁷⁾ See CJEU, judgment of 4 July 2006, Grand Chamber, Case C-212/04, *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos*, ECLI:EU:C:2006:443, paragraph 109.

⁽¹⁶⁸⁾ See most notably CJEU, judgment of 10 April 1984, case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, ECLI:EU:C:1984:153, paragraph 26.

the purpose of the [EU] directive[s] in order to achieve the result referred to' in these Directives ⁽¹⁶⁹⁾. This duty is, however, 'limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem*' ⁽¹⁷⁰⁾.

3.3.4. State liability

In case of a breach of EU law, its effectiveness is maintained by the principle of State liability, i.e. Member States' liability for damage caused to an individual ⁽¹⁷¹⁾. National courts and tribunals have the power to award damages against the Member State when it is found to have breached EU law with resultant losses or damage to individuals. State liability arises irrespective of 'the organ of the State whose act or omission was responsible for the breach' ⁽¹⁷²⁾, provided that four cumulative conditions are fulfilled:

- 1) 'the result prescribed by the [EU legal instrument] should entail the grant of rights to individuals';
- 2) 'it should be possible to identify the content of those rights on the basis of the provision of the [EU legal instrument]';
- 3) the breach is sufficiently serious; and
- 4) there exists 'a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties' ⁽¹⁷³⁾.

3.3.5. Procedural autonomy

Member States benefit from the principle of procedural autonomy in relation to legal actions undertaken by individuals to enforce their rights arising from EU substantive law ⁽¹⁷⁴⁾, provided that procedural conditions are 'no less favourable than those relating to similar actions of a domestic nature' (principle of equivalence) and do not 'render virtually impossible or excessively difficult the exercise of rights conferred by [Union] law' (principle of effectiveness) ⁽¹⁷⁵⁾. This procedural autonomy is newly limited also by the right to an effective remedy and fair trial enshrined in Article 47 of the EU Charter. In the realm of the CEAS, the principle is, however, only of secondary relevance as the APD and APD (recast) harmonised, to a considerable

⁽¹⁶⁹⁾ *Ibid.*, para 26. This obligation was reaffirmed in subsequent jurisprudence, and most notably in: CJEU, judgment of 8 October 1987, case 80/86, *Kolpinghuis Nijmegen BV*, ECLI:EU:C:1987:431, paragraph 12; CJEU, judgment of 13 November 1990, Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentación SA*, ECLI:EU:C:1990:395, paragraph 8; CJEU, *Adeneler* judgment, op. cit., fn. 167, paragraph 108; CJEU, judgment of 16 June 2005, Case C-105/03, *Maria Pupino*, ECLI:EU:C:2005:386, paragraph 43; and CJEU, judgment of 5 July 2007, Case C-321/05, *Hans Markus Kofoed v Skatteministeriet*, ECLI:EU:C:2007:408, paragraph 45.

⁽¹⁷⁰⁾ CJEU *Adeneler* judgment, op. cit., fn. 167, paragraph 110.

⁽¹⁷¹⁾ See CJEU, judgment of 19 November 1991, joined cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and Others v Italian Republic*, ECLI:EU:C:1991:428, paragraphs 33-35.

⁽¹⁷²⁾ CJEU, judgment of 5 March 1996, joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others*, ECLI:EU:C:1996:79, paragraph 32, that is, when the legislature or judiciary is responsible for such breach (see CJEU, judgment of 30 September 2003, Case C-224/01, *Gerhard Köbler v Republik Österreich*, ECLI:EU:C:2003:513, paragraph 32).

⁽¹⁷³⁾ Initially established in the CJEU, *Francovich* judgment, op. cit., fn. 171, paragraph 40, and further upheld in subsequent jurisprudence. See most notably: CJEU, *Brasserie du Pêcheur SA* judgment, op. cit., fn. 172, paragraph 39; and CJEU, *Köbler* judgment, op. cit., fn. 172, paragraph 51.

⁽¹⁷⁴⁾ CJEU, judgment of 16 December 1976, case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, ECLI:EU:C:1976:188, paragraph 5. See also, CJEU, *von Colson* judgment, op. cit., fn. 168, paragraph 15; CJEU, judgment of 14 December 1995, Case C-312/93, *Peterbroeck, Van Campenhout and Cie SCS v Belgian State*, ECLI:EU:C:1995:437, paragraph 12; CJEU, judgment of 14 December 1995, joined cases C-430/93 and C-431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten*, ECLI:EU:C:1995:441, paragraph 17; and CJEU, judgment of 13 January 2004, Case C-453/00, *Kühne and Heitz NV v Produktschap voor Pluimvee en Eieren*, ECLI:EU:C:2004:17, paragraph 28.

⁽¹⁷⁵⁾ CJEU, *Rewe-Zentralfinanz* judgment, op. cit., fn. 174, paragraph 5. See also, CJEU, *Peterbroeck* judgment, op. cit., fn. 174, paragraph 12; and CJEU, *van Schijndel* judgment, op. cit., fn. 174, paragraph 17.

extent, national procedures for granting and withdrawing international protection and the above mentioned principles apply fully only when EU substantive rights are to be enforced by non-harmonised national procedural rules ⁽¹⁷⁶⁾.

3.3.6. The duty to apply EU law of its own motion

As a general rule, EU law does not require national courts and tribunals to raise of their own motion an issue of EU law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves. However, following the principles of effectiveness and equivalence, this is subject to the proviso that the relevant national procedural provisions are not less favourable in the treatment of EU law issues than comparable issues of national law, and that they do not render the exercise of rights arising from EU law virtually impossible or excessively difficult ⁽¹⁷⁷⁾.

In some areas of EU law, national courts and tribunals may be required, of their own motion, to take cognisance of and rule upon an issue of EU law ⁽¹⁷⁸⁾. This is a duty which, thus far, has not been recognised with regards to the CEAS. Nevertheless, it should be noted that in accordance with Article 46(3) APD (recast), at the very least, courts and tribunals of first instance must ensure a ‘full and *ex nunc* examination of both facts and points of law, including where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU’ ⁽¹⁷⁹⁾. Article 27(1) Dublin III Regulation, Article 26(1) RCD (recast) and Article 4(1) and (3) QD (recast) are also of relevance as regards this issue.

3.3.7. Provision of effective judicial protection for rights under EU law

Members of national courts and tribunals are required to exercise the jurisdiction conferred upon them by national law to the greatest extent possible so as to enable the court or tribunal to give effective protection to rights conferred by EU law ⁽¹⁸⁰⁾. It has also been established that the compatibility of acts of the EU institutions with the Treaty and with general principles of EU law is subject to judicial review ⁽¹⁸¹⁾. As such, national courts and tribunals have the right to refer a question concerning the validity of an EU act to the CJEU ⁽¹⁸²⁾. Referral to the CJEU pursuant to Article 267 TFEU is discussed in [Section 3.5. below \(pp. 80-84\)](#). To ensure that an individual has a right of action before the national courts, Article 19(1) TEU requires Member States to ‘provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’. Therefore, national courts are required, so far as possible, to interpret and apply national procedural rules in a way that enables persons to challenge before the national courts the validity of EU acts.

⁽¹⁷⁶⁾ See above [Section 2.2.4.](#), pp. 47-51.

⁽¹⁷⁷⁾ See CJEU, *van Schijndel* judgment, op. cit., fn. 174; CJEU, judgment of 7 June 2007, joined cases C-222/05, C-223/05, C-224/05 and C-225/05, *J van der Weerd and Others v Minister van Landbouw, Natuur en Voedselkwaliteit*, ECLI:EU:C:2007:318; and CJEU, *Peterbroeck* judgment, op. cit., fn. 174, paragraph 14.

⁽¹⁷⁸⁾ See CJEU, *Simmmenthal* judgment, op. cit., fn. 148.

⁽¹⁷⁹⁾ The wording of Art. 46(3) APD (recast) reads in full as follows: ‘In order to comply with paragraph 1, Member States shall ensure that an effective remedy provides a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU, at least in appeals procedures before a court or tribunal of first instance.’

⁽¹⁸⁰⁾ N. Fennelly, op. cit., fn. 154, pp. 71-72.

⁽¹⁸¹⁾ CJEU, judgment of 25 July 2002, Case C-50/00 P, *Unión de Pequeños Agricultores v Council of the European Union*, ECLI:EU:C:2002:462.

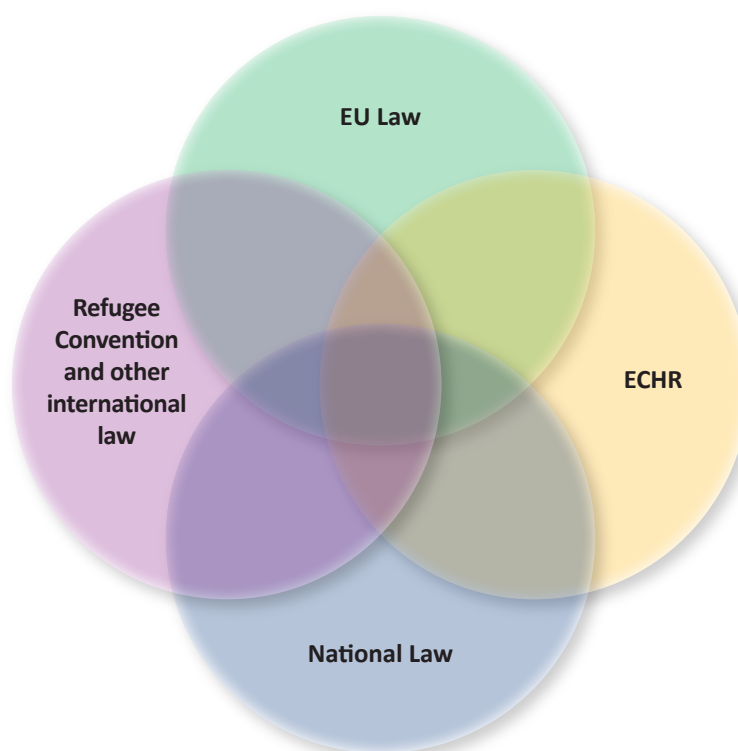
⁽¹⁸²⁾ CJEU, order of 1 February 2001, joined cases C-300/99 P and C-388/99 P, *Area Cova SA and Others v Council of the European Union*, ECLI:EU:C:2001:71.

3.4. The interplay between the interpretation of EU law and the European Convention on Human Rights, international and national law

Many aspects of international protection which are regulated by EU law are also the subject of the Refugee Convention, other international treaties and national law. As such the field of international protection is a complex area of law. It requires the members of national courts and tribunals not only to interpret and apply the relevant provisions of EU law, whether by direct reference to the EU legislation or to national transposing law, but also to understand the inter-relationship of EU law with international law, including relevant international and regional human rights law, and with national constitutional law; and the implications for interpretation of CEAS provisions.

Concerning international law, Article 78(1) TFEU not only requires the CEAS to be in accordance with the Refugee Convention, but also with ‘other relevant treaties’. This Analysis will, therefore, examine the interplay between the interpretation of EU law and the ECHR (Section 3.4.1., pp. 71-75) and other treaties of international law relevant to the field of international protection (Section 3.4.2., pp. 75-77).

National law provisions (Section 3.4.3., pp. 77-79), including those arising from international obligations of Member States (Section 3.4.4., pp. 79-80), may also be relevant where they provide more favourable standards for determination of international protection rights under the QD (recast) and the procedures for deciding on it ⁽¹⁸³⁾. Their applicability will depend on whether those standards are compatible with the Directives. In this context members of courts and tribunals may be required to consider this as a preliminary issue when ruling whether more favourable standards may be applied under the CEAS.



⁽¹⁸³⁾ See Art. 3 QD (recast) and Art. 5 APD (recast). See further, CJEU, *M'Bodj* judgment, op. cit., fn. 62.

3.4.1. EU law and the ECHR

The European Convention on Human Rights (ECHR), which is an entirely distinct system from the CEAS, was adopted under the auspices of the Council of Europe (CoE) in 1950. The CoE currently comprises 47 Member States. The CoE and its institutions are wholly distinct from the EU although they maintain a close relationship. Ratification of the ECHR is, for instance, a prerequisite for a State to become a member of the EU ⁽¹⁸⁴⁾. According to well-established case-law of the CJEU, fundamental rights as guaranteed by the ECHR form an integral part of the general principles of EU law ⁽¹⁸⁵⁾.

Moreover, the Lisbon Treaty makes provision ⁽¹⁸⁶⁾ for the EU also to become party to the ECHR as are all its current Member States. If and when such accession takes place ⁽¹⁸⁷⁾, any breaches of its provisions by the EU in exercise of its powers will then be justiciable in the ECtHR. Similarly, the CJEU would then have jurisdiction under Article 267 TFEU to interpret the meaning of the ECHR since, following accession, as an international instrument to which the EU is a party, it would be incorporated into and become part of EU law. However, the CJEU has recalled that as long as the EU has not acceded to the ECHR, the ECHR does not constitute a legal instrument which has been formally incorporated into EU law ⁽¹⁸⁸⁾.

Until such accession takes place, and since the ECtHR is not an EU institution, it remains that the ECtHR has no jurisdiction in relation to litigation arising against the EU and its institutions in respect of which the ultimate recourse is to the CJEU.

The relationship between EU law and the ECHR differs to some extent depending on whether it is viewed from the standpoint of the CJEU or from that of the ECtHR.

The ECtHR's well-established case-law confirms that Member States remain responsible under the ECHR when implementing EU law ⁽¹⁸⁹⁾. From the perspective of the ECtHR, Member States are fully responsible for ensuring respect for and protection of rights under the ECHR when EU law leaves discretion to Member States on how to implement certain provisions of EU law. Where, however, there is interference with the rights guaranteed by the Convention which is not the result of an exercise of discretion by the Member States, but follows from compliance with their legal obligations under EU law, a rebuttable presumption of compliance with the ECHR is established 'as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides' ⁽¹⁹⁰⁾. This presumption is rebuttable if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient ⁽¹⁹¹⁾.

⁽¹⁸⁴⁾ See European Council, *Conclusions of the Presidency*, Copenhagen European Council 21 and 22 June 1993, EU Doc 93/3, 7A(iii); and *Commission Opinion on Bulgaria's Application for Membership of the European Union*, 15 July 1997, EU Doc 97/11, p. 15.

⁽¹⁸⁵⁾ CJEU, judgment of 14 May 1974, case 4/73, *J Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, ECLI:EU:C:1974:51; CJEU, judgment of 18 June 1991, Case C-260/89, *Elliniki Radiophonia Tileorassi Anonimi Etairia (ERT AE) and Panellinia Omospondia Syllogon Prossopikou ERT v Dimotiki Etairia Pliroforissis (DEP)*, *Sotirios Kouvelas, Nicolaos Avdellas and Others*, ECLI:EU:C:1991:254, paragraph 41; and CJEU, judgment of 3 September 2008, Grand Chamber, joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and El Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, ECLI:EU:C:2008:461, paragraph 283.

⁽¹⁸⁶⁾ Art. 6(2) TEU as amended. Art. 6(3) declares: 'Fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

⁽¹⁸⁷⁾ The compatibility of the proposed terms of accession to the ECHR was referred to the CJEU for its Opinion. *opinion 2/13* issued on 18 December 2014 (op. cit., fn. 48), concludes on a number of grounds that accession by the Union to the ECHR in the proposed terms would be incompatible with EU Law. One of the reasons given concerns the inherent position of the CJEU as sole arbiter of the meaning of EU law.

⁽¹⁸⁸⁾ CJEU, *Åkerberg Fransson* judgment, op. cit., fn. 50, paragraph 44.

⁽¹⁸⁹⁾ ECtHR, judgment of 30 June 2005, Grand Chamber, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland*, application no 45036/98, paragraph 154; and ECtHR, admissibility decision of 20 January 2009, *Coöperatieve Producenten organisatie van de Nederlandse Kokkelvisserij UA v the Netherlands*, application no 13645/05.

⁽¹⁹⁰⁾ ECtHR, *Bosphorus* judgment, op. cit., fn. 189, paragraph 155.

⁽¹⁹¹⁾ *Ibid.*, paragraph 156.

The position of the CJEU concerning the relationship between EU law and the ECHR is different. From the standpoint of the EU, based on Article 6(3) TEU, fundamental rights, as guaranteed by the ECHR, shall constitute general principles of EU law. The importance of, inter alia, the ECHR as an inspiration for the EU Charter is made clear in the latter's preamble which provides:

This Charter reaffirms [...] the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the [ECHR], the Social Charters adopted by the Union and by the Council of Europe and the case-law of the [CJEU] and of the [ECtHR]. [...]

Article 52(3) of the Charter states that '[i]n so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention', although this must 'not prevent EU law providing more extensive protection'. Therefore, those Charter rights which correspond to ECHR rights should be interpreted in light of ECtHR jurisprudence. This may impact also on the CJEU interpretation of the CEAS secondary legislation to which the provisions of the Charter have relevance as illustrated by its case-law ⁽¹⁹²⁾.

In some cases the CJEU takes responsibility for the protection of human rights and does not transfer responsibility for protection of fundamental rights under EU law to the referring national court ⁽¹⁹³⁾. In other cases, the CJEU transfers responsibility for the protection of human rights to the referring court ⁽¹⁹⁴⁾. From the more recent cases, it has become clearer that the main responsibility for respect of fundamental rights deriving from EU law and international human rights law rests with national courts and tribunals. For example, in the case of *Arslan*, the CJEU stated that it was for Member States to establish, in full compliance with their obligations arising from both international law and European Union law, the grounds on which an asylum-seeker may be detained or kept in detention ⁽¹⁹⁵⁾. As a prediction, it is reasonable to expect that when a question for preliminary ruling refers to material law on human rights, then the CJEU in its preliminary ruling will be less likely to leave the responsibility for the interpretation of law in accordance with human rights and for protection of human rights to the referring court ⁽¹⁹⁶⁾. In the case of fundamental rights under EU relating to procedural issues, this responsibility might be more often transferred by the CJEU to the referring court due to the greater autonomy of the Member States, but this will not always happen ⁽¹⁹⁷⁾.

The CJEU has affirmed that it is settled case-law that Member States must not only interpret their national law in a manner consistent with EU law, but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the EU legal order or with the other general principles of European Union law ⁽¹⁹⁸⁾. The Court further stated that consideration of the texts which

⁽¹⁹²⁾ See Section 2.1.3., pp. 28-32, above on the EU Charter.

⁽¹⁹³⁾ See, for example: CJEU, judgment of 11 July 2002, Case C-60/00, *Mary Carpenter v Secretary of State for the Home Department*, ECLI:EU:C:2002:434; CJEU, judgment of 22 October 2002, Case C-94/00, *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes*, ECLI:EU:C:2002:603; and CJEU, judgment of 12 June 2003, Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, ECLI:EU:C:2003:333.

⁽¹⁹⁴⁾ See, for example: CJEU, judgment of 7 January 2004, Case C-117/01, *KB and National Health Service Pensions Agency, Secretary of State for Health*, ECLI:EU:C:2004:7; CJEU, judgment of 20 May 2003, joined cases C-465/00, C-138/01 and C-139/01, *Rechnungshof and Others v Österreichischer Rundfunk and Others*, ECLI:EU:C:2003:294; CJEU, judgment of 6 November 2003, Case C-101/01, *Bodil Lindqvist*, ECLI:EU:C:2003:596.

⁽¹⁹⁵⁾ CJEU, *Arslan* judgment, op. cit., fn. 113, paragraph 56. See also, CJEU, judgment of 15 November 2011, Grand Chamber, Case C-256/11, *Murat Dereci and Others v Bundesministerium für Inneres*, ECLI:EU:C:2011:734, paragraph 72; and CJEU, judgment of 17 January 2013, Case C-23/12, *Mohamad Zakaria*, ECLI:EU:C:2013:24, paragraph 40.

⁽¹⁹⁶⁾ See, for example: CJEU, *Y and Z* judgment, op. cit., fn. 60; CJEU, *X, Y, and Z* judgment, op. cit., fn. 142; and CJEU, *A, B and C* judgment, op. cit., fn. 57.

⁽¹⁹⁷⁾ See, for example: CJEU, *Abdida* judgment, op. cit., fn. 62, first paragraph of operative part of the judgment, where the CJEU did not leave the interpretation of the (non)suspensive effect of a legal remedy to the national court.

⁽¹⁹⁸⁾ CJEU, *NS, ME and Others* judgment, op. cit., fn. 47, paragraph 77.

constitute the CEAS shows that it was conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Refugee Convention and its Protocol, and on the ECHR ⁽¹⁹⁹⁾.

In so far as litigation before the CJEU concerning qualification for subsidiary protection raises issues in respect of which there is relevant ECtHR case-law in relation to Article 3 ECHR, it is reasonable to assume that the CJEU takes into account the ECtHR's case-law in the interpretation of the QD (recast) or it distinguishes the litigation from the *non-refoulement* cases under Article 3 ECHR ⁽²⁰⁰⁾.

The interpretative relevance of the ECHR is also made explicit in the QD (recast). Its Article 9(1)(a), for instance, incorporates a direct reference to Article 15(2) ECHR in relation to rights from which there may be no derogation. Such direct references are, however, the exception and the relevance of such principles is more likely to derive from their relevance to the interpretation of the fundamental rights set out in the EU Charter as a source of inspiration for fundamental rights recognised by EU law.

Although not in themselves sources of inspiration of the CEAS, the provisions of other treaties of the CoE are relevant when interpreting and applying the CEAS secondary legislation ⁽²⁰¹⁾. Among these (in chronological order) are:

- Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other than Those Already Included in the Convention and in the First Protocol Thereto, 1963;
- Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, 1983;
- Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 1984;
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987; and
- Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in All Circumstances, 2002.

This Section has so far been concerned with situations where the national court or tribunal is concerned with the application of EU law and the way in which the ECHR and the jurisprudence of the ECtHR may have relevance to its interpretation. Even after having applied EU law, then dependent on the jurisdiction afforded to them by their national law, members of national courts or tribunals are nevertheless still bound by their obligations under international law, including the ECHR which continues to apply in parallel. This is particularly relevant to the obligation of *non-refoulement* flowing from Article 3 ECHR which is affirmed in Article 4 and Article 19(2) of the EU Charter. The principle of *non-refoulement* stemming from the Charter and ECHR is in large part reflected in the secondary legislation of the CEAS ⁽²⁰²⁾. However, the scope of protection conferred by Article 3 ECHR and Article 4 and Article 19(2) of the Charter is greater than the scope of the CEAS instruments, and so there must be other legal

⁽¹⁹⁹⁾ *Ibid.*, paragraph 78.

⁽²⁰⁰⁾ See for instance CJEU, *Elgafaji* judgment, op. cit., fn. 138, paragraph 28 and CJEU, *M'Bodj* judgment, op. cit., fn. 62, paragraph 40.

⁽²⁰¹⁾ It should be noted, however, that not all Member States are parties to all the protocols of the ECHR. Greece and the UK are not parties to Protocol No 4 (collective expulsion of aliens); Germany, the Netherlands and the UK are not parties to Protocol No 7 (procedural safeguards for the expulsion of aliens); and most EU Member States are not parties to Protocol No 12 (non-discrimination).

⁽²⁰²⁾ See Art. 3(2) Dublin III Regulation (access to the procedure for examining an application for international protection); Art. 9 APD (recast) (right to remain in the Member State pending the examination of the application); and Art. 21 QD (recast) (protection from *refoulement*).

measures put in place within the national legal orders of the Member States to guarantee the principle fully.

This may, for example, be illustrated where the intended removal of an applicant for international protection to the responsible State pursuant to the Dublin III Regulation is challenged on the basis that removal would result in a breach of Article 4 and Article 19(2) of the Charter as well as Article 3 ECHR from which no derogation can be made. Whilst the Dublin III Regulation now contains provision at Article 3(2) concerning impossibility of transfer to the responsible State ‘because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter’ ⁽²⁰³⁾, it does not explicitly prevent transfer when there is a risk of such treatment due to other circumstances. Therefore, members of courts and tribunals may be called upon to consider the relevance of Article 4 and Article 19(2) of the EU Charter, as well as the case-law of the ECtHR which more generally prohibits removal in case of real risk of treatment contrary to Article 3 ECHR, and not only in the case of systemic deficiencies in asylum procedures and reception conditions as provided by Article 3(2) Dublin III Regulation ⁽²⁰⁴⁾.

Differences in scope may arise in connection with claims based on generalised violence in the applicant’s country of origin. According to the CJEU, Article 15(b) QD, which defines serious harm as torture or inhuman or degrading treatment or punishment of an applicant in the country of origin, corresponds, in essence, to Article 3 of the ECHR. However, the CJEU considered that the content of Article 15(c) QD, which defines serious harm as a serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict, is different from that of Article 3 of the ECHR, and so the interpretation of Article 15(c) QD must be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR ⁽²⁰⁵⁾. However, in its *Sufi and Elmi* judgment, the ECtHR noted that it was not persuaded that Article 3 of the ECHR ‘does not offer comparable protection to that afforded under [Article 15(c) QD]’ ⁽²⁰⁶⁾.

Cases illustrating the complementary application of the CEAS instruments and the ECHR primarily arise in situations of denial of international protection under the QD (recast) in circumstances where *refoulement* remains prohibited under Article 3 ECHR. There are three obvious examples.

First, complementary application of the CEAS and the ECHR may arise because the ECHR has a broader personal scope. The CEAS applies only to third-country nationals and stateless persons, but the ECHR is not subject to such a limitation. Hence, nationals of EU Member States can arguably be protected by the *non-refoulement* principle under Article 3 ECHR.

Secondly, the material scope of Article 3 ECHR and Article 4 and Article 19(2) of the EU Charter differs from that of subsidiary protection under the QD (recast). In considering this, it is important to bear in mind that Article 3 ECHR and Article 4 and Article 19(2) of the EU Charter provide protection against *refoulement*, whereas qualification for subsidiary protection under Article 15 together with Article 2(f) QD (recast) confers subsidiary protection **status** which provides

⁽²⁰³⁾ Art. 3(2) was inserted in the Dublin III Regulation in response to earlier decisions of both the CJEU and the ECtHR. See CJEU, *NS, ME and Others* judgment, op. cit., fn. 47; ECtHR, admissibility decision of 7 March 2000, *TI v the United Kingdom*, application no 43844/98, p. 15; ECtHR, judgment of 21 January 2011, Grand Chamber, *MSS v Belgium and Greece*, application no 30696/09, paragraph 359.

⁽²⁰⁴⁾ See ECtHR, judgment of 4 November 2014, Grand Chamber, *Tarakhel v Switzerland*, application no 29217/12, paragraph 104.

⁽²⁰⁵⁾ CJEU, *Elgafaji* judgment, op. cit., fn. 138, paragraph 28.

⁽²⁰⁶⁾ ECtHR, judgment of 28 June 2011, *Sufi and Elmi v the United Kingdom*, applications nos 8319/07 and 11449/07, paragraph 226.

for a range of entitlements (including protection from *refoulement*)⁽²⁰⁷⁾. The definition of serious harm in Article 15(b) QD (recast) differs from Article 3 ECHR and Article 4 EU Charter, and applies only to such harm in the applicant's country of origin. Article 3 ECHR and Article 4 EU Charter contain no such limitation⁽²⁰⁸⁾. As a result, seriously ill applicants risking premature death and inhuman or degrading suffering if returned to their country of origin, because of a lack of appropriate medical treatment in the country of origin or because the facilities for the treatment of the illness are inferior to those available in the Member State, are excluded from the scope of subsidiary protection, unless the applicant is intentionally deprived of health-care⁽²⁰⁹⁾. However, the applicant may still be protected from return, in very exceptional cases, where the humanitarian grounds against removal are compelling, by virtue of Article 3 ECHR. The fact that a third-country national suffering from a serious illness may not, under Article 3 ECHR, in highly exceptional cases, be removed to a country in which appropriate treatment is not available does not mean that that person should be granted leave to reside in a Member State by way of subsidiary protection under the QD⁽²¹⁰⁾.

Thirdly, the complementary application of Article 3 ECHR flows from its absolute nature so that there can be no limitation or derogation from the obligation of *non-refoulement*. Whereas international protection under the QD (recast) is subject to exclusion clauses (Articles 12 and 17), Article 4 and Article 19(2) of the EU Charter as well as Article 3 ECHR may prohibit the removal of individuals irrespective of their criminal conduct or the danger they pose to the host country⁽²¹¹⁾.

3.4.2. EU law and international law

As already noted, the 'other relevant treaties' referred to in Article 78(1) TFEU are not defined but it may be inferred from recital (34) QD (recast) that they encompass both the ECHR and other international human rights treaties. This recital refers to the necessity of introducing common criteria in relation to recognition of subsidiary protection status and then provides that, '[t]hose criteria should be drawn from international obligations under human rights instruments and practices existing in Member States'.

International human rights law is a comparatively recent branch of international law which did not effectively commence until the aftermath of the Second World War. Since then, it has been and is still subject to continuing development both through new international treaty and regional legislative measures as well as judicial interpretation. The principal United Nations international human rights instruments are (in chronological order):

- Universal Declaration of Human Rights, 1948;
- International Covenant on Civil and Political Rights (ICCPR), 1966⁽²¹²⁾;
- First and the Second Optional Protocols to the International Covenant on Civil and Political Rights, 1966 and 1989;

⁽²⁰⁷⁾ See Chapter VII QD (recast).

⁽²⁰⁸⁾ See CJEU, *M'Bodj* judgment, op. cit., fn. 62 and compare with ECtHR, judgment of 2 May 1997, *D v the United Kingdom*, application no 30240/96 and ECtHR, judgment of 27 May 2008, Grand Chamber, *N v the United Kingdom*, application no 26565/05.

⁽²⁰⁹⁾ CJEU, *M'Bodj* judgment, op. cit., fn. 62, paragraphs 39 and 41.

⁽²¹⁰⁾ *Ibid.*, paragraph 40.

⁽²¹¹⁾ See ECtHR, judgment of 15 November 1996, Grand Chamber, *Chahal v the United Kingdom*, application no 22414/93, paragraphs 79-80; ECtHR, judgment of 17 December 1996, *Ahmed v Austria*, application no 25964/94, paragraph 41; ECtHR, judgment of 28 February 2008, Grand Chamber, *Saadi v Italy*, application no 37201/06, paragraph 127; and ECtHR, judgment of 10 April 2012, *Babar Ahmad and Others v the United Kingdom*, applications nos 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09.

⁽²¹²⁾ Explicitly quoted in Commission of the European Communities, Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, 12 September 2001, COM(2001) 510 final, p. 5.

- International Covenant on Economic, Social and Cultural Rights, 1966;
- International Convention on the Elimination of All Forms of Racial Discrimination, 1966;
- Convention on the Elimination of All Forms of Discrimination against Women, 1979;
- Convention against Torture, 1984 ⁽²¹³⁾;
- Convention on the Rights of the Child, 1989 ⁽²¹⁴⁾;
- Convention on the Rights of Persons with Disabilities, 2006; and
- International Convention for the Protection of all Persons from Enforced Disappearance, 2006.

None of the above instruments recognises the right to asylum in their provisions ⁽²¹⁵⁾. Article 3 of the Convention against Torture, however, enshrines the principle of *non-refoulement*. This principle, while not explicitly worded, has been found to be implicit in the prohibition of torture in Article 7 ICCPR by the Human Rights Committee ⁽²¹⁶⁾.

Other international law instruments are also relevant for the interpretation of the CEAS instruments. These include those treaties explicitly or implicitly referred to in Articles 12 and 17 QD (recast) governing exclusion from refugee status and subsidiary protection, such as:

- Charter of the United Nations, 1945;
- Convention on the Prevention and Punishment of the Crime of Genocide, 1948;
- four Geneva Conventions, 1949, and their Additional Protocols I and II, 1977;
- International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973; and
- Rome Statute of the International Criminal Court, 1998.

It is to be noted that other instruments, such as the Statutes of the International Criminal Tribunals for the Former Yugoslavia (1993) and Rwanda (1994) are relevant for the interpretation of the exclusion clauses. Also of relevance are the resolutions of the United Nations Security Council and General Assembly, and resolutions combating terrorism ⁽²¹⁷⁾.

Like the ECHR and the Refugee Convention, these international treaties must be considered as having a dual effect: first, by reference to their relevance to EU primary and secondary law; and secondly, by reference to the degree to which they are relevant to the application of the national law of Member States.

The effect of general references in EU primary law to these treaties has already been noted in Section 2.1.1. above (pp. 24-27). The principles which they enshrine must be respected in the interpretation of the general principles of EU law. It is not, however, within the competence of the CJEU to interpret their provisions save to the extent that they have actually been incorporated into EU law when the doctrine of *renvoi* will apply ⁽²¹⁸⁾. Thus, the CJEU accepted jurisdiction to interpret Article 1D of the Refugee Convention (relating to the status

⁽²¹³⁾ Explicitly quoted in *ibid.*, p. 5.

⁽²¹⁴⁾ Especially the principle of the best interests of the child explicitly referred to in recital (18) QD (recast).

⁽²¹⁵⁾ Although the Convention on the Rights of the Child does not recognise the right to asylum, Art. 22(1) states the following: ‘States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are parties.’

⁽²¹⁶⁾ See, for instance: Human Rights Committee, *General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, paragraph 9; Human Rights Committee, views of 30 July 1993, *Joseph Kindler v Canada*, communication no 470/1991, paragraph 13.1; and Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, paragraph 12.

⁽²¹⁷⁾ See recital (31) QD (recast). See most notably S/RES/1373, 28 September 2001; and S/RES/1377, 12 November 2001.

⁽²¹⁸⁾ CJEU, *Qurbani* judgment, op. cit., fn. 41.

of Palestinians in receipt of assistance from UNRWA) and related international instruments because Article 12(1)(a) QD (now Article 12(1)(a) QD (recast)) provides for exclusion where an applicant ‘falls within the scope of Article 1D of the Refugee Convention’ ⁽²¹⁹⁾.

Whilst neither the Committee against Torture nor the Human Rights Committee is a court nor tribunal and their decisions are not legally binding on States Parties, their decisions may nevertheless be cited by advocates as a possible further source of interpretation before national courts and tribunals ⁽²²⁰⁾.

Despite the importance of international treaties for the interpretation of CEAS legislation, their relevance has its limits. This was clearly illustrated by the CJEU in its *Diakité* judgment in considering the relevance of international humanitarian law (i.e. the 1949 Geneva Conventions and their 1977 Additional Protocols) to the interpretation of Article 15(c) QD. Although the terminology used in that Article echoes that of international humanitarian law, and more specifically the term ‘internal armed conflict’, an interpretation of the provision based on this branch of international law was not accepted by the CJEU as it was not in accordance with the scheme and purpose of subsidiary protection ⁽²²¹⁾. A distinct meaning was thus to be given to the notion of ‘internal armed conflict’ ⁽²²²⁾.

3.4.3. EU law and the national law of EU Member States

At the end of the introduction to [Section 3.4.](#) (p. 79), the effect of more favourable standards under national law was briefly noted. This issue is not, however, restricted to the situation envisaged in Article 3 QD (recast) and Article 5 APD (recast). It may, and frequently does, arise in general terms concerning the interplay between the national law of Member States and applicable EU law with particular reference to the EU Charter.

From the perspective of EU law, the relationship between EU law and constitutional law on due process standards is regulated partly by the EU principles of supremacy and direct effect and partly by the case-law of the CJEU. These principles require that the applicability of provisions of national law is subject to the over-riding principle of the supremacy of EU law when applying EU law provisions. This principle takes precedence over national law (including constitutional law) when acts justiciable under EU law are being carried out by Member States (see above [Section 3.3.](#), pp. 65-69).

The issue of the supremacy of EU law over national constitutional law was considered in two cases concerning the execution of European arrest warrants pursuant to the Framework Decision 2002/548/JHA. The Framework Decision, as secondary EU law, is similar to the Dublin III Regulation insofar as both systems are based on the concept of ‘mutual trust’ between Member States ⁽²²³⁾. The contested issue in the *Melloni* ⁽²²⁴⁾ judgment is an example of where actions of the Member State are entirely determined by EU law. In *Melloni* the CJEU was called upon to consider whether Article 53 of the Charter, together with Articles 47 and 48 of the Charter, allowed a Member State to make the surrender of a person, convicted in his absence,

⁽²¹⁹⁾ CJEU, *Bolbol* judgment, op. cit., fn. 3; and CJEU, *El Kott and Others* judgment, op. cit., fn. 121.

⁽²²⁰⁾ In this regard, see the analysis of the former Chair of the Committee against Torture: F.M. Mariño Menéndez, ‘Recent Jurisprudence of the United Nations Committee against Torture and the International Protection of Refugees’, RSQ (2015), 61-78.

⁽²²¹⁾ CJEU, *Diakité* judgment, op. cit., fn. 134, paragraphs 20-26.

⁽²²²⁾ *Ibid.*, paragraphs 27-35.

⁽²²³⁾ CJEU, judgment of 26 February 2013, Grand Chamber, Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, ECLI:EU:C:2013:107, paragraph 63.

⁽²²⁴⁾ *Ibid.*, paragraphs 55-64.

conditional upon the conviction being open to review in the requesting State. This was in order to avoid an adverse effect on the right to a fair trial and the rights of defence guaranteed by the Member State's constitution. The CJEU observed that the Member State was seeking to determine whether Article 53 of the Charter gives general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard was higher than that deriving from the Charter. Such an interpretation could not be accepted since it would undermine the principle of primacy of EU law, adding that:

It is settled case-law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order [...] rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State [...] ⁽²²⁵⁾.

In *Jeremy F* ⁽²²⁶⁾, the issue was whether the applicant was entitled to appeal against the decision of the court of first instance to remove him in execution of the European arrest warrant against him. The Framework Decision was silent as to such matters. The CJEU stated that, independently of the guarantees expressly provided for by the Framework Decision, the fact that the Decision does not provide for a right of appeal with suspensive effect against decisions relating to European arrest warrants does not prevent the Member States from providing for such a right ⁽²²⁷⁾. The CJEU concluded that the Framework Decision leaves the national authorities discretion as to the specific manner of implementation of the objectives it pursues, with respect inter alia to the possibility of providing for an appeal with suspensive effect against decisions relating to a European arrest warrant ⁽²²⁸⁾. Since the procedural elements of removal were by way of judicial process, it was appropriate to apply the provisions of the national law under its constitutional rules, including respect for the right to a fair trial, provided that the application of the Framework Decision was not frustrated ⁽²²⁹⁾. Generally speaking, this type of situation may be frequent in procedural law, where Member States have procedural autonomy ⁽²³⁰⁾, but may be applicable also in the field of material law on fundamental rights ⁽²³¹⁾.

The position of some national Constitutional Courts or Supreme Courts is of interest in this regard. For example, since the *Frontini* judgment of 1973, the Italian Constitutional Court adopted a doctrine that EU law may derogate from ordinary rules of constitutional law, but not from certain fundamental principles or inalienable rights of persons ⁽²³²⁾. The German Constitutional Court in the *Solange I* and *Solange II* judgments of 1974 and 1986, with express reference to the doctrine of its Italian counterpart, developed what is referred to as the *Solange* principle. This judgment, which is followed by a number of constitutional or supreme courts in the EU Member States, accepts the primacy of EU law even over national constitutional law as long as the European Union in general, and the jurisprudence of the CJEU in particular, guarantees effective protection of fundamental rights comparable in its basic content to that required by the national constitutional order of Germany ⁽²³³⁾. This *Solange* principle is also

⁽²²⁵⁾ *Ibid.*, paragraph 59.

⁽²²⁶⁾ CJEU, judgment of 20 May 2013, Case C-168/13 PPU, *Jeremy F v Premier ministre*, ECLI:EU:C:2013:358.

⁽²²⁷⁾ *Ibid.*, paragraph 51.

⁽²²⁸⁾ *Ibid.*, paragraph 52.

⁽²²⁹⁾ *Ibid.*, paragraph 53.

⁽²³⁰⁾ Art. 19 TEU states that Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

⁽²³¹⁾ See, for example, the position of the CJEU in the case of *B and D* (op. cit., fn. 62, paragraphs 113-121) in comparison with the position of the CJEU in *M'Bodj* (op. cit., fn. 62, paragraphs 43-44).

⁽²³²⁾ B. de Witte, 'Constitutional Aspects of European Union Membership in the Original Six Member States: Model Solutions for the Applicant Countries?', in A. E. Kellermann, W. de Zwaan and J. Czuczai (eds.), *EU Enlargement — The Constitutional Impact at EU and National Level* (TMC Asser Press, 2001), pp. 74-75. See also the *Fragd* ruling from 1989 of the Constitutional Court of the Republic of Italy (*Rivista italiana di diritto pubblico comunitario*, 1991, n. 232).

⁽²³³⁾ Federal Constitutional Court (Germany), judgment of 22 October 1986, 339 2 BvR 197/83 (see unofficial English translation).

reflected in the constitutional case-law of other Member States, for example, Poland ⁽²³⁴⁾ and Lithuania ⁽²³⁵⁾.

Where, however, the provisions of national law are not incompatible with the provisions of EU law, the proper course will be for the national court to apply them in connection with the application of EU law in question.

Where the national court or tribunal is not applying EU law, then it will apply the relevant national law of the Member State. In doing so, it must ensure that it is clear that it is the Member State's national law which is being applied so that, for example, the provision of humanitarian or discretionary protection under national law is not confused with protection provisions under EU law ⁽²³⁶⁾.

3.4.4. The relationship between ECHR and national law: the principle of subsidiarity

In the words of the CJEU in the case of *Åkerberg Fransson*, the ECHR is not yet 'formally incorporated into European Union law' ⁽²³⁷⁾; this means that the ECHR cannot be considered as a part of the CEAS. However, it is not just the relation between EU law and the ECHR which is relevant for judges of the Member States dealing with asylum cases, but also the relation between the ECHR and national law. Several examples of judgments of the ECtHR against Member States of the EU in cases concerning asylum-seekers where the ECtHR has found violation of certain rights of the ECHR prove the relevance of the relationship between the ECHR and national law in the context of the CEAS. This relevance exists not only in cases where the ECtHR has found a violation of the ECHR based on argumentation which among other things took into account the legal situation under the EU law ⁽²³⁸⁾, but also in those cases concerning effective judicial protection of asylum-seekers, where EU law has not been taken into account by the ECtHR at all, although it could have been ⁽²³⁹⁾.

In general, with regard to the relationship between the ECHR and national law, the crucial principle is the principle of subsidiarity, which forms a part of Article 1 of the ECHR. It means that:

[The] machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights [...]. The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted (Article 26) ⁽²⁴⁰⁾.

Therefore, the function of the ECHR and the ECtHR remains to provide a European minimum standard. However, in the field of asylum, as Judge Villiger puts it in his concurring opinion in the *MSS* judgment, it would normally be the wrong place to apply the principle of subsidiarity

⁽²³⁴⁾ Constitutional Court (Poland), judgment of 11 May 2005, K 18/04.

⁽²³⁵⁾ Constitutional Court (Lithuania), judgment of 14 March 2006, case no 17/02.24/02-06703-22/04.

⁽²³⁶⁾ CJEU, *M'Bodj* judgment, op. cit., fn. 62; and CJEU, *B and D* judgment, op. cit., fn. 62.

⁽²³⁷⁾ CJEU, *Åkerberg Fransson* judgment, op. cit., fn. 50, paragraph 44.

⁽²³⁸⁾ See, for example, judgments in cases of *Sufi and Elmi v the United Kingdom*, op. cit., fn. 206, paragraphs 220-226; *MSS v Belgium and Greece*, op. cit., fn. 203, paragraph 263.

⁽²³⁹⁾ See, for example, violations of the ECHR in cases: judgment of 2 February 2012, *IM c France*, application no 9152/09; judgment of 27 February 2014, *SJ v Belgium*, application no 70055/10; and judgment of 22 April 2014, *AC et autres c Espagne*, application no 6528/11.

⁽²⁴⁰⁾ ECtHR, judgment of 7 December 1976, *Handyside v the United Kingdom*, application no 5493/72, paragraph 48.

in a case such as *MSS* where the issue concerns an absolute right, such as Article 3. He further adds that:

Tribute has already been paid to subsidiarity in this case by testing the complaint expressly or implicitly with various admissibility conditions and in particular with that of the exhaustion of domestic remedies (which is in itself an application of the principle of subsidiarity *par excellence*). Subsidiarity plays an important part, for instance, in applying the second paragraphs of Articles 8 to 11 of the Convention. Its role must surely be more restricted in the light of a cardinal provision such as Article 3 in view of the central importance of the applicant's *refoulement* for this case ⁽²⁴¹⁾.

3.5. Referral to the CJEU pursuant to Article 267 TFEU

The CJEU is vested with the jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union (Article 267 TFEU). This includes jurisdiction to give binding interpretations of both primary and secondary EU law concerned with the CEAS ⁽²⁴²⁾. Such jurisdiction was fully extended to cover asylum (and immigration) by the Treaty of Lisbon as from December 2009 ⁽²⁴³⁾. In order to explain this referral system, the present Section considers the right and obligation of courts or tribunals of Member States to request a preliminary ruling (Section 3.5.1., pp. 80-81), the form and content of such requests (Section 3.5.2., pp. 82-84), and the proceedings before the CJEU (Section 3.5.3., p. 84).

3.5.1. The right and obligation to request a preliminary ruling

When a question of ascertaining the true meaning or validity of any provision of the relevant EU legislation arises before any courts or tribunals of a Member State, 'that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the [CJEU] to give a ruling thereon' ⁽²⁴⁴⁾.

In considering the necessity of the reference, the referring court or tribunal should bear in mind that the CJEU has the power to declare the reference inadmissible where, for example, the reference relates to issues which are not before the referring court for decision ⁽²⁴⁵⁾. In general, a court of lower instance has a right, but not an obligation to submit a request for a preliminary ruling. This applies also when the question of the validity of a particular EU legal act arises, if the court or tribunal of lower instance considers that the EU legal act to be applied is valid. This is, however, in contrast to the duty of such a lower court or tribunal to ask for a preliminary ruling when it considers the EU law may be invalid since in that respect the CJEU enjoys exclusive jurisdiction in relation to issues of the validity of EU law ⁽²⁴⁶⁾. The question whether there is a judicial remedy against a decision of a court or tribunal must not be considered generally, but always in relation to the concrete case at hand. However, such

⁽²⁴¹⁾ Concurring opinion of Judge Villiger, in *MSS v Belgium and Greece*, op. cit., fn. 203.

⁽²⁴²⁾ In *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratstelle für Getreide und Futtermittel* (CJEU, judgment of 12 February 1974, Case 146/73, ECLI:EU:C:1974:12) it was held that this was 'essential for the preservation of the Community character of [EU] law' and 'has the object of ensuring that [...] the law is the same in all [Member] States [...]'.

⁽²⁴³⁾ Previously Art. 68 TEC modified Art. 234 (now 267 TFEU) so that references could only be made by national courts 'against whose decision there is no judicial remedy under national law'.

⁽²⁴⁴⁾ Now Art. 267 TFEU (formerly Art. 68 TEC as amended by the Treaty of Amsterdam).

⁽²⁴⁵⁾ CJEU, judgment of 16 December 2008, Grand Chamber, Case C-210/06, *Cartesio Okató és Szolgáltató bt*, ECLI:EU:C:2008:723.

⁽²⁴⁶⁾ CJEU, judgment of 22 October 1987, Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452.

judicial remedy is not limited to ordinary appeals but includes also any type of extraordinary remedies, which may even be subject to permission of the upper court ⁽²⁴⁷⁾.

Having regard to the doctrine of the supremacy of EU law over national law, the CJEU has held that, where there is binding legal opinion of a superior court or tribunal in a concrete case at hand, it is not to be followed where this would be in breach of the requirements of EU law, although in such circumstances it would no doubt be prudent for the lower court or tribunal to make a reference to the CJEU for a ruling on the issue unless it is an *acte éclairé* by the CJEU (see further below) ⁽²⁴⁸⁾.

The Lisbon Treaty, re-enacting former treaty law, provides with effect from 1 December 2009 that where such a question arises before a court or tribunal of final jurisdiction in the field of asylum, such a reference is mandatory ⁽²⁴⁹⁾. That does not mean, however, that the mere raising of an issue relating to interpretation of EU law by the parties will inevitably lead to mandatory referral. The CJEU has issued guidance that referral is not mandatory under this provision in the following cases:

- 1) where the issue is not relevant to the outcome of the proceedings;
- 2) in cases of ‘acte éclairé’ where the Court has already ruled on the interpretation of the law either directly or in essentially similar circumstances; and
- 3) in cases of ‘acte clair’ where the national court is of the opinion that the correct application of EU law is so clear as to leave no scope for any reasonable doubt ⁽²⁵⁰⁾.

If, however, there is a new question of interpretation which is of general interest, or existing case-law of the CJEU which does not appear applicable to a new set of facts, the preliminary reference mechanism may be particularly useful.

In its judgment in *Cartesio* ⁽²⁵¹⁾, the CJEU made clear that the right of any national court or tribunal of a Member State to make a reference for a preliminary ruling cannot be called into question by the application of national law where that national law permits the appellate court to vary the order for reference, to set aside the reference, and to order the referring court to resume the domestic law proceedings. The CJEU considered that the assessment of the relevance and necessity of the question referred for a preliminary ruling is, in principle, the responsibility of the referring court alone. Thus, it is for the referring court to draw the proper inferences from a judgment delivered on an appeal against its decision to refer and, in particular, to come to a conclusion as to whether it is appropriate to maintain the reference for a preliminary ruling, or to amend it or to withdraw it.

The power of any court or tribunal to make such a reference is considered fundamental to the proper functioning of the Union.

⁽²⁴⁷⁾ CJEU, judgment of 4 June 2002, Case C-99/00, *Kenny Roland Lyckeskog*, ECLI:EU:C:2002:329.

⁽²⁴⁸⁾ See *Georgi Ivanov Elchinov v Natsionalna zdravnoosiguritelna kasa* (CJEU, judgment of 5 October 2010, Grand Chamber, Case C-173/09, ECLI:EU:C:2010:581) where the Bulgarian Supreme Court had overturned a decision of a lower court and remitted the case back for rehearing. The lower court, however, found itself unable to reach a decision compatible both with EU Law and the binding ruling of the superior national court. The CJEU held that the lower court must depart from national court procedure and the binding legal opinion to ensure compatibility with EU law. See also CJEU, judgment of 15 January 2013, Grand Chamber, Case C-416/10, *Josef Křížan and Others v Slovenská inšpekcia životného prostredia*, ECLI:EU:C:2013:8 on similar situation arising between the Slovak Constitutional Court and Supreme Court.

⁽²⁴⁹⁾ Art. 267 TFEU (formerly Art. 234 TEC).

⁽²⁵⁰⁾ CJEU, *CILFIT* judgment, op. cit., fn. 129.

⁽²⁵¹⁾ CJEU, *Cartesio* judgment, op. cit., fn. 245.

3.5.2. The form and content of the request for a preliminary ruling

The request for a preliminary ruling is made by way of questions framed by the referring court or tribunal, but the CJEU is not bound by the specific terms of the reference to it. Whilst its jurisdiction is derived from the subject-matter of the reference, the CJEU can redefine the scope of the question before it. The object of the CJEU will be to provide the referring court or tribunal with all the elements of interpretation of EU law which may assist in adjudicating in the case before it ⁽²⁵²⁾. The referral proceedings are interlocutory and limited to the CJEU's interpretation of the provisions of the relevant EU legislation which it identifies for decision. Other interested Member States and the European Commission have the right to intervene and other interested third parties can be heard, provided that they had already been allowed to intervene in the domestic proceedings ⁽²⁵³⁾. The CJEU's decision on the interpretation of the provisions in question is binding on all Member States.

The CJEU has no jurisdiction to interpret directly any international treaty or convention to which the EU is not a party even though the treaty or convention in question may be binding on the referring Member State and have relevance to the treatment of asylum-seekers ⁽²⁵⁴⁾. Where, however, the provisions have been incorporated into EU law, it will have power to do so on the principle of *renvoi* ⁽²⁵⁵⁾. That incorporation will, however, need to be in clear terms and a mere reference to EU legislation being based on the application of such treaties or conventions will not suffice.

The reference must be made in accordance with the [Rules of Procedure of the CJEU](#) ⁽²⁵⁶⁾. Those relevant to references are contained in Title III at Articles 93 to 118. Article 94 provides:

In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling shall contain:

- (a) a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based;
- (b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;
- (c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

The CJEU has also issued an explanatory document giving guidance to making references, and [Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings](#) ⁽²⁵⁷⁾. It notes that it is not for the CJEU either to decide issues of fact raised in the main proceedings or to resolve any differences of opinion on the interpretation or

⁽²⁵²⁾ See CJEU, judgment of 14 October 2010, Case C-243/09, *Günter Fuß v Stadt Halle*, ECLI:EU:C:2010:609, paragraphs 39-40, and CJEU, judgment of 13 June 2013, Case C-45/12, *Office national d'allocations familiales pour travailleurs salariés (ONAF) v Radia Hadj Ahmed*, ECLI:EU:C:2013:390, paragraph 42.

⁽²⁵³⁾ Art. 96, *Consolidated Version of Rules of Procedure of the Court of Justice* of 25 September 2012 [2012] OJ L 265/1, as amended on 18 June 2013 [2013] OJ L 173/65. The Court will also hear other third party interveners such as the UNHCR who have already been a party in the domestic proceedings. Note that these Rules are updated periodically.

⁽²⁵⁴⁾ See CJEU, *Qurbani* judgment, op. cit., fn. 41, paragraphs. 21-26, where the Court was asked to interpret the meaning of Art. 31 of the Refugee Convention and held, applying *TNT Express Nederland BC v AXA Versicherung AG* (CJEU, judgment of 4 May 2010, Grand Chamber, Case C-533/08, ECLI:EU:C:2010:243), that it had no jurisdiction to do so.

⁽²⁵⁵⁾ For an example of the application of *renvoi* see CJEU, *Bolbol* judgment, op. cit., fn. 3 discussed in Section 3.4.2. above, pp. 75-77.

⁽²⁵⁶⁾ *Rules of Procedure of the Court of Justice*, op. cit., fn. 253. These are revised periodically.

⁽²⁵⁷⁾ *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings* [2012] OJ L 338/1.

application of rules of national law. It will, however, seek to address the reference in the way which will be most helpful to the referring court or tribunal.

If the national law results from the transposition of EU law, the national court may have to consider, in the light of the CJEU's ruling as to the interpretation of relevant EU law, whether the national law has effectively transposed the binding provisions of EU Directives.

In addition to Article 94 of the Rules of Procedure, the Recommendations contain further guidance at paragraphs 20 to 28. The referring court must bear in mind that the reference which it settles 'will serve as the basis of the proceedings before the Court' and is the only document which will be notified to the parties to the national proceedings and other interested persons for the purpose of making written observations to the CJEU. It will also need to be translated by the CJEU into all official languages of the EU. It should therefore:

- be 'drafted simply, clearly and precisely avoiding superfluous detail' (para. 21);
- be 'sufficiently complete and must contain all the relevant information to give [...] a clear understanding of the factual and legal context of the main proceedings' (para. 22);
- contain, in addition to the text of the questions referred, the information specified in Article 94 of the Rules of Procedure;
- clearly identify the relevant EU law provisions together with, if appropriate, 'a brief summary of the relevant arguments of the parties to the main proceedings' (para. 21);
- it may be helpful to the CJEU for the referring court or tribunal also to 'briefly state its view on the answer to be given to the question referred [...]' (para. 24).

In terms of presentation, the Recommendations emphasise that the request must be typewritten and the pages and paragraphs should be numbered. The questions referred should 'appear in a separate and clearly identified section [...] preferably at the beginning or the end' and they must be so framed that 'it is possible to understand them on their own terms, without reference to the statement of the grounds for the request' (para. 26). The question of anonymising the parties should, in the first instance, be dealt with by the referring court or tribunal at the time of submission of the reference (paras 27 and 28).

A reference should not generally be made until the national proceedings have reached a stage where the legal and factual content of the case can be defined. The initiative for making the reference may come from the parties or be raised by the referring court or tribunal of its own volition. In the latter case, the parties should be given the opportunity to make representations but the final decision as to whether to make a reference is that of the court or tribunal alone.

It is generally considered that there may be advantages in an identified issue being referred at an early stage for interpretation, particularly where such reference emanates from a specialist court or tribunal. Nevertheless, the drafting of a reference requires considerable care and is ultimately the responsibility of the referring court or tribunal, even though it may seek assistance from the parties to the proceedings before it in framing the terms of reference.

The effect of making the reference is to stay the national proceedings until the CJEU has given its ruling ⁽²⁵⁸⁾. The national court or tribunal should, therefore, take into account that the making of the reference will inevitably lead to delay and additional costs. The national court should also consider the advisability of joining in potentially interested parties, so that they are parties

⁽²⁵⁸⁾ The referring court or tribunal may still order protective measures which it considers necessary but the CJEU must be informed of any procedural step that may affect the referral and if any new party is admitted to the national proceedings.

to the national proceedings before the reference is made. This is because Article 96 of the Rules of Procedure limits the persons entitled to make observation to the CJEU to the parties to the national action, Member States, the European Commission and the institutions which adopted the act the interpretation of which is in dispute. Notwithstanding that by reason of its role and expertise UNHCR may have valuable observations to make, it has no standing under the Rules unless it is party to the national proceedings ⁽²⁵⁹⁾. The same applies to expert non-governmental organisations. Whilst Article 97(2) of the Rules of Procedure acknowledges that parties may be added to the proceedings by the national court or tribunal after the reference has been made but is still pending, such additional party must take the proceedings as they are at that stage. The terms of the referral will then have been settled but, if such third parties are to have meaningful input, it is clearly desirable that they should be joined at a stage when they have the opportunity to address observations to the national court or tribunal which may be pertinent to the framing of the reference.

The fact that under national law there may be an appeal against the decision to make the reference will not invalidate the reference once made unless, as a consequence of this appeal, the national court withdraws its request for a preliminary ruling sooner than notice of the date of the delivery of the CJEU's judgment has been served to the parties.

More detailed guidance in relation to how courts and tribunals should go about making a referral to the CJEU is contained in an IARLJ publication ⁽²⁶⁰⁾.

3.5.3. The proceedings before the CJEU

These are governed by the Statute of the CJEU and the Rules of Procedure of the Court of Justice. It should be noted, however, that there is provision for the referring court or tribunal to make application that the expedited and/or urgent procedures prescribed by the rules should be applied ⁽²⁶¹⁾.

Following the making of its decision on interpretation of the provisions of EU law in question, the case will be remitted to the referring court or tribunal for it to conclude its findings, taking due account of the binding interpretative guidance issued by the CJEU. That guidance will be binding on all Member States.

3.6. The approach of national courts and tribunals

The CEAS is part of the legal system of the EU and has therefore become an integral part of the legal systems of Member States which their courts are bound to apply ⁽²⁶²⁾. As previously noted (Section 3.3., pp. 72-78), any provisions of national law which may conflict with it, whether prior or subsequent to the EU law, must be set aside ⁽²⁶³⁾.

⁽²⁵⁹⁾ See Section 3.1. above, pp. 61-63, which explains the position of UNHCR.

⁽²⁶⁰⁾ IARLJ, *Preliminary references to the Court of Justice of the European Union: A Note for National Judges Handling Asylum-Related Cases*, 2013.

⁽²⁶¹⁾ These are governed by Arts 107 to 111, respectively, of the rules and are further explained in the recommendations in paragraphs 37-46.

⁽²⁶²⁾ See CJEU, *Costa* judgment, op. cit., fn. 147.

⁽²⁶³⁾ See CJEU, judgment of 19 June 1990, Case C-213/89, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others* judgment, ECLI:EU:C:1990:257.

It follows, therefore, that in order to achieve its purpose of a uniform protection status identified by common procedures, there is a necessity for judicial dialogue in order to ensure uniformity of application of its provisions.

This is in part affected by dialogue between the national referring court and the CJEU on referral of particular issues of interpretation, where all Member States also have the opportunity of making submissions to the CJEU as interested parties before its decision is reached (see [Section 3.5.](#) above, pp. 80-84). This may be characterised as ‘vertical’ dialogue ⁽²⁶⁴⁾.

In such cases there will be the necessity for the national referring court to apply that judgment to the facts of the case before it. This will lead to practical examples at national court and tribunal level of the way in which the CJEU interpretation has been applied.

As all Member States will have to deal with similar issues in light of the CJEU judgment, this provides a clear example of a focal point where judicial dialogue between Member States’ courts (which may be characterised as ‘horizontal’ dialogue) might be of particular value.

Horizontal judicial dialogue will also be apt when the CJEU has yet to interpret relevant provisions of CEAS law. To illustrate the various ways horizontal judicial dialogue arises, by way of practical example, the CJEU considered the issue of cessation of refugee status ⁽²⁶⁵⁾ in its judgment of 2 March 2010 in the case of *Abdulla and Others* ⁽²⁶⁶⁾. The CJEU held that Article 11(1)(e) and (f) and Article 11(2) QD (now Article 11(1)-(2) QD (recast)) must be interpreted as meaning:

- (a) that the change of circumstances relied on must be significant and non-temporary in nature so that the basis of grant of refugee status no longer exists and there is no other reason to fear persecution;
- (b) actors of protection must have taken reasonable steps to prevent the persecution by operating (inter alia) an effective legal system for detection, prosecution and punishment of acts of persecution, accessible to the applicant;
- (c) actors of protection may comprise international organisations as provided in the QD;
- (d) the standard of probability used to assess risk stemming from other circumstances which could justify fear of persecution is the same as that applied when refugee status was granted;
- (e) the probative value of previous acts of persecution may apply to a claim that there remains a well-founded fear of persecution by reason of circumstances other than those which led to the original grant of status, but normally only when the reason for persecution is different from that accepted at the time when refugee status was granted and the earlier acts or threats relied on are connected with the reason for persecution being examined in connection with the issue of cessation.

It will be appreciated that the question of the interpretation of the cessation provisions by the CJEU raises a variety of factors. A factual reassessment of the current circumstances, possibly

⁽²⁶⁴⁾ A similar ‘vertical’ dialogue takes place on admission of complaints to the ECtHR but in a more limited way since: (i) the place of ECHR norms in the national legal order may vary; and (ii) states parties who are not parties to the proceedings may be heard as interested parties only with the consent of the court, and then only usually by way of written submission (Rule 44(3) ECtHR, *Rules of Court*, 1 June 2015).

⁽²⁶⁵⁾ This example has been selected because it produces the fewest references to national court decisions in the European Database of Asylum Law. In other more general issues, the number of references substantially increases, widening the area for comparison between the approach of national courts to the CJEU interpretative judgments.

⁽²⁶⁶⁾ CJEU, *Abdulla* judgment, op. cit., fn. 3.

in the light of a re-examination of reasons for fear of persecution not taken into account at the time of the original grant of status, will need to be made by the national court or tribunal. These remain relevant under the QD (recast) as its relevant provisions are drawn in similar terms. A parallel issue which may need to be taken into account at national level is the degree to which the State may be under the obligation of active cooperation having regard to the difficulties which an applicant resident for a number of years in the Member State may have in adducing evidence as to the current situation in his or her country of origin ⁽²⁶⁷⁾. There are, accordingly, many aspects of dealing with cessation cases where the approach of the national courts of other Member States may be both relevant and instructive. The *Abdulla* judgment is likely to lead to numerous such cases as the authoritative statements provided are interpreted by national courts and tribunals.

However, particularly because *Abdulla* has not interpreted the cessation clauses in all respects, what has been said by national courts and tribunals about them may provide a useful start-point. There are already a number of national court judgments which other national courts may wish to take into account.

There have been two decisions of the German Federal Administrative Court. In the first ⁽²⁶⁸⁾, the Court held the cessation provisions applied where the original grant had been on the basis that the then Iraqi authorities viewed an application for asylum in another country as political opposition. Such a basis no longer existed following the collapse of the Saddam Hussein regime. Indeed, the basis had permanently ceased because the new authorities did not consider applications for asylum in that way and there was no prospect of a return to power of the former regime. In the second ⁽²⁶⁹⁾, the Court considered the meaning of a change of circumstances being of ‘a significant and non-temporary nature’. The Court held that this required that the factual circumstances in the country of origin must have changed noticeably and substantially, and that the change would be durable if the changed circumstances were stable and would persist for the foreseeable future. The situation in Iraq met those requirements.

The Cour nationale du droit d’asile (French National Asylum Court) considered the situation of an applicant recognised as a refugee in 1986 as a Yugoslav national whose status was revoked in 2010 by the Office français de protection des réfugiés et apatrides (French Office for the protection of refugees and stateless persons) ⁽²⁷⁰⁾. He had resided in France for 25 years with his family and had visited Kosovo only twice, claiming during those visits to fear for his life because he was regarded there as a deserter. The Court held that, although originally granted status as a Yugoslav citizen, the present situation should be considered by reference to the situation in the Republic of Kosovo. There had been significant and permanent changes there, taking into particular account Kosovo’s declaration of independence, the establishment of democratic institutions and a State subject to the rule of law, so that his fears based on his being a Kosovan Albanian, which had led to the initial recognition, had ceased to exist. He did not claim any compelling reason linked to previous persecution as a basis for refusing the protection of the Kosovan authorities and, on the evidence, had presented no valid basis for any fear of persecution in respect of which he could not claim the protection of the authorities. The revocation of refugee status was upheld.

⁽²⁶⁷⁾ See CJEU, *MM* judgment, op. cit., fn. 64, paragraph 66.

⁽²⁶⁸⁾ Federal Administrative Court (Germany), judgment of 24 February 2011, *BVerwG 10 C 3.10*, ECLI:DE:BVerwG:2011:240211U10C3.10.0 (see *unofficial English translation*).

⁽²⁶⁹⁾ Federal Administrative Court (Germany), judgment of 1 June 2011, *BVerwG 10 C 25.10*, ECLI:DE:BVerwG:2011:010611U10C25.10.0, (see *unofficial English translation*) paragraphs 20 and 24.

⁽²⁷⁰⁾ National Asylum Court (France), judgment of 25 November 2011, *MK*, No 10008275, in *Contentieux des réfugiés, Jurisprudence du Conseil d’Etat et de la Cour nationale du droit d’asile*, Année 2011, pp. 152-154.

In *AA v Migration Office* ⁽²⁷¹⁾, before the *Krajskýsúd v Bratislava* (Slovak Regional Court in Bratislava), a procedural issue as to revocation of status arose. Under s. 20(3) of the national Asylum Act, the applicant requested an extension of stay following the grant of subsidiary protection status. The Migration Office considered the issue of revocation and issued a decision revoking that status. The Court held that the applicant's extension application could either be granted or refused but that in those proceedings there was no power to revoke the status, which could only be done by initiating a separate procedure for that purpose. Whilst this does not go to the merits of revocation, it nevertheless illustrates the relevance of general principles enshrined in the EU Charter relating to good governance and the necessity for a fair trial.

The *Wojewódzki Sad Administracyjny w Warszawie* (Polish Regional Administrative Court in Warsaw ⁽²⁷²⁾) considered the interpretation of Article 16 QD which contains provisions relating to cessation of subsidiary protection status in terms similar but not identical to those in Article 11(1)(e) and (f) QD ⁽²⁷³⁾. Article 16(1) provides that eligibility for subsidiary protection shall cease 'when the circumstances which led to the granting of [it] have ceased to exist *or* have changed to such a degree that protection is no longer required' ⁽²⁷⁴⁾. The Court held that Article 16(1) referred to two separate reasons that justify revoking subsidiary protection. In the instant case, although the circumstances giving rise to the initial grant of status had not ceased to exist, they had changed to such a degree that there was no longer any risk to the life or health of inhabitants of the country of origin, as was further evidenced by the applicant having stayed there for three years before returning to Poland on a passport issued by her country of nationality. The decision to revoke that status was upheld. As a separate issue, the applicant had submitted that she was entitled to the same protection as her husband, who had been separately granted subsidiary protection status which had not been revoked. She argued that she should continue to enjoy subsidiary protection status, together with her husband, on the grounds of family unity. Rejecting that argument, the Court noted that she had through her own behaviour decided not to avail herself of the protection provided by the Polish state and that the institution of subsidiary protection could not be implemented contrary to the purpose for which it was established ⁽²⁷⁵⁾.

On a different point relating to Article 11(1)(a) QD and the effect of re-availing oneself of the protection of the country of nationality, the *Migrationsöverdomstolen* (Swedish Migration Court of Appeal ⁽²⁷⁶⁾) considered the effect of a refugee applying for and receiving a new passport issued by Iraq, his country of origin, following recognition as a refugee and the issue of a residence permit in Sweden, which had been included in the new Iraqi passport. The Court upheld the revocation of refugee status by the Migration Board on the basis that his actions indicated an intention to re-avail himself of the protection of his country of origin.

The small selection of national decisions set out above serves to emphasise the relevance of the national case-law of other Member States to the national judge before whom similar issues are raised and the great importance of 'horizontal judicial dialogue'.

One of the obstacles to greater dialogue is that the Member States have very different legal and procedural traditions. Some Member States have a specialist dedicated court system for

⁽²⁷¹⁾ Regional Court in Bratislava (Slovakia), judgment of 20 March 2012, *AA v Migration Officer of the Ministry of Interior of the Slovak Republic*, 9Saz/47/2011 (see [EDAL English Summary](#)).

⁽²⁷²⁾ Regional Administrative Court in Warsaw (Poland), judgment of 16 May 2013, IV SA.Wa 2684/12 (see [EDAL English summary](#)).

⁽²⁷³⁾ See now Art. 16(1) and (2) QD (recast).

⁽²⁷⁴⁾ Emphasis added.

⁽²⁷⁵⁾ See CJEU, *M'Bodj* judgment, op. cit., fn. 62.

⁽²⁷⁶⁾ Migration Court of Appeal (Sweden), judgment of 13 June 2011, UM 5495-10 (see [EDAL English summary](#)).

the consideration of asylum (and often immigration) law ⁽²⁷⁷⁾, whereas other Member States deal with these issues as part of their administrative law or their wider court system ⁽²⁷⁸⁾. Together with varying political, social and cultural factors, such differences have led to a lack of uniformity of approach between Member States ⁽²⁷⁹⁾ increasing the danger of ‘asylum shopping’ on the part of applicants, the elimination of which is one of the stated objectives of the CEAS (recital (13) QD (recast)).

Nevertheless, there has in recent years been a growing recognition of the need for dialogue between asylum law judges, which has been one of the driving forces behind the activities of IARLJ-Europe ⁽²⁸⁰⁾ through international conferences and workshops, the publication of papers on topical issues and the development of judicial training materials. There have also been efforts on the part of a number of bodies to establish a European case-law database.

Though this remains the exception rather than the rule, there has also been a conscious effort on the part of some national judges to extend the references to ‘foreign’ case-law in their judgments and in their internal training initiatives. Thus both the German Federal Administrative Court and the UK Asylum and Immigration Tribunal now regularly cite relevant case-law of other Member States in their judgments ⁽²⁸¹⁾.

The [Newsletters on European Asylum Issues](#), issued three or four times each year by the Centre for Migration Studies of Radboud, University Nijmegen, contain a list of past relevant CJEU decisions and of cases pending before the Court. And is more generally a useful source of accessible and regularly updated information listed by reference to the relevant EU instruments. However, this Newsletter currently contains limited reference to the decisions of Member States’ national courts.

UNHCR’s regularly updated digest of case-law provides summaries of the leading jurisprudence of the CJEU and ECtHR in relation to refugee and asylum issues ⁽²⁸²⁾. The UNHCR’s website [Refworld](#) contains relevant judgments of the CJEU and ECtHR as well as case-law from a variety of national courts and jurisdictions. The website also contains many publications, including UNHCR’s Protection Manual which includes UNHCR positions.

The [IARLJ website](#) contains references to publications of interest to national asylum law judges, including proceedings of its world conferences and academic publications which might not be otherwise readily accessible ⁽²⁸³⁾.

EASO publishes compilations of jurisprudence on specific topics. It has done this in the context of its publication, [Article 15\(c\) Qualification Directive \(2011/95/EU\): Judicial Analysis and The Implementation of Article 15\(c\) QD in EU Member States](#), which was written by a working

⁽²⁷⁷⁾ This is the position in, for example, Austria, Belgium, Denmark, Finland, France, Sweden and the UK even though first instance appeal or review may then lead to further appeal via the general appeal system.

⁽²⁷⁸⁾ This applies, for example, in Germany, Italy, Luxembourg, Netherlands, Poland, Slovenia and Spain.

⁽²⁷⁹⁾ The 2008 European Pact on Immigration and Asylum (op. cit., fn. 18, p. 11) noted that ‘considerable disparities remain between one Member State and another concerning the grant of protection and the forms that protection takes’. Similar criticisms have been made by UNHCR — see, e.g., UNHCR, *Comments on the European Commission’s Amended Proposal*, op. cit., fn. 44, p. 2.

⁽²⁸⁰⁾ The IARLJ was founded in 1997 with the object of promoting contact and cooperation between asylum law judges worldwide. Its European Chapter (IARLJ-Europe) has always played a very active part in its activities, although it is now focused particularly on issues concerning the development of the CEAS.

⁽²⁸¹⁾ See also National Asylum Court (France), judgment of 5 July 2011, *M V*, No 11005317: the judgment concerned a national of Sri Lanka, of Tamil origin and former journalist of the LTTE. The Court made reference to country guidance for the appraisal of the claimant’s risk provided by the UK Asylum and Immigration Tribunal in its judgment *TK (Tamils — LP updated) Sri Lanka CG* [2009] UKAIT 00049.

⁽²⁸²⁾ UNHCR, *The Case Law of the European Regional Courts: The Court of Justice of the European Union and the European Court of Human Rights. Refugees, Asylum-Seekers, and Stateless Persons*, 2015.

⁽²⁸³⁾ These include, for example, the Opinion of Judge H. Dörig of the German Federal Administrative Court on ‘German Courts and the Understanding of the Common European Asylum System’ (RSQ (2013), 768-778) which includes references to the recent judgments of the German Courts on the criteria for qualification, exclusion and cessation of refugee status and issues arising under the Dublin Regulation.

group of judges and is the first publication in the EASO Professional Development Series for Courts and Tribunals. It will be followed soon by a further chapter, entitled *Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU)* which will also feature such a compilation. This Analysis, like the materials prepared within the joint IARLJ-Europe-EASO project, will also feature such compilations.

A further useful resource is the case summaries provided by the [European Database of Asylum Law](#) (EDAL) which is run by ECRE. These summaries, which are regularly updated, comprise not only CJEU and ECtHR case-law but also a wide selection of national decisions from (currently) 19 Member States who include all those with the higher numbers of applications for international protection. The case summaries are searchable by a free text/full text search, as well as by keyword, applicable legal provisions, country of decision, country of applicant and date. EDAL also contains information on each Member State's legal framework, and a range of [legislation](#) and other [relevant resources](#) such as reports of non-governmental organisations and UNHCR Guidelines.

There can be no doubt that, by reason of its provisions as to the level of judicial oversight of first instance decisions relating to international protection issues, the effect of the CEAS is substantially to enhance the importance of the judicial process. If its dual purpose of providing a uniform protection status by common procedures is to be realised, there is an imperative need for increased transnational dialogue between the national judiciaries concerned with that process. The remit of EASO under Article 6 of its Regulation is to facilitate that process through the provision of professional development activities for members of courts and tribunals and support on terms which have been agreed with a wide cross-section of the judicial community. As has been shown above, many tools to support greater judicial access to all relevant case-law and research information already exist, even though not in a formalised way. A conscious decision to incorporate into their national judgments reference to the national case-law of other Member States, as well as to that of the supra-national courts, is one of the most effective ways in which members of courts and tribunals at the national level dealing with international protection cases can enhance judicial cooperation within the EU and advance the objectives of the CEAS.

Appendix A: Primary sources

1. European Union law

1.1. EU primary law

Treaty on the Functioning of the European Union (consolidated version as amended by the Lisbon Treaty (entry into force: 1 December 2009)) [2012] OJ C 326/47.

Treaty on the European Union (consolidated version as amended by the Lisbon Treaty (entry into force: 1 December 2009)) [2012] OJ C 326/13.

Charter of Fundamental Rights of the European Union of 18 December 2000, OJ C 326/391, as amended on 12 December 2007 OJ C 2007 303/01 (entry into force: 1 December 2009).

Protocol No 24 on Asylum for National of Member States of the European Union, in [2008] OJ C 115/305.

Protocol No 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, in [2012] OJ C 326/313.

1.2. EU secondary legislation

1.2.1. Regulations

Council Regulation (EC) No 2725 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L 316/1.

Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2001] OJ L 8/1.

Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50/1.

Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 222/3.

Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office [2010] OJ L 132/11.

Regulation (EU) No 1077/2011 of the European Parliament and of the Council of 25 October 2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice [2011] OJ L 286/1.

Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member

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

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

Commission Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2014] OJ L 39/1.

1.2.2. Directives

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31.

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212/12.

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18.

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L 16/44.

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12.

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.

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

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98.

Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [2011] OJ L 132/1.

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

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60.

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L 180/96.

2. International treaties of universal and regional scope

2.1. European Union

Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities of 15 June 1990 [1997] OJ C 254/1 (entry into force: 1 September 1997).

Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway [2001] OJ L 93/40 (entry into force: 1 April 2001).

Protocol to the Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway [2006] OJ L 57/16 (entry into force: 1 May 2006).

Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland [2008] OJ L 53/5 (entry into force: 1 March 2008).

Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community, and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland [2009] OJ L 161/8.

2.2. Schengen

Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders of 14 June 1985 [2000] OJ L 239/13 (entry into force: 1 September 1993).

Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at the Common Borders of 19 June 1990 [2000] OJ L 239/19 (entry into force: 1 September 1993).

2.3. United Nations

Charter of the United Nations and Statute of the International Court of Justice, 1 UNTS 16, 26 June 1945 (entry into force: 24 October 1945).

Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, 9 December 1948 (entry into force: 12 January 1951).

Convention Relating to the Status of Refugees, 189 UNTS 150, 28 July 1951 (entry into force: 22 April 1954).

International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195, 7 March 1966 (entry into force: 4 January 1969).

International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entry into force: 23 March 1976).

International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, 16 December 1966 (entry into force: 3 January 1976).

Optional Protocol to the International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entry into force: 23 March 1976).

Protocol Relating to the Status of Refugees, 606 UNTS 267, 31 January 1967 (entry into force: 4 October 1967).

Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entry into force: 27 January 1980).

International Convention on the Suppression and Punishment of the Crime of Apartheid, 1015 UNTS 243, 30 November 1973 (entry into force: 18 July 1976).

Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13, 18 December 1979 (entry into force: 3 September 1981).

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984 (entry into force: 26 June 1987).

Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989 (entry into force: 2 September 1990).

Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, 1642 UNTS 85, 15 December 1989 (entry into force: 11 July 1991).

Rome Statute of the International Criminal Court, 2187 UNTS 3, 17 July 1998 (entry into force: 1 July 2002).

Convention on the Rights of Persons with Disabilities, 2515 UNTS 3, 13 December 2006 (entry into force: 3 May 2008).

International Convention for the Protection of all Persons from Enforced Disappearance, 2716 UNTS 3, 20 December 2006 (entry into force: 23 December 2010).

2.4. International Committee of the Red Cross

Geneva Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, 75 UNTS 31, 12 August 1949 (entry into force: 21 October 1950).

Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces in the Field, 75 UNTS 31, 12 August 1949 (entry into force: 21 October 1950).

Geneva Convention (III) relative to the Treatment of Prisoners of War, 75 UNTS 287, 12 August 1949 (entry into force: 21 October 1950).

Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, 12 August 1949 (entry into force: 21 October 1950).

Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entry into force: 7 December 1978).

Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entry into force: 7 December 1978).

2.5. Council of Europe

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, ETS No 005, 4 November 1950 (entry into force: 3 September 1953).

Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other than Those Already Including in the Convention and in the First Protocol Thereto, ETS No 046, 16 September 1963 (entry into force: 2 May 1968).

Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, ETS No 114, 28 April 1983 (entry into force: 1 March 1985).

Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No 117, 22 November 1984 (entry into force: 1 November 1988).

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ETS No 126, 26 November 1987 (entry into force: 1 February 1989).

Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of the Death Penalty in All Circumstances, ETS No 187, 3 May 2002 (entry into force: 1 July 2003).

3. Resolutions of the United Nations Security Council

Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted in 25 May 1993, UN Doc S/RES/827.

Statute of the International Criminal Tribunal for Rwanda, adopted in 8 November 1994, UN Doc S/RES/955.

Resolution 1373 (2001), 28 September 2001, UN Doc S/RES/1373.

Resolution 1377 (2001), 12 November 2001, UN Doc S/RES/1377.

4. Case-law

4.1. Court of Justice of the European Union

The judgments listed below are those quoted in the present volume. They do not only concern the CEAS and EU immigration law but also broader issues relating, for instance, to the application or interpretation of EU law or to EU free movement.

4.1.1. Judgments

Judgment of 5 February 1963, Case 26/62, *Van Gend en Loos v Netherlands*, ECLI:EU:C:1963:1.

Judgment of 15 July 1964, Case 6/64, *Flaminio Costa v ENEL*, ECLI:EU:C:1964:66.

Judgment of 17 December 1970, Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114.

Judgment of 21 February 1973, Case 6/72, *Europemballage Corporation and Continental Can Company Inc v Commission of the European Communities*, ECLI:EU:C:1973:22.

Judgment of 12 February 1974, Case 146/73, *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1974:12.

Judgment of 14 May 1974, Case 4/73, *J Nold, Kohlen- und Baustoffgrosshandlung v Commission of the European Communities*, ECLI:EU:C:1974:5.

Judgment of 4 December 1974, Case C-41/74, *Yvonne van Duyn v Home Office*, ECLI:EU:C:1974:133.

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Judgment of 16 December 1976, Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, ECLI:EU:C:1976:188.

Judgment of 27 October 1977, Case 30/77, *Regina v Pierre Bouchereau*, ECLI:EU:C:1977:172.

Judgment of 9 March 1978, Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SPA*, ECLI:EU:C:1978:49.

Judgment of 5 April 1979, Case C-148/78, *Publico Ministero v Tullio Ratti*, ECLI:EU:C:1979:10.

Judgment of 19 January 1982, Case 8/81, *Becker v Finanzamt Münster-Innenstadt*, ECLI:EU:C:1982:7.

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Judgment of 26 February 1986, Case 152/84, *MH Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, ECLI:EU:C:1986:84.

Judgment of 8 October 1987, Case 80/86, *Kolpinghuis Nijmegen BV*, ECLI:EU:C:1987:431.

Judgment of 22 October 1987, Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452.

Judgment of 19 June 1990, Case C-213/89, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others* judgment, ECLI:EU:C:1990:257.

- Judgment of 12 July 1990, Case C-188/89, *A Foster, GAHM Fulford-Brown, J Morgan, M Roby, EM Sallo-way and P Sullivan v British Gas plc.*, ECLI:EU:C:1990:313.
- Judgment of 13 November 1990, Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentación SA*, ECLI:EU:C:1990:395.
- Judgment of 18 June 1991, Case C-260/89, *Elliniki Radiophonia Tileorassi Anonimi Etairia (ERT AE) and Panellinia Omospondia Syllogon Prossopikou ERT v Dimotiki Etairia Pliroforissis (DEP), Sotirios Kouvelas, Nicolaos Avdellas and Others*, ECLI:EU:C:1991:254.
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- Judgment of 19 November 1991, Joined Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and Others v Italian Republic*, ECLI:EU:C:1991:428.
- Judgment of 13 April 1994, Case C-128/92, *HJ Banks and Company Limited v British Coal Corporation*, ECLI:EU:C:1994:130.
- Judgment of 14 July 1994, Case C-91/92, *Paola Faccini Dori v Recreb Srl*, ECLI:EU:C:1994:292.
- Judgment of 5 October 1994, Case C-280/93, *Germany v Council*, ECLI:EU:C:1994:367.
- Judgment of 14 December 1995, Case C-312/93, *Peterbroeck, Van Campenhout and Cie SCS v Belgian State*, ECLI:EU:C:1995:437.
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- Judgment of 5 March 1996, Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others*, ECLI:EU:C:1996:79.
- Judgment of 7 March 1996, Case C-192/94, *El Corte Inglés SA v Cristina Blázquez Rivero*, ECLI:EU:C:1996:88.
- Judgment of 30 April 1996, Case C-194/94, *CIA Security International SA v Signalson SA and Securitel SPRL*, ECLI:EU:C:1996:172.
- Judgment of 24 October 1996, Case C-72/95, *Aannemersbedrijf PK Kraaijeveld BV ea v Gedeputeerde Staten van Zuid-Holland*, ECLI:EU:C:1996:404.
- Judgment of 18 December 1997, Case C-129/96, *Inter-Environnement Wallonie ASBL v Région Wallonne*, ECLI:EU:C:1977:628.
- Judgment of 10 March 1998, Case C-122/95, *Germany v Council*, ECLI:EU:C:1998:94.
- Judgment of 11 January 2001, Case C-1/99, *Kofisa Italia Srl v Ministero delle Finanze*, ECLI:EU:C:2001:10.
- Judgment of 11 January 2001, Case C-403/98, *Azienda Agricola Monte Arcosu Srl v Regione Autonoma della Sardegna [...]*, ECLI:EU:C:2001:6.
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- Judgment of 4 June 2002, Case C-99/00, *Kenny Roland Lyckeskog*, ECLI:EU:C:2002:329.

- Judgment of 11 July 2002, Case C-60/00, *Mary Carpenter v Secretary of State for the Home Department*, ECLI:EU:C:2002:434.
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- Judgment of 30 September 2003, Case C-224/01, *Gerhard Köbler v Republik Österreich*, ECLI:EU:C:2003:513.
- Judgment of 6 November 2003, Case C-101/01, *Bodil Lindqvist*, ECLI:EU:C:2003:596.
- Judgment of 7 January 2004, Case C-117/01, *KB and National Health Service Pensions Agency, Secretary of State for Health*, ECLI:EU:C:2004.
- Judgment of 13 January 2004, Case C-453/00, *Kühne and Heitz NV v Produktschap voor Pluimvee en Eieren*, ECLI:EU:C:2004:17.
- Judgment of 16 June 2005, Grand Chamber, Case C-105/03, *Maria Pupino*, ECLI:EU:C:2005:386.
- Judgment of 22 November 2005, Grand Chamber, Case C-144/04, *Werner Mangold v Rüdiger Helm*, ECLI:EU:C:2005:70.
- Judgment of 4 July 2006, Grand Chamber, Case C-212/04, *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos*, ECLI:EU:C:2006:443.
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Appendix B: Methodology

Methodology for the development this Analysis

Although seeking to work as far as possible within the framework of the EASO methodology for the Professional Development Series as a whole ⁽²⁸⁴⁾, the development of this Analysis is one of the four subjects being dealt with under the contract between IARLJ-Europe and EASO to produce core judicial training materials, and therefore required a modified approach. It has already been observed in the [Section on Contributors](#) (pp. 3-4) that the drafting process had two main components: drafting undertaken by a team of experts; and review and overall supervision of that team's drafting work by an Editorial Team composed exclusively of judges.

Preparatory phase

During the preparatory phase, the drafting team considered the scope, structure and content of the Analysis, in conjunction with the Chair of the Editorial Team (ET), and prepared:

1. A provisional bibliography of relevant resources and materials available on the subject.
2. An interim compilation of relevant jurisprudence on the subject.
3. A sample of work in progress.
4. A preparatory background report which included a provisional structure for the Analysis and a report on progress.

These materials were shared with the ET which provided both general guidance and more specific feedback in the form of instructions to the drafting team regarding the further development of the Analysis and compilation of jurisprudence.

Drafting phase

The drafting team developed a draft of the Analysis and compilation of jurisprudence, in accordance with the EASO Style Guide, using desk-based documentary research and analysis of legislation, case-law, training materials and any other relevant literature, such as books, reports, commentaries, guidelines, and articles from reliable sources. Under the coordination of the team leader, sections of the Analysis and the compilation of jurisprudence were allocated to team members for initial drafting. These initial drafts were then considered by all members of the team with a full exchange of views followed by redrafting in the light of those discussions.

The first draft, completed by the drafting team, was shared with the ET which was charged with reviewing the draft with a view to assisting the drafting team to enhance its quality. Accordingly, the ET provided further instructions to the drafting team concerning the structure, format and content. Pursuant to these instructions, the drafting team made further amendments and submitted a final draft to the ET. This draft was shared with UNHCR which provided its views. These were taken into consideration by the ET in its review and some further amendments were made by the ET, in conjunction with the

⁽²⁸⁴⁾ The original version of this is included as an Appendix B to the EASO publication, *Article 15(c) Qualification Directive (2011/95/EU): Judicial Analysis*, December 2014; a revised version is included as Appendix C to the EASO publication, *Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU) — A Judicial Analysis*, 2016.

drafting team, in order to prepare the texts for external consultation. EASO was also consulted and its comments were taken into account by the ET at each stage of drafting.

External consultation

The draft Judicial Analysis and compilation of jurisprudence was shared by EASO with the EASO network of members of courts and tribunals, UNHCR and members of EASO's Consultative Forum who were invited to review the material and provide feedback with a view to further enhancing quality. Feedback received was taken into consideration by the ET which reached conclusions on the resultant changes that needed to be made. Final revisions were made by the ET.

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Appendix D: Compilation of jurisprudence

CJEU

court	case name/ reference/date	relevance/keywords/main points	cases cited
CJEU	<p><i>Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health</i> Case 283/81 ECLI:EU:C:1982:335 6.10.1982</p>	<p>Judgment after a reference for preliminary ruling from the Corte Suprema di Cassazione on preliminary rulings on the basis of Article 177 EEC Treaty (now Article 267 TFEU). Obligation to request CJEU preliminary ruling Obligation for MS courts or tribunals to request a preliminary ruling, para. 21: ‘(...) the third paragraph of Article 177 of the EEC Treaty is to be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope of any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community.’</p>	<p>CJEU — 28/62, 29/72 and 30/62 <i>Da Costa v Nederlandse Belastingadministratie</i></p>
CJEU	<p><i>Kenny Roland Lyckeskog</i> Case C-99/00 ECLI:EU:C:2002:329 4.4.2002</p>	<p>Judgment after a reference for preliminary ruling from the Horvätten för Västra Sverige — Sweden on preliminary rulings on the basis of Article 234 TEC (now Article 267 TFEU). Rationale of CJEU preliminary rulings — obligation to request for courts or tribunals of last instance Rationale of the obligation for MS courts or tribunals of last instance to request a preliminary ruling, para. 14: ‘The obligation on national courts against whose decisions there is no judicial remedy to refer a question to the Court for a preliminary ruling has its basis in the cooperation established, in order to ensure the proper application and uniform interpretation of Community law in all the Member States, between national courts, as courts responsible for applying Community law, and the Court. That obligation is in particular designed to prevent a body of national case-law that is not in accordance with the rules of Community law from coming into existence in any Member State [...].’</p>	<p>CJEU — 85/76 <i>Hoffmann-La Roche & Co AG v Commission of the European Communities</i>; CJEU — C-337/95, <i>Parfums Christian Dior</i></p>

court	case name/ reference/ date	relevance/keywords/main points	cases cited
CJEU (Grand Chamber)	<p><i>Cartesio Oktató és Szolgáltató bt</i> Case C-210/06 ECLI:EU:C:2008:723 16.12.2008</p>	<p>Judgment after a reference for preliminary ruling from the Szegedi Ítéltábla — Hungary — on preliminary rulings on the basis of Article 234 TEC (now Article 267 TFEU). Preliminary rulings — definition of court or tribunal of last instance Definition of ‘a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law’, para. 55: ‘In that regard, it should be borne in mind that, according to settled case-law, in order to determine whether the body making a reference is a “court or tribunal” for the purposes of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is <i>inter partes</i>, whether it applies rules of law and whether it is independent (...)’</p>	CJEU — C-96/04 <i>Standesamt Stadt Niebüll</i>
CJEU (Grand Chamber)	<p><i>Aydin Salahadin Abdulla and Others v Bundesrepublik Deutschland</i> Joined Cases C-175/08, C-176/08, C-179/08 and C-179/08 ECLI:EU:C:2010:21</p>	<p>Judgment after a reference for a preliminary ruling from Bundesverwaltungsgericht — Germany — on cessation of refugee status on the basis of Article 11 QD. Importance of the Refugee Convention — methods of interpretation — interpretation in line with the Refugee Convention and the EU Charter Importance of the Refugee Convention, paras 51-52: ‘The Directive was adopted on the basis of, <i>inter alia</i>, point (1)(c) of the first paragraph of Article 63 EC, which required the Council of the European Union to adopt measures on asylum, in accordance with the Geneva Convention and other relevant treaties, within the area of minimum standards with respect to the qualifications of nationals of third countries as refugees. [52] It is apparent from recitals 3, 16 and 17 in the preamble to the Directive that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria.’ Methods of interpretation and interpretation in line with the Refugee Convention, para. 53: ‘The provisions of the Directive must for that reason be interpreted in the light of its general scheme and purpose, while respecting the Geneva Convention and the other relevant treaties referred to in point (1) of the first paragraph of Article 63 EC.’ Interpretation in line with the EU Charter, para. 54: ‘Those provisions must also, as is apparent from recital 10 in the preamble to the Directive, be interpreted in a manner which respects the fundamental rights and the principles recognised in particular by the Charter.’</p>	

court	case name/ reference/ date	relevance/keywords/main points	cases cited
CJEU (Grand Chamber)	<i>Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal</i> Case C-31/09 ECLI:EU:C:2010:351 17.6.2010	<p>Judgment after a reference for a preliminary ruling from Fővárosi Bíróság — Hungary on exclusion from refugee status on the basis of Article 12(1)(a) QD.</p> <p>Importance of the Refugee Convention — methods of interpretation — interpretation in line with Refugee Convention and EU Charter</p> <p>Importance of the Refugee Convention, paras 36-37: [36] The Directive was adopted on the basis of, inter alia, point (1)(c) of the first subparagraph of Article 63 EC which required the Council of the European Union to adopt measures on asylum, in accordance with the Geneva Convention and other relevant treaties, within the area of minimum standards with respect to the qualifications of nationals of third countries as refugees. [37] It is apparent from recitals 3, 16 and 17 in the preamble to the Directive that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria [...].</p> <p>Methods of interpretation and interpretation in line with the Refugee Convention and the EU Charter, para. 38: ‘The provisions of the Directive must for that reason be interpreted in the light of its general scheme and purpose, while respecting the Geneva Convention and the other relevant treaties referred to in point (1) of the first subparagraph of Article 63 EC. Those provisions must also, as is apparent from recital 10 in the preamble to the Directive, be interpreted in a manner which respects the fundamental rights and the principles recognised in particular by the Charter of Fundamental Rights of the European Union [...].’</p>	CJEU — C-175/08, C-176/08, C-178/08 and C-179/08 <i>Salahadin Abdulla and Others v Bundesrepublik Deutschland</i>

court	case name/ reference/ date	relevance/keywords/main points	cases cited
CJEU (Grand Chamber)	<i>Bundesrepublik Deutschland v B and D</i> Joined Cases C-57/09 and C-101/09 ECLI:EU:C:2010:661 9.11.2010	<p>Judgment after a reference for a preliminary ruling from Bundesverwaltungsgericht — Germany on exclusion from refugee status on the basis of Article 12(2)(b) and (c) QD.</p> <p>Importance of Refugee Convention — interpretation in line with Refugee Convention and EU Charter — interpretative relevance of UNSC resolutions for interpretation</p> <p>Importance of the Refugee Convention, paras 76-77: [76] One of the legal bases for Directive 2004/83 was point (1)(c) of the first paragraph of Article 63 EC, under which the Council was required to adopt measures on asylum, in accordance with the 1951 Geneva Convention and other relevant treaties, within the area of minimum standards with respect to “the qualification of nationals of third countries as refugees”. [77] Recitals 3, 16 and 17 to Directive 2004/83 state that the 1951 Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the directive for determining who qualifies for refugee status and the content of that status were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria [...].’</p> <p>Methods of interpretation and interpretation in line with the Refugee Convention and the EU Charter, para. 78: ‘Directive 2004/83 must for that reason be interpreted in the light of its general scheme and purpose, and in a manner consistent with the 1951 Geneva Convention and the other relevant treaties referred to in point (1) of the first paragraph of Article 63 EC, now Article 78(1) TFEU. As is apparent from recital 10 to that directive, Directive 2004/83 must also be interpreted in a manner consistent with the fundamental rights and the principles recognised, in particular, by the Charter of Fundamental Rights of the European Union [...].’</p> <p>Interpretative relevance of UNSC resolutions, para. 82: ‘Secondly, with regard to acts contrary to the purposes and principles of the United Nations, as referred to in point (c) of Article 12(2) of Directive 2004/83, recital 22 to that directive states that such acts are referred to in the preamble to the Charter of the United Nations and in Articles 1 and 2 of that Charter and that they are among the acts identified in the UN Resolutions relating to “measures combating international terrorism”.’</p>	CJEU — C-175/08, C-176/08, C-178/08 and C-179/08 <i>Salahadin Abdulla and Others v Bundesrepublik Deutschland</i> ; CJEU — C-31/09 <i>Narwas Bolbol v Bevándorlási és Állampolgársági Hivatal</i>

court	case name/ reference/ date	relevance/keywords/main points	cases cited
CJEU	<p><i>Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration</i> Case C-69/10 ECLI:EU:C:2011:524 28.7.2011</p>	<p>Judgment after a reference for a preliminary ruling from Tribunal administratif –Luxembourg on accelerated procedures and right to judicial review on the basis of Article 39 APD.</p> <p>Respect for EU Charter — CJEU competence in preliminary rulings — interpretation of national law in conformity with EU law — effectiveness of EU law — importance of Refugee Convention</p> <p>Respect for EU Charter, para. 34: 'As stated in recital 8 in its preamble, Directive 2005/85 respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Specifically, decisions taken on an application for asylum and on the withdrawal of refugee status are, according to recital 27 to the directive, subject to an effective remedy before a court or tribunal within the meaning of Article 267 TFEU.'</p> <p>CJEU competence in preliminary rulings, para. 59: 'In that regard, it should be noted that it is not for the Court, in the context of a reference for a preliminary ruling, to give a ruling on the interpretation of provisions of national law or to decide whether the interpretation given by the national court of those provisions is correct. Indeed, only the national courts are competent to decide upon the interpretation of domestic law [...].'</p> <p>Interpretation of national law in conformity with EU law and effectiveness of EU law, para. 60: 'However, in that context, attention should also be drawn to the requirement that national law be interpreted in conformity with EU law, which permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of EU law when they determine the disputes before them [...]. The principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it [...].'</p> <p>Importance of Refugee Convention, para. 61: 'The objective of Directive 2005/85 is to establish a common system of safeguards serving to ensure that the Geneva Convention and the fundamental rights are fully complied with. The right to an effective remedy is a fundamental principle of EU law. [...].'</p>	<p>CJEU — Cases C-378/07 to 380/07 <i>Kiriaki Angelidaki and Others v Organismos Nomarchiakís Autodioikísís Rethymnis</i>; CJEU — C-268/06 <i>Impact v Minister for Agriculture and Food and Others</i></p>

court	case name/ reference/ date	relevance/keywords/main points	cases cited
CJEU (Grand Chamber)	<i>NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform</i> Joined Cases C-411/10 and C-493/10 ECLI:EU:C:2011:865 21.12.2011	<p>Judgment after a reference for a preliminary ruling from the Court of Appeal (England & Wales) (Civil Division) — United Kingdom on the concept of ‘safe countries’ and the rebuttable presumption of compliance with fundamental rights by Member States under the Dublin II Regulation.</p> <p>Importance of Refugee Convention — compliance of CEAS legislation with EU Charter — interpretation of national law in accordance with EU law — principle of mutual confidence</p> <p>Importance of the Refugee Convention, para. 78: ‘The Common European Asylum System is based on the full and inclusive application of the Geneva Convention and the guarantee that nobody will be sent back to a place where they again risk being persecuted. Article 18 of the Charter and Article 78 TFEU provide that the rules of the Geneva Convention and the 1967 Protocol are to be respected [...]’</p> <p>Compliance of CEAS legislation with EU Charter, para. 76: ‘As stated in paragraph 15 above, the various regulations and directives relevant to [sic] in the cases in the main proceedings provide that they comply with the fundamental rights and principles recognised by the Charter’</p> <p>Interpretation of national law in accordance with EU law, para. 77: ‘According to settled case-law, the Member States must not only interpret their national law in a manner consistent with European Union law but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the European Union legal order or with the other general principles of European Union law [...]’</p> <p>Principle of mutual confidence and presumption of compliance, paras 78, 80 and 83: ‘[78] Consideration of the texts which constitute the Common European Asylum System shows that it was conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard. [...] [80] In those circumstances, it must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR. [83] At issue here is the <i>raison d’être</i> of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights.’</p>	CJEU — C-175/08, C-176/08, C-178/08 and C-179/08 <i>Salahadin Abdulla and Others v Bundesrepublik Deutschland</i> ; CJEU — C-31/09 <i>Narwas Bolbol v Bevándorlási és Állampolgársági Hivatal</i> ; CJEU — C-101/01 <i>Bodil Lindqvist</i> ; CJEU — C-305/05 <i>Ordre des barreaux francophones et germanophone and Others v Conseil des ministres</i>

court	case name/ reference/ date	relevance/keywords/main points	cases cited
CJEU (Grand Chamber)	<p><i>Bundesrepublik Deutschland v Y and Z</i> Joined Cases C-71/11 and C-99/11 ECJ:EU:C:2012:518 5.9.2012</p>	<p>Judgment after a reference for a preliminary ruling from the Bundesverwaltungsgericht — Germany on the notion of persecution on the basis of Article 9(1) and 10(1)(b) QD. Importance of the Refugee Convention — methods of interpretation of CEAS legislation — interpretation in line with Refugee Convention and EU Charter Importance of the Refugee Convention, para. 49: ‘It appears from recitals 3, 16 and 17 to the Directive that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Directive for determining who qualifies for refugee status and the content of that status were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria [...]’ Methods of interpretation and interpretation in line with the Refugee Convention and the EU Charter, para. 48: ‘The Directive must, for that reason, be interpreted in the light of its general scheme and purpose, and in a manner consistent with the Geneva Convention and the other relevant treaties referred to in Article 78(1) TFEU. As is apparent from recital 10 in the preamble thereto, the Directive must also be interpreted in a manner consistent with the rights recognised by the Charter [...]’</p>	<p>CJEU — C-175/08, C-176/08, C-178/08 and C-179/08 <i>Salahadin Abdulla and Others v Bundesrepublik Deutschland</i>; CJEU — C-31/09 <i>Narwas Bolbol v Bevándorlási és Állampolgársági Hivatal</i>; CJEU — C-411/10 and C-493/10 <i>NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform</i></p>
CJEU	<p><i>MM v Minister for Justice, Equality and Law Reform, Ireland, Attorney General</i> Case C-277/11 ECJ:EU:C:2012:744 22.11.2012</p>	<p>Judgment after a reference for a preliminary ruling from the High Court — Ireland on Article 4 QD. Interpretation of national law in line with EU law and fundamental rights Paras 93-94: ‘[93] It should be added that, according to the Court’s settled case-law, the Member States must not only interpret their national law in a manner consistent with EU law but also make sure they do not rely on an interpretation which would be in conflict with the fundamental rights protected by the EU legal order or with the other general principles of EU law [...]. [94] It is in the light of that guidance as to the interpretation of EU law that it will be for the referring court to determine whether the procedure followed in the examination of Mr M.’s application for subsidiary protection was compatible with the requirements of EU law and, should it find that Mr M.’s right to be heard was infringed, to draw all the necessary inferences therefrom.’</p>	<p>CJEU — C-411/10 and C-493/10 <i>NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform</i></p>

court	case name/ reference/ date	relevance/keywords/main points	cases cited
CJEU (Grand Chamber)	<i>El Kott and Others v Bevándorlási és Állampolgársági Hivatal</i> Case C-364/11 ECLI:EU:C:2012:826 19.12.2012	<p>Judgment after a reference for a preliminary ruling from the Fővárosi Bíróság — Hungary on exclusion from refugee status on the basis of Article 12 QD.</p> <p>Importance of Refugee Convention — methods of interpretation — interpretation in line with Refugee Convention and EU Charter</p> <p>Importance of Refugee Convention, para. 42: ‘It is apparent from recitals 13, 16 and 17 in the preamble to Directive 2004/83 that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria [...]’</p> <p>Methods of interpretation and interpretation in line with the Refugee Convention and the EU Charter, paras 43 and 80: ‘[43] Directive 2004/83 must, for that reason, be interpreted in the light of its general scheme and purpose, and in a manner consistent with the Geneva Convention and the other relevant treaties referred to in Article 78(1) TFEU. As is apparent from recital 10 in the preamble thereto, the directive must also be interpreted in a manner consistent with the rights recognised by the Charter [...] [80] It should be noted in that regard that, having regard to the particular situation of Palestinian refugees, the States signatories to the Geneva Convention deliberately decided in 1951 to afford them the special treatment provided for in Article 1D of the convention, to which Article 12(1)(a) of Directive 2004/83 refers.’</p>	CJEU — C-31/09 <i>Narwas Bolbol v Bevándorlási és Állampolgársági Hivatal</i> ; CJEU — C-71/11 and C-99/11 <i>Bundesrepublik Deutschland v Y and Z</i>

court	case name/ reference/ date	relevance/keywords/main points	cases cited
CJEU	<i>Minister voor Immigratie en Asiel v X and Y, and Z v Minister voor Immigratie en Asiel</i> Joined Cases C-199/12, C-200/12 and C-201/12 ECLI:EU:C:2013:720 7.11.2013	<p>Judgment after a reference for a preliminary ruling from the Raad van State — Netherlands on membership of a particular social group on ground of sexual orientation on the basis of Articles 9(1) and 10(1)(d) QD.</p> <p>Importance of the Refugee Convention — methods of interpretation — interpretation in line with Refugee Convention and EU Charter — QD as clarification of the conventional refugee definition</p> <p>Importance of the Refugee Convention, para. 39: ‘It is apparent from recitals 3, 16 and 17 in the preamble to Directive 2004/83 that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria [...]’</p> <p>Methods of interpretation and interpretation in line with the Refugee Convention and the EU Charter, para. 40: ‘The Directive must, for that reason, be interpreted in the light of its general scheme and purpose, and in a manner consistent with the Geneva Convention and the other relevant treaties referred to in Article 78(1) TFEU. As is apparent from recital 10 in the preamble thereto, the directive must also be interpreted in a manner consistent with the rights recognised by the Charter [...]’</p> <p>QD as clarifying the refugee definition under the Refugee Convention, para. 51: ‘In order to answer that question, it must be recalled that Article 9 of the Directive defines the elements which support the finding that acts constitute persecution within the meaning of Article 1(A) of the Geneva Convention. [...]’</p>	CJEU — C-71/11 and C-99/11 <i>Bundesrepublik Deutschland v Y and Z</i> ; CJEU — C-364/11 <i>Mostafa Abed El Karem El Kott and Others v Bevándorlási és Állampolgársági Hivatal</i>

court	case name/ reference/ date	relevance/keywords/main points	cases cited
CJEU (Grand Chamber)	<p><i>Shamso Abdullahi v Bundesasylamt</i> Case C-394/12 ECLI:EU:C:2013813 10.12.2013</p>	<p>Judgment after a reference for a preliminary ruling from the Asylgerichtshof — Austria on the determination of the Member State responsible for examining an asylum application under the Dublin II Regulation.</p> <p>Principles of direct applicability and direct effects — methods of interpretation — principle of mutual confidence</p> <p>Principles of direct applicability and direct effects, paras 48-49: '[48] It should be recalled in that connection that, under the second paragraph of Article 288 TFEU, regulations are of general application, they are binding in their entirety and they are directly applicable in all Member States. Accordingly, owing to their very nature and their place in the system of sources of EU law, regulations operate to confer rights on individuals which the national courts have a duty to protect [...] [49] It is necessary to ascertain to what extent the provisions laid down in Chapter III of Regulation No 343/2003 actually confer on applicants for asylum rights which the national courts have a duty to protect.'</p> <p>Methods of interpretation, para. 51: 'As regards the scope of the appeal provided for in Article 19(2) of Regulation No 343/2003, that regulation must be construed not only in the light of the wording of its provisions, but also in the light of its general scheme, its objectives and its context, in particular its evolution in connection with the system of which it forms part.'</p> <p>CEAS built on the principle of mutual confidence, paras 52-53: '[52] In that regard, it should be borne in mind, first, that the Common European Asylum System was conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard [...] [53] It is precisely because of that principle of mutual confidence that the EU legislature adopted Regulation No 343/2003 in order to rationalise the treatment of applications for asylum and to avoid blockages in the system as a result of the obligation on State authorities to examine multiple applications by the same applicant, and in order to increase legal certainty with regard to the determination of the State responsible for examining the asylum application and thus to avoid forum shopping, it being the principal objective of all these measures to speed up the handling of claims in the interests both of asylum seekers and the participating Member States [...]'</p>	<p>CJEU — 34/73 <i>Variola SPA v Amministrazione italiana delle Finanze</i>;</p> <p>CJEU — C-253/00 <i>Antonio Muñoz y Cia and Superior Fruiticola SA v Frumar Ltd and Redbridge Produce Marketing Ltd</i>;</p> <p>CJEU — C-4/10 and C-27/10 <i>Bureau national interprofessionnel du Cognac</i>;</p> <p>CJEU — C-411/10 and C-493/10 <i>NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform</i></p>

court	case name/ reference/ date	relevance/keywords/main points	cases cited
CJEU	<p><i>Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides</i> Case C-285/12 ECLI:EU:C:2014:39 30.1.2014</p>	<p>Judgment after a reference for a preliminary ruling from the Conseil d'Etat — Belgium — on the notion of 'internal armed conflict' in Article 15(c) QD.</p> <p>Limits of relevance of international law for interpreting EU law — methods of interpretation</p> <p>Limits of interpretation informed by international law, paras 20-24: '[20] In that regard, it should be noted that the EU legislature has used the phrase "international or internal armed conflict", as opposed to the concepts on which international humanitarian law is based (international humanitarian law distinguishes between "international armed conflict" and "armed conflict not of an international character"). [21] In those circumstances, it must be held that the EU legislature wished to grant subsidiary protection not only to persons affected by "international armed conflicts" and by "armed conflict not of an international character", as defined in international humanitarian law, but also to persons affected by internal armed conflict, provided that such conflict involves indiscriminate violence. In that context, it is not necessary for all the criteria referred to in Common Article 3 of the four Geneva Conventions and Article 1(1) of Protocol II of 8 June 1977, which develops and supplements that article, to be satisfied. [22] In addition, it should be noted that international humanitarian law governs the conduct both of international armed conflicts and of armed conflict not of an international character, which means that the existence of either type of conflict acts as a trigger for applying the rules established by such law (judgment of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia of 2 October 1995 in Case No IT-94-1-AR72 <i>Prosecutor v Dusko Tadić a/k/a 'Dule'</i>, paragraph 67). [23] While international humanitarian law is designed, inter alia, to provide protection for civilian populations in a conflict zone by restricting the effects of war on persons and property, it does not — by contrast with Article 2(e) of Directive 2004/83, read in conjunction with Article 15(c) of that directive — provide for international protection to be granted to certain civilians who are outside both the conflict zone and the territory of the conflicting parties. As a consequence, the definitions of "armed conflict" provided in international humanitarian law are not designed to identify situations in which such international protection would be necessary and would thus have to be granted by the competent authorities of the Member States. [24] More generally, it should be pointed out that, as the Advocate General observed in points 66 and 67 of his Opinion, international humanitarian law, on the one hand, and the subsidiary protection regime introduced by Directive 2004/83, on the other, pursue different aims and establish quite distinct protection mechanisms.'</p> <p>Methods of interpretation, para. 27: 'Consequently, since Directive 2004/83 does not define "internal armed conflict", the meaning and scope of that phrase must, as the Court has consistently held, be determined by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part [...].'</p>	<p>CJEU — C-549/07 <i>Friederike Wallentin-Hermann v Alitalia</i>; CJEU — C-119/12 <i>Josef Probst v mr.nexnet GmbH</i></p>

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CJEU	<i>HN v Minister for Justice, Equality and Law Reform, Ireland, Attorney General</i> Case C-604/12 ECLI:EU:C:2014:302 8.5.2014	<p>Judgment after a reference for a preliminary ruling from the Supreme Court — Ireland on national procedures for applications of international protection under the QD and APD.</p> <p>Importance of the Refugee Convention — methods of interpretation — interpretation in line with Refugee Convention — principle of procedural autonomy</p> <p>Importance of the Refugee Convention, para. 27: ‘It should be noted in that regard that, as is apparent from recitals 3, 16 and 17 in the preamble to Directive 2004/83, the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the directive were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria [...]’</p> <p>Methods of interpretation and interpretation in line with the Refugee Convention, para. 28: ‘Directive 2004/83 must for that reason be interpreted in the light of its general scheme and purpose, and in a manner consistent with the Geneva Convention and the other relevant treaties referred to in Article 78(1) TFEU [...]’</p> <p>Principle of procedural autonomy, para. 41: ‘Accordingly, in the absence of EU rules concerning the procedural requirements attaching to the examination of an application for subsidiary protection, the Member States remain competent, in accordance with the principle of procedural autonomy, to determine those requirements, while at the same time ensuring that fundamental rights are observed and that EU provisions on subsidiary protection are fully effective [...]’</p>	CJEU — C-199/12, C-200/12 and C-201/12 <i>Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel</i> ; CJEU — C-364/11 <i>Mostafa Abed El Karem El Kott and Others v Bevándorlási és Állampolgársági Hivatal</i> ; CJEU — C-439/08 <i>VEBIC</i>

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CJEU	<p><i>Mohammad Ferooz Qurbani</i> Case C-481/13 ECLI:EU:C:2014:2101 17.7.2014</p>	<p>Judgment after a reference for a preliminary ruling from the Oberlandesgericht Bamberg — Germany on the interpretation of Article 31 of the Refugee Convention.</p> <p>Material jurisdiction in preliminary rulings — interpretation of international treaties — interpretation of EU legislation making explicit <i>renvoi</i> to international treaties — formulation of request for preliminary rulings</p> <p>Material jurisdiction of the CJEU in case of preliminary rulings relating to the interpretation of international treaties, paras 20-26: '[20] In those circumstances, it should be noted that, in light of the fact that the Geneva Convention does not contain a clause conferring jurisdiction on the Court, the Court can interpret the provisions of that convention, in the present case Article 31 thereof, as requested only if the performance by it of such tasks is covered by Article 267 TFEU [...]. [21] It is settled case-law that the power, resulting from Article 267 TFEU, to provide interpretations by way of preliminary rulings extends only to rules which are part of EU law [...]. [22] In the case of international agreements, it is settled that such agreements concluded by the European Union form an integral part of its legal order and can therefore be the subject of a request for a preliminary ruling. On the other hand, the Court does not, in principle, have jurisdiction to interpret, in preliminary ruling proceedings, international agreements concluded between Member States and non-member countries [...]. [23] It is only where and in so far as the European Union has assumed the powers previously exercised by the Member States in the field to which an international convention not concluded by the European Union applies and, therefore, the provisions of the convention have the effect of binding the European Union that the Court has jurisdiction to interpret such a convention [...]. [24] In the present case, although several pieces of EU legislation have been adopted in the field to which the Geneva Convention applies as part of the implementation of a Common European Asylum System, it is undisputed that the Member States have retained certain powers falling within that field, in particular relating to the subject-matter covered by Article 31 of that convention. Therefore, the Court does not have jurisdiction to interpret directly Article 31, or any other article, of that convention. [25] The fact that Article 78 TFEU provides that the common policy on asylum must be in accordance with the Geneva Convention and that Article 18 of the Charter of Fundamental Rights of the European Union makes clear that the right to asylum is to be guaranteed with due respect for that convention and the Protocol relating to the status of refugees of 31 January 1967 is not such as to call into question the finding in paragraph 24 above that the Court does not have jurisdiction. [26] In addition, as previously held at paragraph 71 of the judgment in <i>B and D</i> [...], although it is true that it is clearly in the interests of the European Union that, in order to forestall future differences of interpretation, the provisions of international agreements which have been taken over by national law and by EU law should be given a uniform interpretation, irrespective of the circumstances in which they are to apply, it must be noted that Article 31 of the Geneva Convention has not been taken over in a piece of EU legislation, a number of provisions of EU law referring to that article.'</p>	<p>CJEU — C-533/08 <i>TNT Express Nederland BV v AXA Versicherung AG</i>; CJEU — C-31/09 <i>Narwas Bolbol v Bevándorlási és Állampolgársági Hivatal</i>; CJEU — C-364/11 <i>Mostafa Abed El Karem El Kott and Others v Bevándorlási és Állampolgársági Hivatal</i>; CJEU — C-57/09 and C-101/09 <i>Bundesrepublik Deutschland v B and D</i></p>

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CJEU (Grand Chamber)	A, B, and C v <i>Staatssecretaris van Veiligheid en Justitie</i> Joined Cases C-148/13, C-149/13 and C-150/13 ECLI:EU:C:2014:2406 2.12.2014	<p>Interpretation of EU legislation making explicit <i>renvoi</i> to international treaties and formulation of request for preliminary rulings, paras 27-28: '[27] In this connection, the Commission points out, in its written observations, that Article 14(6) of Directive 2004/83 refers to Article 31 of the Geneva Convention. [28] Although in <i>Bolbol</i> [...] and <i>Abad El Karem El Kott and Others</i> [...] the Court did indeed accept that it had jurisdiction to interpret the provisions of the Geneva Convention to which EU law made a <i>renvoi</i>, it must be noted that the present request for a preliminary ruling contains no mention of any rule of EU law which makes a <i>renvoi</i> 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.'</p> <p>Judgment after a reference for a preliminary ruling from the Raad van State — Netherlands on assessment of facts and circumstances in the context of application for international protection on ground of sexual orientation under Article 4 QD.</p> <p>Importance of the Refugee Convention — CEAS legislation clarifying the conventional refugee definition — methods of interpretation — interpretation in line with Refugee Convention and EU Charter</p> <p>Importance of the Refugee Convention and CEAS legislation as clarifying the conventional refugee definition, para. 45: 'It is apparent from recitals 3, 16 and 17 in the preamble to Directive 2004/83 that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria [...].'</p> <p>Methods of interpretation and interpretation in line with the Refugee Convention and EU Charter, para. 46: 'Directive 2004/83 must, therefore, be interpreted in the light of its general scheme and purpose, and in a manner consistent with the Geneva Convention and the other relevant treaties referred to in Article 78(1) TFEU. As is apparent from recital 10 in the preamble thereto, the directive must also be interpreted in a manner consistent with the rights recognised by the Charter [...].'</p>	CJEU — C-604/12 <i>HN v Minister for Justice, Equality and Law Reform and Others</i> ; CJEU — C-199/12, C-200/2 and C-201/12 <i>Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel</i>

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CJEU (Grand Chamber)	<i>Mohamed M'Bodj v Etat belge</i> Case C-542/13 ECLI:EU:C:2014:2452 18.12.2014	<p>Judgment after a reference for a preliminary ruling from the Cour constitutionnelle — Belgium on eligibility for subsidiary protection on medical grounds on the basis of Article 15(b) QD.</p> <p>Contextual and teleological interpretations — limits of interpretative relevance of ECtHR case-law</p> <p>Contextual and teleological interpretations, para. 34: 'Certain factors specific to the context in which Article 15(b) of Directive 2004/83 occurs must, in the same way as the directive's objectives, also be taken into account for the purpose of interpreting that provision [...].'</p> <p>Limits of interpretative relevance of the ECtHR case-law, paras 39-40: '[39] It should be noted in that regard that, according to the case-law of the European Court of Human Rights that, while non-nationals subject to a decision authorising their removal cannot, in principle, claim any entitlement to remain in the territory of a State in order to continue to benefit from medical, social or other forms of assistance and services provided by that State, a decision to remove a foreign national suffering from a serious physical or mental illness to a country where the facilities for the treatment of the illness are inferior to those available in that State may raise an issue under Article 3 ECHR in very exceptional cases, where the humanitarian grounds against removal are compelling [...]. [40] None the less, the fact that a third country national suffering from a serious illness may not, under Article 3 ECHR as interpreted by the European Court of Human Rights, in highly exceptional cases, be removed to a country in which appropriate treatment is not available does not mean that that person should be granted leave to reside in a Member State by way of subsidiary protection under Directive 2004/83.'</p>	CJEU — C-11/12 <i>Maatschap LA en DAB Langestraat en P Langestraat-Troost v Staatssecretaris vna Economische Zaken, Landbouw en Innovatie</i> ; ECtHR — <i>N v the United Kingdom</i> application no 26565/05

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CJEU (Grand Chamber)	<p><i>Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida</i> Case C-562/13 ECLI:EU:C:2014:2453 18.12.2014</p>	<p>Judgment after a reference for a preliminary ruling from the Cour du travail de Bruxelles — Belgium on suspensive effect of appeals and provision of emergency healthcare in return procedures under the Returns Directive.</p> <p>Principle of cooperation in preliminary rulings — interpretative relevance of ECtHR case-law — contextual interpretation</p> <p>Principle of cooperation in preliminary rulings, para. 37: 'That said, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. Consequently, even if, formally, the referring court has referred only to Directives 2003/9, 2004/83 and 2005/85, that does not prevent the Court from providing the referring court with all the elements of interpretation of EU law which may be of assistance in adjudicating in the case pending before it, whether or not the referring court has referred to them in the wording of its questions. It is, in this regard, for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision to make the reference, the points of EU law which require interpretation in view of the subject-matter of the dispute [...].'</p> <p>Interpretative relevance of ECtHR case-law, paras 47 and 52: '[47] It is the case-law of the European Court of Human Rights, which, in accordance with Article 52(3) of the Charter, must be taken into account in interpreting Article 19(2) of the Charter, that, while non-nationals subject to a decision authorising their removal cannot, in principle, claim any entitlement to remain in the territory of a State in order to continue to benefit from medical, social or other forms of assistance and services provided by that State, a decision to remove a foreign national suffering from a serious physical or mental illness to a country where the facilities for the treatment of the illness are inferior to those available in that State may raise an issue under Article 3 ECHR in very exceptional cases, where the humanitarian grounds against removal are compelling [...]. [...] [52] Indeed, the European Court of Human Rights has held that, when a State decides to return a foreign national to a country where, there are substantial grounds for believing, he will be exposed to a real risk of ill-treatment contrary to Article 3 ECHR, the right to an effective remedy provided for in Article 13 ECHR requires that a remedy enabling suspension of enforcement of the measure authorising removal should, <i>ipso jure</i>, be available to the persons concerned [...].'</p> <p>Contextual interpretation, para. 57: 'It is apparent from the general scheme of Directive 2008/115, which must be taken into account when interpreting its provisions [...], that Article 9(1)(b) of that directive must cover all situations in which a Member State is required to suspend enforcement of a return decision following the lodging of an appeal against the decision.'</p>	<p>CJEU- C-243/09, <i>Günter Fuß v Stadt Halle</i>; CJEU — C-45/12 <i>Office national d'allocations familiales pour travailleurs salariés v Radia Hadj Ahmed</i>; CJEU — C394/12 <i>Shamsi Abdullahi v Bundesasylamt</i>; ECtHR — <i>N v the United Kingdom</i> application no 26565/05; ECtHR — <i>Gebremedhin [Gaberamadhien] v France</i> application no 25389/05; ECtHR — <i>Hirsi Jamaa and Others v Italy</i> application no 27765/09</p>

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CJEU	<p><i>Andre Lawrence Shepherd v Bundesrepublik Deutschland</i> Case C-472/13 ECLI:EU:C:2015:117 26.2.2015</p>	<p>Judgment after a reference for a preliminary ruling from the Bayerisches Verwaltungsgericht München — Germany on eligibility for refugee status and meaning of acts of persecution on the basis of Article 9(2)(b), (c) and (e) QD.</p> <p>Importance of the Refugee Convention — interpretation in line with Refugee Convention and EU Charter — CEAS legislation clarifying conventional refugee definition</p> <p>Importance of Refugee Convention, para. 22: ‘It must be noted, first of all, that it is apparent from recitals 3, 16 and 17 in the preamble to Directive 2004/83 that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of that directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria [...]’</p> <p>Methods of interpretation and interpretation in line with Refugee Convention and EU Charter, para. 23: ‘Directive 2004/83 must, for that reason, be interpreted in the light of its general scheme and purpose, and in a manner consistent with the Geneva Convention and the other relevant treaties referred to in Article 78(1) TFEU. As is apparent from recital 10 in the preamble thereto, the directive must also be interpreted in a manner consistent with the rights recognised by the Charter of Fundamental Rights of the European Union [...]’</p> <p>CEAS legislation clarifying the conventional refugee definition, para. 25: ‘Thirdly, it must be emphasised that Article 9 of Directive 2004/83 sets out the factors which support a finding that acts constitute persecution within the meaning of Article 1(A) of the Geneva Convention. [...] It is clear from those provisions that, for an infringement of fundamental rights to constitute persecution within the meaning of Article 1(A) of the Geneva Convention, it must be sufficiently serious [...]’</p>	<p>CJEU — C-199/12, C-200/2 and C-201/12 <i>Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel</i></p>

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CJEU	<p><i>HT v Land Baden-Württemberg</i> Case C-373/13 ECLI:EU:C:2015:413 24.6.2015</p>	<p>Judgment after a reference for a preliminary ruling from the Verwaltungsgerichtshof Baden-Württemberg — Germany on revocation of residence permits on the basis of Article 24(1) QD. MS obligation to respect international law — methods of interpretation — CEAS objectives — EU Charter</p> <p>Member States’ obligation to respect their parallel international law obligations, para. 42: ‘According to Article 21(1) of Directive 2004/83, Member States must respect the principle of non-refoulement in accordance with their international obligations. Article 21(2) of that directive, whose wording essentially repeats that of Article 33(2) of the Geneva Convention, nevertheless provides for a derogation from that principle, allowing Member States the discretion to refoule a refugee where it is not prohibited by those international obligations and where there are reasonable grounds for considering that that refugee is a danger to the security of the Member State in which he is present or where, having been convicted by a final judgment of a particularly serious crime, he constitutes a danger to the community of that Member State. However, Article 21 of that directive is silent in relation to expelling a refugee where refoulement is not at issue.’</p> <p>Methods of interpretation, para. 58 (see also paras 48-50): ‘In that context, the meaning and scope of those terms must be determined, in accordance with settled case-law, taking into account both the terms in which the provisions of EU law concerned are couched and their context, the objectives pursued by the legislation of which they form part [...] and, in the circumstances of this case, the origins of that legislation [...]’</p> <p>CEAS objective, para. 64: ‘Next, it follows from Article 78(1) TFEU that the common policy developed by the European Union on asylum is aimed at offering “appropriate status” to any third-country national “requiring international protection” and ensuring “compliance with the principle of non-refoulement”’.</p> <p>EU Charter, para. 65: ‘It should also be noted that that principle of non-refoulement is guaranteed as a fundamental right by Articles 18 and 19(2) of the Charter of Fundamental Rights of the European Union.’</p>	<p>CJEU — C-317/12 <i>Daniel Lundberg</i>; CJEU — C-114/13 <i>Theodora Hendrika Bouman v Rijksdienst voor Pensioenen</i>; CJEU — C-370/12 <i>Thomas Pringle v Government of Ireland</i></p>

ECtHR

court	case name/ reference/date	relevance/keywords/ main points	cases cited
ECtHR	<i>TI v the United Kingdom</i> application no 43844/98 7.3.2000	<p>ECtHR admissibility decision.</p> <p>Continuing applicability of ECHR during Dublin procedures — MS responsibility under ECHR</p> <p>Continuing applicability of ECHR obligations during Dublin procedures and Member States' responsibility: 'The Court finds that the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States establish international organisations, or mutatis mutandis international agreements, to pursue cooperation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution [...]. The Court notes the comments of the UNHCR that, while the Dublin Convention may pursue laudable objectives, its effectiveness may be undermined in practice by the differing approaches adopted by Contracting States to the scope of protection offered. The English courts themselves have shown a similar concern in reviewing the decisions of the Secretary of State concerning the removal of asylum-seekers to allegedly safe third countries (see Relevant Domestic Law and Practice above, United Kingdom case-law).'</p>	

court	case name/ reference/ date	relevance/keywords/ main points	cases cited
ECtHR (Grand Chamber)	<i>Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland</i> , application no 45036/98 30.6.2005	<p>ECtHR judgment. Continuing applicability of ECtHR obligations — MS responsibility under ECHR — principle of equivalent protection</p> <p>Continuing applicability of ECHR obligations in parallel to those undertaken in the realm of an international organisation and Member States' responsibility, paras 154-156: '154. In reconciling both these positions and thereby establishing the extent to which a State's action can be justified by its compliance with obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty, the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention; the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards [...]. The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention [...]. 155. In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides [...]. By "equivalent" the Court means "comparable"; any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued (see paragraph 150 above). However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection. 156. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights [...].'</p>	<p>ECtHR — <i>Waite and Kennedy v Germany</i> application no 26083/94; ECtHR — <i>Prince Hans-Adam II of Liechtenstein v Germany</i> application no 42527/98; ECtHR — <i>Loizidou v Turkey</i> application no 15318/89</p>

court	case name/ reference/ date	relevance/keywords/ main points	cases cited
ECtHR	<i>KRS v the United Kingdom</i> application no 32733/08 2.12.2008	<p>ECtHR admissibility decision.</p> <p>Continuing applicability of ECHR during Dublin procedures — MS responsibility under ECHR</p> <p>Continuing applicability of ECHR obligations during Dublin procedures and Member States' responsibility: 'Having regard to these general principles, the Court also considers it necessary to recall its ruling in <i>T.I. v. the United Kingdom</i> [...] that removal to an intermediary country which is also a Contracting State does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of the decision to expel, exposed to treatment contrary to Article 3 of the Convention. In <i>T.I.</i> the Court also found that the United Kingdom could not rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States established international organisations, or <i>mutatis mutandis</i> international agreements, to pursue cooperation in certain fields of activities, there could be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution [...]. The Court finds that this ruling must apply with equal force to the Dublin Regulation, created within the framework of the "third pillar" of the European Union. Returning an asylum seeker to another European Union Member State, Norway or Iceland according to the criteria set out in the Dublin Regulation, as is proposed in the present case, is the implementation of a legal obligation on the State in question which flows from its participation in the asylum regime created by that Regulation. The Court observes, though, that the asylum regime so created protects fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance.'</p>	ECtHR — <i>T.I v the United Kingdom</i> application no 43844/98; ECtHR — <i>Waite and Kennedy v Germany</i> application no 26083/94

court	case name/ reference/ date	relevance/keywords/ main points	cases cited
ECtHR (Grand Chamber)	<i>MSS v Belgium and Greece</i> application no 30696/09 21.1.2011	<p>ECtHR judgment.</p> <p>Continuing applicability of ECHR during Dublin procedures — MS responsibility under ECHR</p> <p>Continuing applicability of ECHR obligations during Dublin procedures and Member States' responsibility, paras 338-339 (see also paras 341-343): '338. The Court notes the reference to the Bosphorus judgment by the Government of the Netherlands in their observations lodged as third-party interveners [...]. The Court reiterated in that case that the Convention did not prevent the Contracting Parties from transferring sovereign powers to an international organisation for the purposes of cooperation in certain fields of activity (see Bosphorus, cited above, § 152). The States nevertheless remain responsible under the Convention for all actions and omissions of their bodies under their domestic law or under their international legal obligations (<i>ibid.</i>, § 153). State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights in a manner which can be considered at least equivalent to that for which the Convention provides. However, a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations, notably where it exercised State discretion (<i>ibid.</i>, §§ 155-57). The Court found that the protection of fundamental rights afforded by Community law was equivalent to that provided by the Convention system (<i>ibid.</i>, § 165). In reaching that conclusion it attached great importance to the role and powers of the Court of Justice of the European Union (CJEC) — now the CJEU — in the matter, considering in practice that the effectiveness of the substantive guarantees of fundamental rights depended on the mechanisms of control set in place to ensure their observance (<i>ibid.</i>, § 160). The Court also took care to limit the scope of the Bosphorus judgment to Community law in the strict sense — at the time the “first pillar” of European Union law (§ 72). 339. The Court notes that Article 3 § 2 of the Dublin Regulation provides that, by derogation from the general rule set forth in Article 3 § 1, each member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in the Regulation. This is the so-called “sovereignty” clause. In such a case, the State concerned becomes the member State responsible for the purposes of the Regulation and takes on the obligations associated with that responsibility. 340. The Court concludes that, under the Dublin Regulation, the Belgian authorities could have refrained from transferring the applicant if they had considered that the receiving country, namely Greece, was not fulfilling its obligations under the Convention. Consequently, the Court considers that the impugned measure taken by the Belgian authorities did not strictly fall within Belgium's international legal obligations. Accordingly, the presumption of equivalent protection does not apply in this case.'</p>	<p>ECtHR — <i>Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland</i> application no 45036/98; ECtHR — <i>TI v the United Kingdom</i> application no 43844/98; ECtHR — <i>Waite and Kennedy v Germany</i> application no 26083/94</p>

court	case name/ reference/ date	relevance/keywords/ main points	cases cited
ECtHR	<i>Sufi and Elmi v the United Kingdom</i> applications nos 8319/07 and 11449/07 28.6.2011	<p>ECtHR judgment. Relationship Art. 3 ECHR-Art. 15(c) QD</p> <p>Relationship between Article 3 ECHR and Article 15(c) QD and recast, paras 225-226: ‘225. In <i>Elgafaji</i> the ECJ held that Article 15(c) would be violated where substantial grounds were shown for believing that a civilian, returned to the relevant country, would, solely on account of his presence on the territory of that country or region, face a real risk of being subjected to a threat of serious harm. In order to demonstrate such a risk he was not required to adduce evidence that he would be specifically targeted by reason of factors particular to his personal circumstances (<i>Elgafaji</i>, cited above, § 35). Nevertheless, the ECJ considered that such a situation would be ‘exceptional’ and the more the applicant could show that he was specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection (<i>Elgafaji</i>, cited above, § 39). 226. The jurisdiction of this Court is limited to the interpretation of the Convention and it would not, therefore, be appropriate for it to express any views on the ambit or scope of Article 15(c) of the Qualification Directive. However, based on the ECJ’s interpretation in <i>Elgafaji</i>, the Court is not persuaded that Article 3 of the Convention, as interpreted in NA, does not offer comparable protection to that afforded under the Directive. In particular, it notes that the threshold set by both provisions may, in exceptional circumstances, be attained in consequence of a situation of general violence of such intensity that any person being returned to the region in question would be at risk simply on account of their presence there.’</p>	CJEU — C-465/07 <i>Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie</i>

court	case name/ reference/ date	relevance/keywords/ main points	cases cited
ECtHR	<i>Mohammed v Austria</i> application no 2283/12 6.6.2013	<p>ECtHR judgment.</p> <p>Continuing applicability of ECHR during Dublin procedures — MS responsibility under ECHR</p> <p>Continuing applicability of ECHR obligations during Dublin procedures and Member States' responsibility, para. 93: 'In the specific context of the application of the Dublin Regulation, the Court has found before that indirect removal, in other words, removal to an intermediary country which is also a Contracting State, leaves the responsibility of the transferring State intact, and that State is required, in accordance with the Court's well-established case-law, not to transfer a person where substantial grounds had been shown for believing that the person in question, if transferred, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. Furthermore, the Court has reiterated that where States cooperate in an area where there might be implications for the protection of fundamental rights, it would be incompatible with the purpose and object of the Convention if they were absolved of all responsibility vis-à-vis the Convention in the area concerned [...]. When they apply the Dublin Regulation, therefore, the States must make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum-seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention [...].'</p>	<p>ECtHR — <i>Waite and Kennedy v Germany</i> application no 26083/94; ECtHR — <i>Ti v the United Kingdom</i> application no 43844/98; ECtHR — <i>KRS v the United Kingdom</i> application no 32733/08; ECtHR — <i>MSS v Belgium and Greece</i> application no 30696/09</p>
ECtHR	<i>Sharifi et autres c Grèce</i> application no 16643/09 21.10.2014	<p>ECtHR judgment.</p> <p>Relationship Art. 13 ECHR-APD (recast) — continuing applicability of ECHR during Dublin procedures — MS responsibility under ECHR — interpretation of EU line in line with ECHR</p> <p>Relationship between Article 13 ECHR and APD (recast), para. 169: 'Il n'est pas dépourvu d'intérêt, du reste, que, d'une part, la directive Procédure, telle qu'applicable ratione temporis, imposait déjà aux États membres de l'Union européenne de veiller, notamment, à ce que les personnes aient un accès effectif à la procédure d'asile (paragraphe 71 ci-dessus), et que, d'autre part, les obligations découlant de la directive Accueil s'appliquent à tous les ressortissants de pays tiers et apatrides à la seule condition qu'ils déposent une demande d'asile à la frontière ou sur le territoire d'un État membre (paragraphe 67-68 ci-dessus). La récente refonte du droit de l'Union européenne en la matière (paragraphe 63-65, 69-70 et 72-73 ci-dessus) renforce ces principes: tous les droits procéduraux et matériels reconnus aux demandeurs d'asile supposant l'introduction d'une demande d'asile, plusieurs dispositions du règlement Dublin III et de la directive Procédure refondue visent à assurer un accès effectif à cette procédure, accès dont une information exhaustive et compréhensible des intéressés constitue le préalable indispensable.'</p>	<p>ECtHR — <i>MSS v Belgium and Greece</i> application no 30696/09; ECtHR — <i>Hirsi Jamaa and Others v Italy</i> application no 27765/09</p>

court	case name/ reference/ date	relevance/keywords/ main points	cases cited
		<p>Continuing applicability of ECHR obligations during Dublin procedures, Member States' responsibility under the ECHR, and interpretation of EU law in conformity with the ECHR, paras 222-224 and 332: '222. La Cour se réfère ici, d'une part, à l'argument avancé par lui selon lequel interpréter l'article 4 du Protocole no 4 dans le sens de son applicabilité au refoulement ou au refus d'admission sur le territoire national exposerait les États parties à la Convention à devoir subir des invasions massives de migrants irréguliers; et, d'autre part, à son argument subsidiaire tiré de l'articulation à opérer, selon lui, entre ledit article 4 et le système de Dublin [...]. 223. A ce dernier propos, le gouvernement italien explique que, dans le système de Dublin, seule la Grèce était compétente pour statuer sur les éventuelles demandes d'asile des requérants, et donc pour procéder à l'évaluation des situations particulières de chacun d'entre eux, telle que requise, justement, par l'article 4 du Protocole no 4. Il estime qu'appliquer l'article 4 du Protocole no 4 au refoulement collectif des requérants de l'Italie vers la Grèce présentement contesté reviendrait à méconnaître cette circonstance particulière de l'espèce. En ce qui concerne l'application des règles de compétence établies par le règlement Dublin II [...], la Cour considère au contraire que, pour établir si la Grèce était effectivement compétente pour se prononcer sur les éventuelles demandes d'asile des requérants, les autorités italiennes auraient dû procéder à une analyse individualisée de la situation de chacun d'entre eux plutôt que les expulser en bloc. Aucune forme d'éloignement collectif et indiscriminé ne saurait être justifiée par référence au système de Dublin, dont l'application doit, dans tous les cas, se faire d'une manière compatible avec la Convention [...]. 224. Sans remettre en cause ni le droit dont disposent les États d'établir souverainement leur politique en matière d'immigration, éventuellement dans le cadre de la coopération bilatérale, ni les obligations découlant de leur appartenance à l'Union européenne, la Cour entend souligner que les difficultés qu'ils peuvent rencontrer dans la gestion des flux migratoires ou dans l'accueil des demandeurs d'asile ne sauraient justifier le recours à des pratiques incompatibles avec la Convention ou ses Protocoles [...]. [...] 232. Ensuite, elle rappelle les principes exposés, en matière de refoulement indirect, dans les arrêts M.S.S. c. Belgique et Grèce et Hirsi Jamaa et autres, précités [...]: il appartient à l'État qui procède au refoulement de s'assurer, même dans le cadre du système de Dublin, que le pays de destination offre des garanties suffisantes permettant d'éviter que la personne concernée ne soit expulsée vers son pays d'origine sans une évaluation des risques qu'elle court.'</p>	

court	case name/ reference/ date	relevance/keywords/ main points	cases cited
ECtHR (Grand Chamber)	<i>Tarakhel v Switzerland</i> application no 29217/12 4.11.2014	<p>ECtHR judgment.</p> <p>Continuing applicability of ECHR during Dublin procedures — MS responsibility under ECHR</p> <p>Continuing applicability of ECHR obligations during Dublin procedures and Member States' responsibility, paras 88-90: '88. The Court notes that, in the present case, Switzerland's responsibility under Article 3 of the Convention is not disputed. Nevertheless, the Court considers it relevant to observe that, in the case of <i>Bosphorus</i> [...], it held that the Convention did not prohibit Contracting Parties from transferring sovereign power to an international organisation in order to pursue cooperation in certain fields of activity. The States nevertheless remain responsible under the Convention for all actions and omissions of their bodies under their domestic law or under their international legal obligations (<i>ibid.</i>, § 153). State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights in a manner which can be considered at least equivalent to that for which the Convention provides. However, a State will be fully responsible under the Convention for all acts falling outside its strict international legal obligations, notably where it has exercised State discretion [...]. It is true that, unlike Ireland in the <i>Bosphorus</i> case, Switzerland is not a Member State of the European Union. However, under the terms of the association agreement of 26 October 2004 between the Swiss Confederation and the European Community, Switzerland is bound by the Dublin Regulation [...] and participates in the system established by that instrument. 89. The Court notes that Article 3(2) of the Dublin Regulation provides that, by derogation from the general rule set forth in Article 3(1), each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in the Regulation. This is the so-called "sovereignty" clause [...]. In such a case the State concerned becomes the Member State responsible for examining the asylum application for the purposes of the Regulation and takes on the obligations associated with that responsibility [...]. By virtue of the association agreement, this mechanism applies also to Switzerland. 90. The Court concludes from this that the Swiss authorities could, under the Dublin Regulation, refrain from transferring the applicants to Italy if they considered that the receiving country was not fulfilling its obligations under the Convention. Consequently, it considers that the decision to return the applicants to Italy does not strictly fall within Switzerland's international legal obligations in the context of the system established by the Dublin Regulation. Accordingly, the presumption of equivalent protection does not apply in this case [...].'</p>	ECtHR — <i>Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland</i> application no 45036/98; ECtHR — <i>Michaud v France</i> application no 12323/11; ECtHR — <i>MSS v Belgium and Greece</i> application no 30696/09

National

MS/court	case name/ reference/date	relevance/keywords/main points	cases cited
ES Supreme Court	6894/2005 16.2.2009	<p>Judgment. Obligation to refrain from measure liable to seriously compromise EU legislation during implementation period</p> <p>P. 9: ‘Debemos recordar también, como justificación de nuestra decisión, que, en la Sentencia de esta misma Sala y Sección del Tribunal Supremo de fecha 2 de enero de 2009 (recurso de casación 4251/2005), hemos declarado que la Directiva europea 83/2004, de 29 abril, sobre normas mínimas relativas a los requisitos para el reconocimiento y el estatuto de nacionales de terceros países o apátridas como refugiados o personas que necesitan otro tipo de protección internacional y al contenido de la protección concedida, en su artículo 4.5 dispone que [...]. Es cierto que esta Directiva, aun no traspuesta a nuestro derecho interno a pesar de haber transcurrido el plazo para ello (10 de octubre de 2006), no estaba vigente cuando los recurrentes solicitaron asilo ante las autoridades españolas ni cuando se inició el proceso en la instancia sino que lo fue cuando se sustanciaba éste, de manera que, al pronunciar el Tribunal <i>quo</i> la sentencia recurrida, debió decidir de acuerdo con lo establecido en ella, dado que, entre otras, su finalidad es evaluar las solicitudes de asilo, por lo que la Sala de instancia debió atenerse a sus preceptos, aun cuando no hubiese finalizado el plazo para su adaptación al derecho interno. El Tribunal de Justicia de la Unión Europea, en su sentencia de 4 de julio de 2006 (asunto C-212/04), afirma que, durante el plazo de adaptación del Derecho interno a una directiva, los órganos jurisdiccionales nacionales se hayan sometidos a la obligación de abstenerse de adoptar decisiones que puedan comprometer gravemente el resultado previsto en ella.’</p>	

MS/court	case name/ reference/ date	relevance/keywords/main points	cases cited
UK Court of Appeal of England and Wales	<p><i>QD and AH v Secretary of State for the Home Department</i> [2009] EWCA Civ 620 24.6.2009</p>	<p>Judgment. Legal foundations of QD — subsidiary protection — ECHR Paras 9, 13 and 20, per Lord Justice Sedley: 'As this suggests, the Directive brings together classical Geneva refugee status with what it calls subsidiary protection status. The latter status has broadly two sources. One is the obligation assumed by all EU Member States as part of the Council of Europe to give effect to the rights contained in the European Convention on Human Rights and Fundamental Freedoms — essentially rights of non-refoulement for individuals who cannot establish an affirmative right to asylum. The other is the humanitarian practices adopted by many EU states, the UK included, towards individuals who manifestly need protection but who do not necessarily qualify under either convention. Among these are people whose lives or safety, if returned to their home area, would be imperilled by endemic violence. [...] 13. It is also left open to Member States, by Article 3, to adopt more favourable standards of protection. This the UK has already done by paragraph 339C of the Immigration Rules, which repairs the surprising omission of Article 15 to provide for protection from a real risk of targeted deprivation of life in breach of ECHR Article 2. Rule 339C accordingly adds unlawful killing to the tabulation of forms of serious harm which, for the rest, it takes directly from Article 15. [...] 20. The shape of Article 15 follows the guidelines contained in the preamble. Paragraph (a) reflects the prohibition on the use or execution of the death penalty contained in the Sixth and Thirteenth Protocols to the ECHR. Paragraph (b) reflects Article 3. ECHR. In <i>NA v United Kingdom</i> (25904/07; 17 July 2008) the European Court of Human Rights made it clear (§114-7) that the risk of ill-treatment contrary to this article could arise from general as well as from particular circumstances.'</p>	<p>ECtHR — <i>NA v United Kingdom</i> application no 25904/07; CJEU — C-465/07 <i>Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie</i></p>

MS/court	case name/ reference/ date	relevance/keywords/main points	cases cited
BE Council for Alien Law Litigation	49821 20.10.2010	<p>Judgment.</p> <p>Interpretation of nation law in line with EU law — CEAS legislation not properly implemented</p> <p>Para. 4.7.3: ‘L’article 48/3, § 4, de la loi du 15 décembre 1980, énumère les éléments qui doivent être pris en considération dans le cadre de l’appréciation des motifs de persécution. Il énonce ce qui suit concernant la notion de ‘groupe social’: [...] Cette disposition n’a donc pas transposé entièrement l’article 10, d) de la directive 2004/83/CE précitée. La formule concernant les aspects liés à l’égalité entre les hommes et les femmes n’a, en particulier, pas été transposée. Toutefois, l’emploi des mots ‘entre autres’ indique clairement que le législateur n’a pas voulu établir une définition exhaustive de ce concept. De plus, dans la mesure où la directive énonce des normes minimales, les dispositions de droit national qui la transposent ne peuvent être interprétées dans un sens qui en restreindrait la portée. Il convient par ailleurs de rappeler que conformément à l’article 18 de la Charte des droits fondamentaux de l’Union Européenne l’interprétation du droit européen et national applicable en matière de réfugié s’effectue dans le respect des règles de la convention de Genève du 28 juillet 1951 et du protocole du 31 janvier 1967 relatifs au statut des réfugiés.’</p>	
IE High Court	WA v Minister for Justice and Equality, Ireland and the Attorney General [2012] IEHC 251 25.6.2012	<p>Judgment.</p> <p>Interpretation of national law implementing CEAS legislation</p> <p>Paras 33 and 36: ‘33. In the judgment of the Court, it is important when applying principles of interpretation to domestic regulations which transpose and implement the provisions of a European Union directive not to place undue reliance upon literal construction and upon the common law approach to statutory interpretation. In the judgment of the Court, it is unwise to attribute undue significance to the fact that the contents of Article 6 of the Directive are in this instance to be found transposed in the definition section of the Regulations, thus giving rise to the implication that the definition is superfluous because no reliance appears to be placed upon it elsewhere in the Regulations. Insofar as that could be said to give rise to an ambiguity in the construction of the Regulations, it is, in the view of the Court, an ambiguity which falls to be resolved by recourse to a purposive construction of the Regulations in the light of the objectives of the Directive. [...] 36. In the view of the Court, it is in the light of that background and objective that it is necessary to consider the purpose and effect of the definition of “actors of persecution or serious harm” as it appears in s.2 (1) of the 2006 Regulations giving effect to Article 6 of the Directive. It is a mistake, in the view of the Court, to focus upon that definition in isolation because it falls to be read and applied in conjunction with the definition of “serious harm” itself and the definitions of “persons eligible for subsidiary protection” and “protection against persecution or serious harm” in Regulation 2(1) based upon Article 7 — “actors of protection” — in the Directive.’</p>	

MS/court	case name/ reference/ date	relevance/keywords/main points	cases cited
DE Federal Administrative Court	BVerwG 10 C 7.13 7.6.2014	<p>Judgment. State of development of CEAS — lack of uniform status for international protection valid throughout the EU</p> <p>Unofficial English translation of the judgment, para. 29: 'It is true that recognising a foreigner as a refugee or as someone entitled to subsidiary protection in another country does not have the same effect in international law as a decision on status by German authorities, and in that sense has no comprehensive binding effect for the Federal Republic of Germany (...). The Geneva Convention on Refugees of 28 July 1951 defines uniform criteria for qualification as a refugee, but established no requirement under international law for one treaty state to be bound by another treaty state's decision on status (...). Nor does such a binding effect proceed from Union law. It is true that Article 78(2)(a) and (b) TFEU does establish an authorisation to enact legislative measures that provide for an asylum status that is valid throughout the Union, and for uniform subsidiary protected status for third-country nationals, but the relevant Directive 2011/95/EU OF 13 December 2011 makes no provision for a status decision that is valid for the entire Union. However, the Federal Republic of Germany has exercised the opportunity that is still available under international and Union law to attribute a limited degree of legal effect in its own country, through a national provision, to other countries' decisions on recognition [...]'</p>	

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