

## **Preliminary references to the Court of Justice of the European Union: A Note for national judges handling asylum-related cases.**

*This note, which is co-written by several judges from different EU Member States<sup>1</sup>, is designed to give guidance to national judges when having to decide whether to make a reference in asylum-related cases to the Court of Justice of the European Union (CJEU). As such it gives prominence to examples of asylum-related references made recently but also draws heavily on the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2012/C 338/01) issued by the Court of Justice of the European Communities, OJ C 160, 28.5.2011<sup>2</sup> (reproduced in Appendix B (hereafter “Recommendations”). Whereas the Court’s Recommendations deal with all aspects of the reference procedure, our Note seeks to focus on those that bear on asylum-related cases; in this way it aims to supplement rather than substitute for the Court’s guidance. Readers should bear in mind that the Court’s Recommendations are updated from time to time to reflect innovations introduced by amendments to its rules of procedure, which may affect both the principle of a reference for a preliminary ruling to the CJEU and the*

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<sup>2</sup> This is attached as Appendix B. This draft is also indebted to various EU studies, including the ‘Summary report of the meeting of 3 December 2007 of the working group of the Association of the Councils of State and the Supreme Administrative Jurisdictions of the EU and the Network of the Presidents of the Supreme Judicial Courts of the EU (ACA-Europe) on preliminary references’, its Guide to preliminary reference proceedings before the Court of Justice of the European Union, updated 1 April 2013; an early 2013 paper by Carsten Zatschler, Head of Cabinet to Judge Vajda, CJEU; and leading academic studies: see in particular, M Broberg and N Fenger, Preliminary References to the European Court of Justice, OUP 2010 (hereafter “Broberg and Fenger”), P Craig, G De Burca, EU Law: Text, Cases and Materials 4<sup>th</sup> Ed 2008 OUP (hereafter “Craig and De Burca”) ch.13 and K Lenaerts and P Van Nuffel, European Union Law 3<sup>rd</sup> Ed 2011.

*procedure for making such a reference. The current Rules of Procedure are those in force from 29 September 2012 (OJ L 265, 29.9.2012).*

*It should be emphasised that the focus of this Note is solely on our legal responsibilities as national judges when we have to apply EU/Union law<sup>3</sup>.*

*The Note's guidance is in two parts: a Short Summary and an Explanatory Note. The former furnishes a quick overview; the latter enables the reader to delve further if needed.*

## TABLE OF CONTENTS

### A. Short Summary

### B. Explanatory Note

#### **I. INTRODUCTION**

**Why are PRs important?**

**Should national judges be making references in the field of asylum?  
Effect on proceedings before the national court or tribunal of making a reference**

#### **II. THE PR PROCEDURE**

**The PR procedure -main stages**

**Who can make a reference?**

**When is it appropriate to make a reference?**

**Approach to interpretation**

#### **III. DRAFTING OF A REFERENCE**

**Drafting an order for reference**

**Form and contents**

**Formulating the questions**

#### **IV. IMPLICATIONS FOR THE NATIONAL COURT**

**Task of referring court when CJEU has given its ruling**

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<sup>3</sup> See Article 267 Treaty on the Functioning of the European Union (TFEU) (reproduced in Appendix A).

## **V. APPENDICES**

**A. Text of Article 267 TFEU (formerly Art 234 EC)**

**B. Court of Justice Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling procedures (2012/C 338/01)**

**C. Table of asylum-related cases (pending and decided) referred to the CJ**

**D. Online resources**

## A. SHORT SUMMARY

With the coming into force of the Treaty on the Functioning of the European Union (TFEU) as from 1 December 2009 the preliminary reference (PR) procedure is now available to national courts and tribunals at all levels and, in the area of asylum law, preliminary rulings of the Court of Justice (CJ)<sup>4</sup> are increasingly becoming the governing case law on EU asylum law for all national courts and tribunals. According to the Court's Recommendations on preliminary ruling proceedings (2012/C 338/01)<sup>5</sup>, (hereafter "Recommendations") (see Appendix B) at para 13, "a reference for a preliminary ruling may prove particularly useful when there is a new question of interpretation of general interest for the uniform application of European Union law in all the Member States, or where the existing case-law does not appear to be applicable to a new set of facts."

Given that asylum law is still a relatively new EU competence in respect of which there are many unanswered issues of interpretation and application, it would appear particularly desirable that national judges dealing with this area of law continue to give thought to possible reference-making.

It should be remembered that the current procedural rules, adopted with effect from 29 September 2012, represent a major recasting of the rules to reflect the position that the majority of actions before the Court arise from preliminary references<sup>6</sup>, and were drafted with the intent of simplifying and speeding up procedures, and where possible to permit disposal of actions without the need for a hearing.

Mention should be made at this point of the power of the CJ to dispose of a PR by way of a reasoned reply<sup>7</sup> where the Court has already ruled on an issue, where the reply can be clearly deduced from existing case law or where there can be no reasonable doubt as to the answer to the questions raised in the PR.

This Note analyses the relevant rules for national courts and tribunals making a reference and seeks to provide national judges with the means to decide whether a reference is needed or is appropriate in any particular case. This Note expresses the view that national courts and tribunals, while respecting the existing framework of CJ Rules of Procedure, should ensure where possible that references are made in a form and manner that allows the CJ to have before it all relevant facts and law, e.g. by referring to leading national court and tribunal decisions on Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless

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<sup>4</sup> Throughout this document "CJ" is used to refer to either the European Court of Justice (ECJ) or the Court of Justice of the European Union (CJEU) - as it became known as from 1 December 2009.

<sup>5</sup> Previously known as "Information Note".

<sup>6</sup> See Preamble to the Rules of Procedure, paragraph 1.

<sup>7</sup> Article 99 of the Rules of Procedure has made it easier for the court to utilise this power.

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 (the Qualification Directive or QD; being a recast of Directive EC/83/2004) or other asylum-related directives. Particular emphasis is placed on the value of the national court or tribunal considering whether to allow UNHCR (or other appropriate NGOs/INGOs) to join the proceedings as an intervener or as an "*amicus curiae*" before (or very shortly after) making the reference. Only parties and interveners before the national court are allowed to present observations before the CJ.

The main stages of the PR procedure are described and attention is given to the issue of which courts or tribunals have the capacity to make a reference (most are). It is noted that when there has been an issue about capacity in the past the Court has taken account of (and continues to take 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 *inter partes*, whether it applies rules of law and whether it is independent.

The Note addresses the question of whether lower courts should leave reference-making to the higher courts, explaining the great emphasis placed by the CJ in its landmark ruling in Case C-210/06, Cartesio 16 December 2008 on the national courts at whatever level having the widest discretion in referring matters to the CJ if they consider that a case pending before them raises questions involving interpretation of provisions of EU law, or consideration of their validity<sup>8</sup>: see also Cases C-188/10 and C-189/10 Aziz Melki and Sélim Abdeli, judgment of 22 June 2010.

Analysis is given of the scope for making a reference, it being noted that the circumstances under which the CJ will regard a reference as appropriate are wider than is often thought. The criteria that should govern the decision by the national court or tribunal on whether to refer questions are discussed, both in relation to courts of final instance and all other courts and tribunals.

In order to ensure that national judges can play their expected part in co-operating with the CJ in ensuring that appropriate questions are referred, it is important to make sure we have the tools for the job. To that end, this Note offers suggestions to national judges, based on the Court's current Rules of Procedure, as regards the drafting of an order for reference, clarifying when and at what stage in proceedings the issue of a possible reference may come up or might be raised (and in what form) by the judges themselves. It is in everyone's interest that an order for reference is well-drafted so as to give the CJ the best possible basis for rendering a ruling that provides not just the

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<sup>8</sup> Albeit a lower court or tribunal might take the view that it would be best to leave the issue of a reference for a higher-level court or tribunal if for example, in relation to an issue of interpretation on which it was unsure, it had not had the benefit of full argument from the parties and there was a legitimate expectation the higher-level court would be able to address the issue with the assistance of the good quality legal submissions from the parties and without undue delay.

referring court but judges in other Member States with thorough and targeted guidance. Considerable detail is given as to form and contents and the formulation of questions.

The basic elements of an order are identified as: Facts (the order should set out in concise form the given facts of the main proceedings - note that in the interpretation of EU law the CJ relies entirely on the facts presented by the national court); Legal context (covering (i) all relevant national law provisions; (ii) relevant EU law; (iii) relevant case law (if any) of national courts or tribunals of other countries); Summary of claims and arguments of parties; Explanation of the reasons for the choice of questions to be referred; the Questions; and if possible, the national court's suggested answers to some or all of the questions raised.

Addressing concerns about delay that may be entailed by making a reference, the Note refers to the existence of an expedited procedure under Article 105 of the Rules of Procedure and an urgent PR procedure provided by Article 107 of the Rules of Procedure, which governs the area of freedom, security and justice.

The Note also addresses the task of the referring court once the CJ has given its PR. The referring court - like every other court or tribunal in the Union - is bound *erga omnes* by a PR on the case in question, but it is for the referring court to apply the PR to the facts in the main proceedings.

As part of the aim to furnish national judges with the tools they need, references in the main body of the text are wherever possible to asylum, immigration or free movement of persons cases. Appendices give the text of Article 267 TFEU (formerly Articles 234 EC and 68 EC), The Court of Justice of the European Union Recommendations (Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings) (2012/C 338/01), a table of asylum-related cases (pending and decided) referred to the ECJ/CJEU and a guide to Online Resources.

## **B. EXPLANATORY NOTE**

### **I. INTRODUCTION**

#### **Why are PRs important?**

1. The coming into force of the TFEU as from 1 December 2009 means that the PR procedure is now available to national courts and tribunals at all levels. It is no longer subject to the Article 68(1)<sup>9</sup> limitation that had been introduced by Title IV of the EC Treaty.

2. Ex-Art 68 EC had limited Art 234 EC so that references in relation to the areas of freedom, justice and security (which included asylum) could only be made by national courts “against whose decision there is no judicial remedy under national law”. However, there was a great deal of criticism of this limitation: it was said that it fragmented the PR scheme, was detrimental to the rule of law and could lead to a vital area of Community or EU law being left outside proper CJ supervision<sup>10</sup>. Since 1 December 2009, however, the reference procedure has been open to all courts and tribunals.

3. The preliminary rulings of the CJ are increasingly becoming the governing case law on EU asylum law for all national courts. A decision of the CJ has a precedential impact on all national courts within the Union<sup>11</sup>. It is only by participating in the reference system that national courts can influence the overall case law.

4. A PR is a request from a national court or tribunal of a Member State to the CJ to give an authoritative interpretation on a Union act or a decision on the validity of such an act<sup>12</sup>.

5. The PR procedure was previously known as the “Article 234” procedure, but it is now the “Article 267” procedure: for text of Art 267 see Appendix A.

6. The effect of a national court or tribunal making a reference is that the national proceedings are stayed/suspended/adjourned to await the Court’s preliminary ruling; see Article 22 of the Rules of Procedure<sup>13</sup>.

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<sup>9</sup> Following the entry into force of the Lisbon Treaty, Article 63(1) and (2) EC is reproduced (with some alterations) in Article 78(1) and (2) TFEU. Article 63(3)(a) is reproduced (with some alterations) in Article 79(2)(a) TFEU.

<sup>10</sup> Broberg and Fenger, p.99.

<sup>11</sup> See C-28/95, Leur-Bloem, judgment of 17 July 1997, ECR p.1-4161(32); Recommendations, op.cit., para 1.

<sup>12</sup> See on validity, International Air Transport and European Low Fares Airline Association (2006) which clarifies that the fact that the validity of a Community measure is contested before a national court is not in itself sufficient to warrant a referral of a question to the CJ. The decision not to send an order for a preliminary ruling concerning the question of validity can be taken by a domestic court or tribunal as a matter of discretion (except by national courts of final instance).

<sup>13</sup> Recommendations, para 29.

7. The EU institutions view the PR procedure as an essential form of co-operation and interaction between the Luxembourg Court judges and national judges<sup>14</sup>. The reference for a preliminary ruling is therefore seen as “from one judge to another”. The procedure places the initiative on the national court or tribunal and leaves it entirely to the national courts/tribunals to assess whether such a reference is necessary and/or appropriate: that assessment does not depend on the parties agreeing to it or even on them raising the possibility in the first place. However, in practice they will often do so<sup>15</sup>.

8. A court or tribunal may refer, and a court of last instance must refer, a question to the CJ if it has doubts on the interpretation of a rule of Community or EU law or Union law (we use the terms interchangeably although since the Lisbon Treaty the preferred term appears to be Union law) or on the validity of an act of the EU and if a decision on a question is necessary to enable it to give judgment. More precisely, for a court of final instance there is an *obligation* to make a reference (Article 267(3), formerly Article 234(3)) in all situations where a case gives rise to a question of the interpretation or validity of EU law<sup>16</sup>. For all courts or tribunals, although there is discretion, it is discretion governed by law.

9. When the CJ Registry in Luxembourg receives a request by a referring court or tribunal for a PR it publishes a brief statement for information purposes in the Official Journal series C. This information normally takes the form of reproducing the text of the questions asked.

10. The eventual ruling by the CJ on a reference is normally given in the form of a judgment or order which informs the referring court or tribunal of its answers to its questions but has also, of course, the legal effect of being binding *erga omnes* on courts and tribunals throughout the Union. But it is important to understand what CJ rulings do **not** amount to.

11. The CJ is not a fact-finding body. A national court or tribunal cannot refer a question to the CJ about the correct interpretation of the facts in the main proceedings. Assessment of the facts is a matter only for the national court or tribunal.

12. The CJ is not a court of appeal which rules on the outcome of the main proceedings before the national court or tribunal. Article 267 does not give the CJ jurisdiction to decide on the validity of the laws of the Member State(s). Under the provisions of Art 267 it is for the national courts and tribunals to

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<sup>14</sup> Case C-210/06 Cartesio; Case 166/73 Rheinmuhlen [1974] ECR 33 at 38. See also Council Resolution 2008/C299/01 on the training of judges.

<sup>15</sup> Case C-2/06 Kempter, judgment of 12 February 2008, ECR p. I-411.

<sup>16</sup> Case C-238/81, CILFIT.



interpret national rules<sup>17</sup>. Nor is it the Court's function to resolve any differences of opinion on the interpretation or application of rules of national law<sup>18</sup>. The Court's function is only to give national courts and tribunals help in resolving interpretative issues concerning EU law. The national court or tribunal remains competent for (or seized of) the original case. However, since through preliminary rulings the CJ gives the national courts and tribunals authoritative guidance on how to interpret EU law, in practice this means its guidance can also amount to guidance on how to interpret the national law so that it is compatible with EU law<sup>19</sup>.

13. Although, therefore, the CJ lacks jurisdiction to give advisory opinions on general issues, its rulings are effectively binding on all national courts and tribunals.

14. The PR procedure has been the principal engine through which the CJ has built up EU case law. The annual rate of references in all types of cases is currently in excess of 420<sup>20</sup>. In 2011 there were 423 references, in 2012, there were 404 and in 2013, 450 references. The number of references in 2013 from Germany was 97, Italy 62, Netherlands 46 and Belgium 26 (see CJEU Annual Report for 2013, Table 19).

### **Should national judges be making references in the field of asylum?**

15. Even under the limited Article 68 EC procedure (which governed the area of asylum) formerly in place, several national courts, which were courts of final instance for EU law purposes, made references: see e.g. the Dutch Council of State (Raad van State) in Case C-465/07; 17 Feb 2009 Elgafaji, the German Federal Administrative Court (Bundesverwaltungsgericht) in Joined Cases C-175/08, C-176/08, C-178/08 et C-179/08 Salahadin Abdullah and Others (2010) and in Joined Cases C-71/11 and C-99/11 Bundesrepublik Deutschland v Y & Z as well as the Budapest Municipal Court (Fovárosi Biróság) of Hungary in Case C-31/09 Bolbol. Already it can be seen that the CJ's rulings have considerably assisted national courts and tribunals in

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<sup>17</sup> When one of the parties contests the correctness of the presentation of national law made by the national judge in his reference, the CJ's practice is to note that it is not for the CJ, in the context of the judicial cooperation established by Article 267, to call back into question or to verify the accuracy of the interpretation of national law made by the referring court, see e.g. Case C-212/10, Logstor ROR Polska, para 30.

<sup>18</sup> Recommendations, para 7.

<sup>19</sup> See e.g. Case C-130/93 Lamare, para 10; C-506/04 Graham J Wilson, para 35, Case C-42/07 Liga Portuguesa, para 37.

<sup>20</sup> In 2008 there were 288 references. For a number of reasons national courts and tribunals differ in their use of the PR procedures, including, of course, reasons related to differing national and constitutional traditions. On 2008/9 figures, graphs for references per year per country show the following: Germany 55, Netherlands 22, UK 18, France 16, Sweden 5.5 and Portugal 3.6. German and Italian courts made more than twice as many PRs per inhabitants as did French and UK courts. Dutch courts make four times as many references as Portuguese courts. However, high or low figures do not necessarily tell us whether or not there is strong national compliance or considerable EU expertise at a national level: see Broberg and Fenger, p. 57.

applying EU international protection law (asylum and subsidiary protection)<sup>21</sup>: see e.g. in the context of Article 15(c) of the Qualification Directive, the Czech Republic Supreme Administrative Court case of March 13, 2009, n° 5 Azs 28 : 2008; the UK cases of QD (Iraq) [2010] EWCA and HM and others (Article 15(c)) Iraq [2012] UKUT 00409 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 13 November 2012 (“HM2”) <sup>22</sup>; and the German case of BVerwG 10 C 4.09, 27 April 2010, all four of which build on Case C-465/07 Elgafaji. In Y & Z the CJ has greatly clarified the nature and scope of Article 9 of the QD which defines acts of persecution.

16. There are a number of reasons why national judges doing asylum-related work should be considering making references.

- In general terms, after the Lisbon Treaty, the CJ has reaffirmed its belief<sup>23</sup> that national courts and tribunals should make use of the PR procedure.

- If they decide not to make a reference in a given case involving a matter of interpretation which is not *acte clair* it may take some time before the matter is eventually dealt with by the CJ, causing legal uncertainty and divergent interpretations at the level of national courts throughout the Union meanwhile.

- According to the Court’s Recommendations (see Appendix B) at para 13, “a reference for a preliminary ruling may prove particularly useful when there is a new question of interpretation of general interest for the uniform application of European Union law in all the Member States, or where the existing case-law does not appear to be applicable to a new set of facts.” Recent informal discussions between national judges and judges of the CJ suggest that the CJ sees a particular utility in references being made in the field of asylum and immigration because it is a relatively new area of EU law and within a relatively short period of time there have been a number of “recast” legislative measures about which there are many unanswered issues of interpretation and application. We are still in a period when the new asylum-related directives are “bedding-down”<sup>24</sup>.

- If every national court or tribunal leaves the reference-making to others, important matters may never be decided. The German Federal Administrative Court (Bundesverwaltungsgericht) has sometimes made a reference even when another national court or another court of a different

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<sup>21</sup> See Appendix C for list of cases.

<sup>22</sup> With reference to earlier cases, HM and Others (Article 15(c)) Iraq CG [2010] UKUT 331 (“HM”) and HM (Iraq) [2010] EWCA Civ 1322. HM2 was upheld by the Court of Appeal in HF(Iraq) [2013] EWCA Civ 1276.

<sup>23</sup> At a May 2010 conference in Luxembourg bringing together national judges and judges of the CJ: see above n1

<sup>24</sup> As at June 2013 the Council has completed its programme of further Common European Asylum System (CEAS) legislation in the form of several “recast” directives relating to asylum. The new QD came into force on 1 December 2013.

Member State has already brought the question to the CJ (see Case C-436/09, Attila Belkiran v Oberbürgermeister der Stadt Krefeld, 25 August 2009). It has reasoned that the CJ should have a wide spectrum of cases and an additional reference also ensures that a question does not remain unanswered if the referred case is solved without decision - because, e.g., the national government grants residence or citizenship. Where a PR is lodged while another case dealing with the same or related issue is pending, the CJ will either join them (as happened in Joined Cases C-411/10 and C-493/10 NS and ME), leave them to proceed separately or formally or informally suspend consideration of the later case. Once it has decided the issue in a ruling, it may then ask the national court or tribunal in the other case(s) whether it wants to retain its question. In Case C-4/11 Puid, the referring court withdrew three of its questions on three cases concerning Article 3 of Regulation No. 343/2003 after learning what the CJ had said in NS and ME.

- Making a reference also has the advantage of making it possible for the CJ to receive observations from the EU/Union institutions and governments of all Member States<sup>25</sup> (if they choose) - and also, if the national court has decided to join as a third-party intervener an NGO with relevant legal expertise, observations from the wider legal community - so that there is an engagement at various levels within Member States and civil society, thereby deepening and improving everyone's understanding of the applicable law.

- There have been - and are likely to continue for some time to be - significant divergences in the interpretation of key provisions of the main asylum directives,<sup>26</sup>: e.g. in relation to Article 15(c) of the QD as to the role of international humanitarian law (IHL) as a tool for interpreting key terms such as "...armed conflict" In Case C-285/12 Diakité the CJ held that it should not be used in such a manner, and that<sup>27</sup> the phrase "internal armed conflict"

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<sup>25</sup> Article 96 of the Court's Rules of Procedure state that "1. Pursuant to Article 23 of the Statute, the following shall be authorised to submit observations to the Court:

(a) the parties to the main proceedings,

(b) the Member States,

(c) the European Commission,

(d) the institution which adopted the act the validity or interpretation of which is in dispute,

(e) the States, other than the Member States, which are parties to the EEA Agreement, and also the EFTA Surveillance Authority, where a question concerning one of the fields of application of that Agreement is referred to the Court for a preliminary ruling,

(f) non-Member States which are parties to an agreement relating to a specific subject-matter, concluded with the Council, where the agreement so provides and where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of that agreement."

<sup>26</sup> As highlighted by the European Commission, Report from the Commission to the European Parliament and to the Council on the application of Directive 2004/83/EC of 29 April 2004 COM (2010) 314 final June 16, 2010. See also the UNHCR publication, Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice, March 2010.

<sup>27</sup> See C-285/12 Diakité v CGRA [2014] CJEU, paragraphs 17-28, the court agreeing with the AG that international humanitarian law and subsidiary protection pursue different aims and

should be given its natural meaning. (Prior to that, the English Court of Appeal in *QD (Iraq)* had held that in construing such terms IHL is not to be used as an interpretive tool; on the other hand the German Federal Administrative Court had expressly disagreed with the English Court of Appeal over this matter<sup>28</sup>.) However, the Court shed no light on what definition it would give to the term “civilian” or to the “by reason of” requirement and left unanswered many questions facing decision-makers in seeking to give practical everyday effect to Article 15(c).

It would appear that there are currently very different approaches to actors of protection, with some countries considering that it is possible in certain circumstances for private actors (such as tribes, families) to provide protection under Art 7 of the QD; others taking a different view.

- Furthermore, a national court which fails to make a reference in a case where it was under an obligation to do so may face possible legal consequences: infringement proceedings initiated by the Commission against the Member State (theoretical possibility; no actual cases); an action for damages based on EU law being awarded for a failure to refer<sup>29</sup>; or the failure to refer being considered by the European Court of Human Rights (ECtHR) to be contrary to Article 6 of the ECHR<sup>30</sup> (there is now also Article 47 of the Charter of Fundamental Rights of the European Union (“CFR”) to consider).

17. It is important nonetheless to ask why there has been some reluctance hitherto to consider making a reference in the field of asylum law.

- There have been concerns voiced by some<sup>31</sup> about the impact on international refugee jurisprudence. They have pointed out that because there has never been a case taken to the International Court of Justice as provided for by Article 38 of the Refugee Convention, the CJ has become (by default) the first and only supranational court with jurisdiction to consider matters of refugee law and that as a consequence there is a danger that the CJ will furnish a “Eurocentric” rather than an international approach to interpretation of the Refugee Convention, which is a global, not a regional, international treaty. Fears have been expressed that because CJ rulings constitute ‘state practice’ in 28 countries signatory to the Refugee Convention

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establish different protective mechanisms, the former being linked to international criminal liability.

<sup>28</sup> Judgment of Federal Administrative Court (Bundesverwaltungsgericht) BVerwG 10 C 4.09, 27 April 2010, paras 22-23, 33-34.

<sup>29</sup> See C-224/01 *Kobler* [2003] ECR-I-10239.

<sup>30</sup> See *Coeme and others v Belgium* ECHR 2000-VII, para 114; *Canela Santiago v Spain* (app no. 60350/00) Decision of 4 October 2001. In *John v Germany* [2007] 45 EHRR SE4 ECtHR the ECtHR confirmed that the refusal to refer a case to the CJ for a preliminary ruling could infringe the fairness of proceedings within the meaning of Article 6 ECHR if it appeared to be arbitrary. However, the extent of such possible consequences will be far more limited for courts and tribunals other than those of final instance.

<sup>31</sup> See e.g. Helene Lambert, in *The Limits of Transnational Law*, ed. G. Goodwin-Gill and H. Lambert, Cambridge University Press, 2010 pp. 8-9.

many non-EU countries will be likely to adopt, or defer to, that interpretation. Such concerns have been strengthened by the lack of a procedure within the CJ system for UNHCR or other bodies concerned with international refugee law to make third party interventions (although, as explained below, the CJ accepts UNHCR and appropriate others as interveners when they have been joined as such before the national courts)<sup>32</sup>.

- There have been practical concerns expressed by national courts and tribunals about the delays (and costs) that can be caused by making a reference for pending cases both in a court's own country and in other countries<sup>33</sup>. As already noted, unless the CJ applies an expedited or urgent procedure, the procedure can take over 12 months (it currently takes on average 16 months (see CJEU Annual Report, 2013). For example, the case of Case C-31/09 Bolbol took some 17 months from the reference in January 2009 to the judgment of the Court in June 2010. In Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 Salahadin Abdulla the reference from the German court made in early 2008 did not receive a ruling by the Court until 2 March 2010. The reference in Joined Cases C-57/09 and 101/09 B and D was received by the Court on 10 February 2009 and judgment was not issued until 9 November 2010 – a time-lapse of 21 months. (It should be recalled that more than half the time involved in such cases is spent on translation; it is not delay for judicial reasons.)

18. However, in relation to concerns about the primacy of the Refugee Convention, CJ references are not binding on the international interpretation of the Refugee Convention or any other global treaty. Thus even if the case of Bolbol which concerned a specific reference in the Qualification Directive (QD) to Art 1D of the Refugee Convention, the CJ's ruling is, evidently, authoritative only in respect of the Directive<sup>34</sup>. In any event the Court has made clear that one of the legal bases of the QD is Article 78.1 TFEU (formerly

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<sup>32</sup> But see paragraphs 64-66 below for suggestions as to how UNHCR and other NGOs/INGOs may nevertheless be joined at the level of the national court or tribunal prior or shortly after to the reference being made either as an intervener or as an *amicus curiae*.

<sup>33</sup> Between 2008-2009 the UK higher courts deferred listing of lead cases on Article 15(c) to await the outcome of the Dutch reference to the CJ in the Elgafaji case, causing a considerable backlog in the listing of pending appeals by Iraqi and Somali appellants. Between July 2010-December 2011 the Dutch courts deferred deciding cases on Dublin II pending the outcome of UK and Irish references to the CJ in Joined Cases C-411/10 and C-493/10, NS v Secretary of State for the Home Department (the UK case in question was Saeedi Case No.2010/0943, 25 August 2010).

<sup>34</sup> Case C-31/09 Bolbol Opinion of Advocate General Sharpston 4 March 2010 n. 38. The CJ has stated that it does not have jurisdiction to make decisions on the interpretation of provisions under international law that are binding on the Member States outside the framework of Community law: Case 130 130/73 Vandeweghe [1973] ECR 1329. When the CJ has done so – e.g. Orken Case 374/87 [1989] ECR 3283 (concerning self-incrimination) – it has made clear that such “supplementary interpretation” does not constitute an authoritative interpretation of an international agreement for the purposes of international law, but merely means the CJ has established the necessary basis for being able to give a preliminary ruling on the validity of a given Community act. The CJ's decisions will therefore only be relevant to the validity of the Community act in question.

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 Refugee Convention and other relevant treaties, within the area of minimum standards with respect to ‘the qualification of nationals of third countries as refugees’ and that recitals 4, 14, 22 and 23 to the QD clarify 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 (Salahadin Abdulla and Others, para 52, and Case C-31/09 Bolbol [2010] ECR I-0000, para 37). Against this background the Court concluded in B and D that:

“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 (Salahadin Abdulla and Others, paragraphs 53 and 54, and Bolbol, paragraph 38).”

19. In addition, the early evidence is that the CJ can have a positive role in helping resolve some intractable issues of refugee law. In Case C-31/09 Bolbol, the Court followed the Opinion of Advocate General Sharpston (4 March 2010) that had adopted an interpretation of Article 1D (one incidentally more generous to potential Palestinian refugees than that set out by UNHCR)<sup>35</sup> which has commanded great respect on the part of leading academics. In C 71/11 Y and Z<sup>36</sup>, a case concerning religious persecution, the Court’s ruling went a long way to resolving very considerable uncertainties among courts and tribunals as to the issue of whether asylum claimants could be expected to refrain from certain activities related not just to their religious but also their sexual or political orientation<sup>37</sup>. At the same time, were the CJ to seek in future cases to give its own “autonomous interpretation” of key provisions of the Refugee Convention, that could cause tension with international refugee jurisprudence which predominantly bases itself on international law.

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<sup>35</sup> Also more generous than the interpretation adopted by the English Court of Appeal in El-Ali [2003] 1 WLR 95.

<sup>36</sup> C-71/11 Bundesrepublik Deutschland v Y & Z [2012] EUECJ.

<sup>37</sup> For further background see G De Baere, “The Court of Justice of the EU as a European and International Asylum Court”, Leuven Centre for Global Governance Studies, Working Paper No.118-August 2013.. In X, Y, & Z v Minister voor Immigratie en Asiel [2013] C-199/12, C-200/12 and C-201/12, referred by the Dutch Council of State, the CJ held at paragraph 71 that gay persons cannot be expected to conceal their orientation in their country of origin to avoid persecution..

20. As regards delay, the CJ has introduced from 2008 an urgent procedure specifically designed for cases falling within the area of freedom, security and justice (the area within which asylum cases fall)<sup>38</sup>. This can result in a ruling taking as little as two months although on the evidence so far the Court appears to take a rather strict view of its powers on the various fast track procedures where they may apply)<sup>39</sup>. There is also an expedited procedure<sup>40</sup>: see below at paragraph 86.

21. To summarise, it is only by participating in the reference system that national courts can influence the overall case law of the CJ and in that way to influence the uniform application and interpretation of EU law on asylum<sup>41</sup>.

### **Effect on proceedings before the national court or tribunal of making a reference**

Before turning to consider the PR procedure, it is important to emphasise that the effect of making an order for reference is that the national court of tribunal stays/suspends/adjourns its proceedings to await the ruling of the Court of Justice: see Article 23 of Protocol (No 3) of the Statute of the CJEU annexed to the Treaties.

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<sup>38</sup> Protocol (No 3) on the Statute of the Court of Justice of the European Union, Art23a; Rules of Procedure of the Court of Justice, op.cit., Art 107.

<sup>39</sup> See K. Lenaerts, 'Accelerated and Urgency Procedures in the Area of Freedom, Security And Justice', *Today's Multi-layered Legal Order: Current Issues and Perspectives*, Zutphen 2011, pp. 155-174 (ISBN 978-94-90962-20-3). The CJEU Annual Report, 2012 at Table 16 indicates that in both 2011 and 2012 there were 5 applications for an urgent preliminary ruling, 2 being granted in 2011 and 4 in 2012.

<sup>40</sup> Rules of Procedure of the Court of Justice, op.cit. Art 105.

<sup>41</sup> Case 166/73 *Rheinmuhlen*[1974] ECR 33 at 38. See also Council Resolution 2008/C299/01 on the training of judges and *Recommendations*, op.cit., para 1.

## II. THE PR PROCEDURE

### The PR procedure - main stages

22. The main stages of the PR procedure are usually: (1) order for a reference made by a national “referring court”; (2) publication of the reference questions in the Official Journal<sup>42</sup>; (3) observations/submissions from the parties/interested persons; (4) oral hearing; (5) Advocate General (AG) Opinion<sup>43</sup>; (6) judgment/order; (6) completion by the national referring court of the main proceedings.

23. So far as concerns the CJ’s internal workings the procedure is as follows. Once received in the Registry and after it has been translated into French, the reference is passed to the President of the Court who allocates it to a judge-rapporteur. The First Advocate General appoints an AG. The reference also goes to the Research and Documentation Unit which is staffed by national lawyers who look at and append to it a note explaining any national legal, political or social issues. This is referred to as the ‘Pré-examen’ stage and includes a consideration of whether there are similar cases before the court. The judge-rapporteur drafts a preliminary report advising, depending on the importance and complexity of the case, whether it should be allocated to a 3-judge chamber, a 5-judge chamber, the Grand Chamber or, rarely, an extraordinary plenary session. A decision will also be taken on whether an opinion is needed from the AG, again dependent on complexity. The preliminary report is signed by the judge-rapporteur and the allocated AG, and is then circulated in time for the Réunion Générale (RG), which is a meeting of all the judges and AGs of the CJ that takes place every Tuesday to decide how cases will proceed. The RG decides on the proposals of the reporting judge in the preliminary report, i.e. in which chamber the case is to be decided, with or without an opinion of the AG, with or without the hearing, and whether any other procedural measures are needed (e.g. “note de recherché”, clarifications to national judge, request for concentration of pleadings, questions for written/oral response).

In an increasing number of cases there is no AG opinion<sup>44</sup>. Furthermore, in a certain number of cases, where none of the parties request an oral hearing, the CJ will decide the case without organising such a hearing: Article 76 of the

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<sup>42</sup> If publication in the OJ is delayed the CJ may already have received written observations of the parties.

<sup>43</sup> The AG is a judge of the Court but opinions of AGs are not binding on the Court. The role of the AG is to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. Whilst the CJ often follows AG opinions, it cannot be assumed that this will be the case.

<sup>44</sup>See Broberg and Fenger, p.402 give the figure of 40% although this includes all types of cases, not just PRs.



Rules of Procedure allow the CJ to dispense with a hearing even if one of the parties has requested it<sup>45</sup>.

In addition, if the CJ decides to deploy the Reply by way of Reasoned Order procedure<sup>46</sup>, there will be no hearing. In some cases, the PR is identified as suitable for reasoned order at an early stage<sup>47</sup> (see for example C-352/12 Consiglio Nazionale degli Ingegneri v Comune di Castelvecchio Subequo and Comune di Barisciano) but in others the matter is referred to a chamber of the Court, usually to a 3-judge chamber and there will be no AG's opinion (see for example C-425/12 Brandes v Land Niedersachsen).

24. As already noted, the procedure can take over 12 months (it currently takes on average some 16 months) but it is clear that where the reasoned order procedure is followed, the decision of the CJ is being announced in many cases within six months and within twelve months if referred to a chamber of the Court. This is likely to reduce significantly the length of time cases take overall. In the area of freedom, security and justice (which includes asylum) cases, there is a special urgent cases Article 107 procedure, although the Court appears somewhat reluctant to apply it except in very limited types of cases: see below at paragraphs 84 to 91. There is also an Article 105 expedited procedure: see below at paragraph 86

### **Who can make a reference?**

25. As already noted, prior to 1 December 2009 in asylum-related cases only a court of final instance could make a reference, but now any level of court/tribunal can.

26. The CJ applies an autonomous EU/Union notion of a "court or tribunal" which entails that many quasi-judicial bodies that are not viewed as courts in the national legal system are nevertheless competent to make preliminary references. Thus some administrative appeal boards exercising judicial functions may well qualify: see e.g. El-Yassine [1999] ECR I-1209. 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 267 TFEU, which is a question governed by EU/Union 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 *inter partes*, whether it applies rules of law and whether it is independent<sup>48</sup>.

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<sup>45</sup> On the other hand the CJ can organise a hearing *ex officio*, even if none of the parties requests it – such cases are rare, but may occur when the Court has specific questions to the parties or when it wants to clarify certain issues.

<sup>46</sup> See Article 99 of the Rules of Procedure.

<sup>47</sup> It appears that the Pré-examen stage conducted by national lawyers within the Research & Documentation section identify cases as suitable for disposal in this manner.

<sup>48</sup> Recommendations, op.cit., para 9. See also, *inter alia*, Case C-54/96 Dorsch Consult [1997] ECR I-4961, para 23; Case C-53/03 Syfait and Others [2005] ECR I-4609, para 29; and Case C-

27. As to which courts qualify as courts of final instance in a particular case, that is a matter for the CJ to decide but in general the test is seen to be whether the decision the referring court will deliver in the main proceedings will be final so that it is not possible to bring an action against its decision<sup>49</sup>. In Cartesio the CJ stated that "...a court...whose decision in disputes...may be appealed on points of law, cannot be classified as a national court of tribunal against whose decisions there is no judicial remedy under national law, within the meaning of the third paragraph of [Article 267]". The same point was emphasised in Lyckeskog<sup>50</sup>. In the Roda Golf case<sup>51</sup> it was decisive for the CJ that the "referring court has indicated in its reference that the decision it will deliver in the main proceedings will be final".

### Should lower courts leave PRs to higher courts?

28. Statistics show that considerably more references have been made by lower or intermediate courts than by courts of final instance and commentators emphasise that PRs from lower courts/tribunals have played a crucial role in the development of EU law<sup>52</sup>. CJ jurisprudence would not have been as effective without those references<sup>53</sup>.

29. As already noted, failure on the part of a lower court to make a reference may mean important questions of EU law may never reach the CJ.

30. Failure to grasp an opportunity to make a reference in a case which enables clear questions to be posed can sometimes mean that the same question is then decided by the Court in another case where there may be a less clear content to the reference, making it difficult for the Court to address the core issues. This, like the other failures specified above, can mean that there is significant delay in having important issues of EU law clarified.

On the other hand it may make sense to leave to a higher court to make a reference bearing in mind especially if such a court has oversight of a lot of cases (as may happen in a federal system) and legal aspects which need clarification by the CJEU. Such a court may also have a broader oversight as to which cases are already pending in the CJEU as well as of the decisions of other national courts on the relevant legal issues. Such a court may also have more relevant legal expertise. A further consideration may be if it is thought

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246/05 Häupl [2007] ECR I-4673, para 16 and more recently Merck Canada v Accord Healthcare C-555/13.

<sup>49</sup> See Case C-99/00 (4 June 2002, Lyckeskog), Case C-210/06 16 Dec 2008 Cartesio, and C-14/08 Roda Golf & Beach Resort (25.6.2009, paras 28-29.

<sup>50</sup> See n.29.

<sup>51</sup> See n.29

<sup>52</sup> Around three quarters of PRs have come from courts or tribunals other than those of final instance, most from intermediate levels: see e.g. Broberg and Fenger, pp.33, 40.

<sup>53</sup> Ibid, p.55.

that a higher court will have the benefit of better submissions from the parties.

Can higher courts prevent a lower court/tribunal from making/proceeding with a reference?

31. In Case 106/77 Simmenthal [1978] ECR 629 the CJ ruled that EU law prevented a provision in national law that would hinder a national court in referring a question to the CJ about the compatibility of national provisions with EU law.

32. In Case C-348/89 Mecanarte [1991] ECR-I-3277 the question of whether a Portuguese law was unconstitutional had to be referred to the Portuguese constitutional court. The CJ ruled that this did not mean that only Portugal's constitutional court could make a PR: the national courts have the widest possible powers to refer questions to the CJ if they consider that an interpretation of EU law is necessary in a case before them. The Court has also held that even if a case raises questions of national constitutional law a lower court is entitled to make a reference to the CJ, if the question may be decisive for the case: see Case C-188/10, Melki and Abdeli, 22 June 2010, para 52. The functioning of the system of cooperation between the national court and the CJ requires the national court to be free to refer "any question that it considers necessary, at whatever stage of the proceedings it considers appropriate".

33. The Court's position on this question has become more defined as a result of the judgment in Cartesio, Case C-210/06, 16 December 2008.

34. The pre-Cartesio position was that EU law allowed a decision to make a preliminary reference to be overturned by an appellate court according to national rules<sup>54</sup>. Once the CJ was informed that the decision to make a reference had been overturned on appeal, it had traditionally abided by that decision and removed the case from its case register.

35. The post-Cartesio position is that a national rule under which a lower court is bound by a superior court's interpretation of EU/Union law cannot of itself deprive the lower court of the possibility of making a reference to the CJ for a preliminary ruling, even when the superior court had denied that a reference was necessary. At para 88 in Cartesio the Court stated that "national courts have the widest discretion in referring matters to the CJ if they consider that a case pending before them raises questions involving interpretation of provisions of Community law, or consideration of their validity". At para 93 it stated that if a legal remedy against referral exists, the outcome of such an appeal cannot limit the jurisdiction conferred by Article 234 [now Article 267]. It is, therefore, solely for the referring court to draw the proper inferences from a judgment delivered on an appeal against its decision to refer and, in

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<sup>54</sup> See e.g. R (on the application of A) v Secretary of State for the Home Department [2002] European Law Reports 580, cited in Broberg and Fenger, p.325.

particular to come to a conclusion as to whether it should maintain the reference or amend or withdraw it<sup>55</sup>. That is true regardless of the existence of a rule of national law whereby a court is bound on points of law by the ruling of the superior court (Cartesio, para 94).

36. However, if an appeal against a judgment making a reference for a PR is lodged and the appeal court (without regard to the reference) has by some route adjudicated on the dispute in the main proceedings, then the CJ might decide that there is “no need to reply/adjudicate” due to the absence of a dispute pending before the referring court. Thus for example, in Case C-525/06 De Nationale Loterij NV v Customer Service Agency BVBA the CJ stated that

“the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute. Therefore, there is no need for the Court to reply to a reference for a preliminary ruling from a referring court where the decision to refer such a question has been reversed by an appeal court which itself adjudicated on the dispute between the parties in the main proceedings...There is no need to reply to such a reference...even though the referring court...has not withdrawn that reference”<sup>56</sup>.

37. From the above it can be seen that for a court or tribunal whose decisions are subject to onward appeal challenges, the decision as to whether to make a reference will depend on a number of factors, including (but not necessarily limited to), whether it considers that it has heard full legal arguments from the parties, whether in the national legal hierarchy it is considered to be a specialist body on the relevant area of law, the extent to which a higher court has oversight of a range of related cases.

#### Do I have to be a specialised court/tribunal to refer?

38. In the discussions at the IARLJ European Chapter Berlin Workshop in 2009 a CJ judge<sup>57</sup>, said he hoped courts and tribunals with specialist expertise would be in the forefront of the reference making in asylum-related cases albeit that this did not mean that non-specialist courts or tribunals should desist.

#### Similar references

39. Where a PR is lodged while another case dealing with the same or related issue is pending, the CJ will either join them (as happened in Joined Cases C-

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<sup>55</sup> See discussion in Broberg and Fenger, pp.326-329.

<sup>56</sup> Case C-525/06 De Nationale Loterij, 24 March 2009.

<sup>57</sup> Judge Schiemann, now retired.

411/10 and C-493/10 NS and ME), leave them to proceed separately or formally or informally suspend consideration of the later case. Once it has decided the issue in a ruling, it may then ask the national court or tribunal in the other case(s) whether it wants to retain its question.

#### Withdrawal of references

40. If a party withdraws/or the government concerned makes a grant of a residence permit, or something similar, to the asylum applicant and a settlement has thereby been reached in the main proceedings then the referring court or tribunal is expected to withdraw the reference on its own initiative and thereby save the CJ time and expense<sup>58</sup>. In Case C-155/11 Bibi Mohammad Imran v Minister van Buitenlandse Zaken the CJ decided not to answer questions put by a Netherlands Court because meantime the Dutch government had granted the applicant a residence permit. However, the fact that the government gives some kind of residence permit is not necessarily a reason for the national court to withdraw the reference: see e.g. Case -3/90 Bernini [1992] ECR I-1071, C-413/99, Baumbast [2002] ECR I-7091, paras 29-38. In Baumbast the ECJ noted that the permits had been granted under national law and so the question of the rights conferred under EU law on the persons concerned had not therefore been resolved. In Bernini one of the reasons the referring court decided to maintain the reference was that the questions were also relevant to other pending cases.

#### **When is it appropriate to make a reference?**

41. One of the purposes of the IARLJ European Chapter network is to act as a resource for national judges doing cases in the asylum area. However, reference-making does not require and is not intended to require specialist knowledge of EU/Union law or specialist expertise in the relevant area of law, since the whole purpose of the procedure is to enable the CJ to provide the right interpretation of EU/Union law and/or to decide on the validity of an act of the Union institutions. Subject to constraints of time the approach of the CJ is generally facilitative: e.g. if it considers the questions asked by the national court are unclear, it can decide to reformulate them – as they did in Elgafaji<sup>59</sup> - or it may ask for clarification, mainly in respect of the national legal framework: see e.g. Case C-565/11, Mariane Irimie. Or for example it may, in order to provide the national court with an answer which will be of use to it and enable it to determine the case before it, consider provisions of EU/Union law which the national court has not referred to in its questions<sup>60</sup>.

42. In the eyes of the CJ the starting-point is that:

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<sup>58</sup> As happened in respect of the Dutch reference in Gunes, which was withdrawn when the Court gave judgment in Case C-16/05 Tum and Dari [2007] ECR I-7415.

<sup>59</sup> See above at paragraph 15

<sup>60</sup> See, to that effect, Case C-374/05 Gintec [2007] ECR I-9517, para 48 and Case C-434/09, McCarthy, 5 May 2011 para 24.

“[i]t is solely for the national court...to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling...Nevertheless, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to confirm its own jurisdiction...the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it”<sup>61</sup>.

### Scope

43. A national court or tribunal may refer a question to the CJ only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature<sup>62</sup>.

44. A reference concerning EU asylum law can be made even when the provision concerned gives discretion to the national law. It does not have to be a provision with direct effect: Mazzalai [1976] ECR 657; Case C-373/95 Maso [1997] ECR I-4051. If EU secondary law regulates certain areas of law but gives discretion to Member States, the case may still fall within the scope of EU law (and therefore under the PR procedure regime): see Case C-442/00 Angel Rodriguez Caballero v Fondo di Garantia Social (Fogasa), 12 Dec 2002 and Case C-540/03 European Parliament v Council of the European Union, 27 June 2006. In the latter case the CJ said that “the fact that the contested provisions of the Directive afford the Member States a certain margin of appreciation and allow them in certain circumstances to apply national legislation derogating from the basic rules imposed by the Directive cannot have the effect of excluding those provisions from review by the CJ of their legality as envisaged by Article 230 EC” (para 22)<sup>63</sup>. At the same time, “when the eventual question refers to the application of the principle of proportionality as a general principle of EU law, if the state’s measure is seen to be primarily within the competence of the state, the CJ is likely to be reluctant, unless a very important Community interests is adversely affected, to examine the proportionality of the national measure too closely<sup>64</sup>”: see e.g. Case C-36/02 Omega.

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<sup>61</sup> Case C-648/11, MA, BT, DA, 6 June 2013 (on Dublin Regulation); see also Case C-119/05, Lucchini SpA 18 July 2007, paras 43-44.

<sup>62</sup> Case C-14/08, Roda Golf, 25 June 2009, paras 34-35.

<sup>63</sup> Although this case was an annulment, not a PR case, it is submitted that the same principles must apply to Article 267 cases. See also Battjes, Hemme, European Asylum Law and International Law, Martinus Nijhoff Publishers, Leiden, 2006.

<sup>64</sup> De Burca, G, “The Principle of Proportionality and its Application in EC Law, Yearbook of European Law XIII (I): 105-150.

45. The fact that a directive is only a minimum standard directive (as were the original Qualification Directive and Procedures Directive and other “first-generation” asylum-related directives) cannot justify a refusal to interpret one of its provisions on the grounds that stricter (or more generous) national rules would in any case be compatible with the directive<sup>65</sup>. The reason is that the question can have a bearing on the validity of the implementing provisions under national law: see Case C-491/01 British American Tobacco [2002] ECR I-1453 paras 28-41<sup>66</sup>.

46. A reference can be made even if the parties in the case do not invoke EU law in support of their claims but the national referring court considers *proprio motu* that the dispute raises issues of EU law<sup>67</sup>.

47. A reference can be made even if the Member State has not transposed the Directive or other EU measure into the national law of Member State: e.g. in Bolbol<sup>68</sup> the relevant provision of the Qualification Directive had not been transposed into Hungarian law when the reference was made. All this meant for the Court was that “the provisions of European Union law should in this instance, be applied directly”<sup>69</sup> (para 33). The same was true in Case 465/07 Elgafaji<sup>70</sup>.

48. A reference may be valid even when the case is not covered *ratione temporis* by the relevant Directive because it concerns an application made before the Directive entered into force. Thus in Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 Salahadin Abdulla and Others the CJ said at para 48 that:

“...In such a case it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (see Case C-3/04 Poseidon Chartering [2006] ECR I-2505, paras 15 and 16...)”.

49. A reference can be made even if the deadline for implementing a directive has not expired, although there must be at least indirect relevance to the nature of the ongoing dispute<sup>71</sup>.

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<sup>65</sup> In Cases C-297/88 & C-197/89 Dzodzi v Belgian State [1990] ECR I-3763 the CJ ruled that national provisions “transposing” the directive outside its scope of application have to be interpreted in the same way as provisions of the directive.

<sup>66</sup> Cited in Broberg and Fenger, p.189.

<sup>67</sup> See Case C-222/05-225/05 Van der Weerd and others; cf previous judgments in C-430/93 and C-431/93, paras 20-22 (Schijndel) and C-327/00 (Peterbroeck).

<sup>68</sup> Case C-31/09, paragraphs 41-42

<sup>69</sup> Case C-31/09 Bolbol 17 June 2010. See also Case C-465/07 Elgafaji.

<sup>70</sup> See C-465/07 at paragraphs 41 & 42

<sup>71</sup> Case C-491/01 British American Tobacco [2002] ECR I-11453, paras 28-41. In the period before the deadline the member state only has a negative obligation not to adopt measures

50. Based on the position of the CJ in Case C-175/08, C-175/08, C-176/08, C-178/08 and C-179/08 Salahadin Abdullah and Others para 48, a national court may send an order for a preliminary ruling even in cases where the relevant situations are purely internal to the state.

### Approach to interpretation

51. The method of interpretation of EU law used by the CJ differs from the well-established methods of national administrative law and also from that applied in international law under the Vienna Convention on the Law of Treaties. 1969. According to CJ case law, a literal interpretation cannot always be decisive. It is necessary to consider the spirit, the general scheme and the wording of the relevant EU provisions, which may sometimes require comparing of different linguistic versions (see e.g. Case C-251/12 Van Buggenhout & anr). “Every provision of EU law must be placed in its context and interpreted in the light of the provisions of the Community as a whole, with regard to the objectives thereof and to its state of evolution at the date on which the provision is to be applied”<sup>72</sup>. A very similar observation was made by the Court in Case C-648/11, 6 June 2013 MA, BT and DA, when construing Article 6 of the Dublin II Regulation.

### Criteria

52. In collaboration with the CJ, the national courts and tribunals fulfil a duty entrusted to them to ensure that interpretation and application of the Treaty is observed. One consequence already noted is that a reference can be made even if the parties in the case do not invoke EU law in support of their claims but the national court *propriu motu* considers the dispute raises issues of EU law. The reference must be necessary to enable the national court “to give judgment” and to resolve the dispute involved in the main proceedings: see Art 267. The national court does not have jurisdiction to ask hypothetical questions not directly related to the dispute<sup>73</sup>.

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that would endanger the attainment of the objective of the directive: see Case-106/89 Marleasing.

<sup>72</sup> Case C-238/81, CILFIT, para 20, Case C-26/62 Van Gend en Loos; Case C-6/64 Costa, Case C-292/89 Antonissen; Case C-378/97 Wijsenbeek, Case C-144/04 Mangold. Battjes (op.cit., n 63 above) at p.46 argues that the “context” encompasses the preamble and documents or instruments that are explicitly referred to in explanatory memoranda, comments of the European Parliament, opinions of the Economic and Social Committee and the Committee of the Regions, and that the Comment on Articles and other publicly accessible Council documents can be invoked on the same footing as Commission proposals. Comments on drafts have value for interpretation only if their content is reflected in the text adopted and then only as a “supplementary means” (see Zalar, Boštjan, ‘Constitutionalisation of the Implementing Act of the Procedures Directive: the Slovenian perspective’, European Journal of Migration and Law, 10, 2, 187-217).

<sup>73</sup> However, the principle that rulings should not be given to hypothetical questions does not prevent the national court from referring one or more questions, each of which is based on different hypothetical views of the facts of the case, as long as the national court has not yet



### Acte clair

53. A reference should not normally be made when the EU provision is “*acte clair*”. “*Acte clair*” denotes situations where the question for interpretation has not previously been put before the Court but where there is no real doubt about the proper interpretation of Community law<sup>74</sup>. The doctrine of *acte clair* is widely regarded as central both to references made by courts of final instance (where there is an obligation to refer) and all other courts and tribunals (where there is a discretion, although certain national courts have preferred to adopt their own (but similar) formulations<sup>75</sup>.

54. In Case C-283/81 CILFIT [1982] ECR 3415, paras 16-20, the CJ required that the national court of final instance must not only itself be convinced as to the correct interpretation of Community law, but also “be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice”. The Court also observed that the interpretation of an EU provision may require a comparison of different language versions (see above para 51). The approach in subsequent national case law has been more pragmatic, taking into account, *inter alia*, considerations such as the importance of the case to the parties, the problem of delay a reference may entail and the costs associated with the making of a reference. It should be noted, however, that even where a national court of last instance considers an EU provision *acte clair*, the CJ is not prevented from making a preliminary ruling: see Joined Cases C-428/06-434/06 UGT-Rioja [2008] ECR-I-6747, para 43<sup>76</sup>.

55. Further, the fact that another national court has made a PR regarding the interpretation of the same provision in a Community act does not in itself exclude another national court concluding that the provision in question is *acte clair*<sup>77</sup>. However, it may be difficult, although not necessarily so<sup>78</sup>, for a higher-level national court to be sure a provision is *acte clair* if judges in the lower court supported a diverging interpretation.

### Acte éclairé

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decided which view it will take: Case C-297/89 Ryborg [1991] ECR I-1943 para 6 (cited in Broberg and Fenger, p. 180); Case C-105/03, Pupino [2005] ECR I-5285, paras 19-48.

<sup>74</sup>In Case 283/81 CILFIT [1982] ECR 3415, paras 16-20. See also Case C-495/03 Intermodal Transport, BV, ECR p.1-8151 (33).

<sup>75</sup> Thus in the UK the test is currently a “complete confidence” test: see R V Stock Exchange ex parte Else [1993] QB 534.

<sup>76</sup> Cited in Broberg and Fenger p.237.

<sup>77</sup> For a UK example where a higher court considered *acte clair* questions referred by a lower court (the Upper Tribunal) see Secretary of State for the Home Department v FV (Italy) [2012] EWCA Civ 1199, para 101.

<sup>78</sup> *Ibid*, p.244.

56. Nor should a reference normally be made when the case is “*acte éclairé*”. “*Acte éclairé*” denotes situations where the CJ has already made a decision on the question in other cases <sup>79</sup>.

57. In deciding whether to make a reference the main considerations of principle are: that the relevant facts have been found and are substantially agreed; that the point of law will be substantially determinative of the case; that there is not any existing CJ ruling addressing the point of EU law; that the issue in question is one of principle and/or of wide-ranging practical importance; that there are similar cases pending at national level; and that the question is one that is likely at some stage in the life of the case to need referral to the CJ. However, not all these considerations need apply for a reference to be made.

58. In addition for the national court or tribunal there may also be practical or “commonsense” considerations such as expense and delay (but on the latter see below at paragraph 71).

59. It will normally be appropriate for the national court to wait to make a reference until the facts of the case have been established. In the context of a PR “it is for the national court to establish the facts”: see e.g. Case C-31/09 Bolbol 17 June 2010, para 40.

60. Normally, as well, the national *legal context* must be established and references to official sources of the national legislation included: see the Court’s Recommendations (reproduced below in Appendix B) at para 22.

#### Other preparatory steps

61. If lack of information concerning the context of the relevant provisions of EU/Union law is a problem it is also worth recalling that there is the possibility of making a request to the Commission for information (see Art 4(3) TFEU conferring a general duty on the Commission to loyally cooperate with national courts and to assist them when needed in order to ensure a correct application of EU law<sup>80</sup>).

It is prudent before making a reference to check by consulting the Curia website that there are no pending (or decided!) references on the same point.

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<sup>79</sup> Joined Cases 28-30/62 Da Costa [1963] ECR 31.

<sup>80</sup> Broberg and Fenger p.17ff.

### III. DRAFTING OF A REFERENCE

#### Drafting an order for reference

62. It is in everyone's interest that an order for reference is well-drafted so as to give the CJ the best possible basis for furnishing a ruling that provides not just the referring court but also judges in other Member States thorough and targeted guidance<sup>81</sup>. Being published in the Official Journal the referring court's questions will serve as a marker for all other national courts pending a CJ response first in the form of an Advocate General Opinion (not in all cases) and eventually (if no use has been made of the Reply by way of a Reasoned Order procedure<sup>82</sup>) of a CJ ruling.

63. It will normally be useful for the national court to inform the parties in the proceedings that it is considering making a PR, if necessary reconvening to hear argument. In some countries the referring court asks the parties to draft an agreed proposed text of the questions; however, it is entirely a matter for the national court or tribunal whether to adopt or modify or ignore such proposals. It is for the referring court or tribunal alone to decide both the form and content of any questions. This is true irrespective of whether a member state has an adversarial or inquisitorial legal system: see Case C-104/10 Kelly, 21 July 2011, paras 65-66. It may be that for such purposes legal aid will normally be granted by the national court or tribunal; it can also be granted by the Court<sup>83</sup>.

#### Interveners/*amici curiae* at the national level

64. (If it has not done so already), the national court or tribunal should consider whether to join UNHCR or any other appropriate body as an intervener or as an "*amicus curiae*" before making the reference. It is possible for an intervener to be joined at a later stage as allowed for by Article 97<sup>84</sup> but that limits the extent to which the party joining can participate (see Article 97.2). We recommend this because by Article 35 of the Refugee Convention UNHCR is accorded the role of supervising the Convention and is ideally

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<sup>81</sup> Conversely, the CJ can decide to refuse to take a case if the questions are not articulated clearly enough for the Court to be able to give any meaningful legal response: see Case C-318/00 Bacardi-Martini SAS [2003] ECR I-905.

<sup>82</sup> see paragraphs 23, 24 and n7. above

<sup>83</sup> See Protocol No.3 on the Statute of the Court of Justice of the European Union, Article 104.6; the Court's Recommendations (reproduced at Appendix B below) para 36. The CJ's Rules of Procedure contain rules on legal aid.

<sup>84</sup> Article 97 provides:

"1. The parties to the main proceedings are those who are determined as such by the referring court or tribunal in accordance with national rules of procedure.

2. Where the referring court or tribunal informs the Court that a new party has been admitted to the main proceedings, when the proceedings before the Court are already pending, that party must accept the case as he finds it at the time when the Court was so informed. That party shall receive a copy of every procedural document already served on the interested persons referred to in Article 23 of the Statute."

placed to assist the Court with relevant information regarding case law and state practice and, being a body with a global remit, may be of particular assistance to the Court in ensuring it does not approach matters from a European perspective only.

65. Despite UNHCR being identified in the asylum-related directives as being a source of “valuable guidance” (see e.g. recital 22 of the Qualification Directive) the CJ Statute does not permit third-party intervention<sup>85</sup>. If however, UNHCR<sup>86</sup> is joined as an intervener at the national level, then the CJ will treat it as an interested party. This is what happened in Case C-192/99 R v Secretary of State for the Home Department [2001] 2 CM.L.R 24 (the Manjit Kaur case).

66. It would appear that (unless prevented by national rules of procedure) the national referring court or tribunal can join an intervener even after it has stayed the case for reference<sup>87</sup>, although this may only be practicable for a short period<sup>88</sup>. Under Article 130.1 the time limit for any participation by a new party is normally 6 weeks from the notice of the reference being placed in the OJ unless the CJ acts under Art 129(4) and in any event must be before the opening of any oral proceedings.

67. Some commentators contend that Article 23 of the Court’s Statute<sup>89</sup>, which envisages a role in Court proceedings for “interested persons”, covers not only interveners but also *amici curiae* in the main proceedings where this concept is recognised in the relevant national legal system<sup>90</sup>. However, in either case it is a matter for the national referring court or tribunal.

68. If current national rules do not permit a national court or tribunal to join UNHCR (or others) as an intervener or *amicus curiae*, it may be a matter the national head of judiciary might wish to take up with domestic legislators, with a view to legislative reform.

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<sup>85</sup> The Court has taken a strict approach to Article 23 of its Statute: see e.g. Case 2/74 Reyners [1974] ECR 63; Broberg and Fenger, pp.344-345.

<sup>86</sup> Or other NGOs/INGOs. In a recent reference by the UK Court of Appeal in Joined Cases C-411/ and 493/10 N.S. and M.E., 21 December 2011, the interveners were UNHCR, Amnesty International, the Aire Centre and the Equality and Human Rights Commission.

<sup>87</sup> See Article 97, Rules of Procedure. It is implicit in Article 97 that third parties can be added by the referring court or tribunal post-referral and are entitled to be served with the relevant documents. The stipulation in Art 97.2 that such a party "must accept the case as he finds it at the time when the Court was so informed [of his admission by the national court as a new party]".

<sup>88</sup> For an illustration of a party being joined at a later stage under the old procedural rules, see Case 432/92 R v Minister of Agriculture, Fisheries and Food ex P S P Anastasiou (Pissouri Ltd).

<sup>89</sup> See also Rules of Procedure of the CJ, op.cit., Article 105 (2) and (3).

<sup>90</sup> An *amicus curiae* (“friend of the court”) is not a party, but contributes information on the case with a view to assisting the relevant court to reach the right decision. See for example, Broberg and Fenger, p.346. They cite Advocate General Jacob’s Opinion in Case C-379/98 Preussen-Elektra [2001] ECR I-2099 paras 69-71; Case C-27/89 SCAPE [1990] ECR I-1701; and Case C-230/96 Cabour [1998] ECR I-3087.

69. It may sometimes be important for the national court or tribunal to consider whether to join several cases together for the purposes of making a reference. This may help ensure the CJ is able to consider more than one factual scenario and it may also make it less likely that the CJ will deal with the underlying issue (even if, for example, the government of the referring court's Member State has decided late in the day to issue a residence permit). In Metock<sup>91</sup>, a free movement of persons case, the Irish High Court were faced with a number of cases brought by third-country nationals married to non-Irish Union citizens. The Court pooled all the cases and distilled three questions from them. The CJ carried out a similar exercise in the five cases referred by the German Federal Administrative Court (Bundesverwaltungsgericht) in Joined Cases C-175/08, C-176/08 and C-179/06, Salahadin Abdullah and Others<sup>92</sup> and the five cases dealt with in the reference made by the Verwaltungsgerichtshof (Austria) in Case C-256/11 Dereci.

### **Form and contents**

70. There is no set form. For courts and tribunals the Court has prepared recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (Recommendations): see Appendix B. It may sometimes be appropriate to inform the parties that the CJ has issued such guidance and has issued an Information Note to Counsel.<sup>93</sup>

71. The order should be written in one document (without annexes) in simple, clear language with short sentences. It is highly desirable that it be kept to around 10-15 pages (if it is longer this may lead the Court to translate only a summary and can lead to interpreting delays). The points or paragraphs should be numbered. When preparing the reference the referring court or tribunal should bear in mind that the information provided must be in such a form as to enable not only the CJ but also the governments of the Member States and other interested parties to submit observations pursuant to Article 23 of the Statute of the Court<sup>94</sup>. Only the orders for reference are notified to the interested parties.

72. The order should be self-explanatory, i.e. it should be understandable without the need to refer to other documents. Appendices should be avoided as they will neither be notified nor translated.

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<sup>91</sup> Case C-127/08 Metock [2008] ECR I-6241.

<sup>92</sup> See n...

<sup>93</sup> See Broberg and Fenger, 313ff. Although this Note to Counsel appears still on the CJEU website, it was written in 2009 and does not take into account the new procedural rules.

<sup>94</sup> An order for reference must give an account of the relevant facts and national law in such a way as to make it clear to the Member States and EU/Union institutions what the case is about: see Joined Cases 141/81-143/81 Holdijk [1982] ECR 1299, paras 5-8 cited in Broberg and Fenger, p.302.

73. The order for reference should be drawn up in the language of the proceedings of the referring court.

74. The reference should state the names and addresses of the parties and their legal representatives. The referring court or tribunal may ask the CJ to refrain from using the correct names and substitute them by letters to protect the claimants from possible later problems in their countries of origin: see e.g. the German Federal Administrative Court asked the CJ to proceed in this fashion in relation to Joined Cases C-57/09 and C-101/09 B and D<sup>95</sup>, the cases concerned with the Qualification Directive's exclusion clauses. Article 95 of the new Rules of Procedure contains specific rules on anonymity. It is important to note that (contrary to the practice of certain national courts) the CJ will disclose the name of the parties unless the national court or tribunal provides for anonymity.

75. The reference should be sent by registered post to the Court of Justice, Rue du Fort Niedergrunwald, L-2925 Luxembourg. There are no set deadlines but there is a strong expectation that the request be sent as soon as possible.

76. The question or questions should appear in a separate and clearly identified section of the order for reference, generally at the beginning or the end.

77. The basic elements of an order can be gleaned from reading the summaries contained in recent CJ judgments and the Court's own Recommendations (reproduced at Appendix B below). The essential elements have now been codified in Article 94 of the Rules of Procedures of the CJ<sup>96</sup>. They are:

Facts: The order should set out in concise form the given facts of the main proceedings). In the interpretation of EU law the CJ relies on the facts presented by the national court. The early 2013 article by Carsten Zatschler (op.cit.) observes that "[w]hile the Court is entitled to take into account the submissions of the parties in order to clarify or complete factual matters which are not fully dealt with in the order for reference (Case 47/82) Gebroeders Vismans, para 8) it should be

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<sup>95</sup> See above at paragraphs 17 and 18.

<sup>96</sup> Article 94 (Content of the request for a preliminary ruling) states that:

"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".

remembered that the submissions of the parties will be available to Member States and Union Institutions only *after* the expiry of the deadline of two months by which they have themselves been required to submit their written observations. The facts contained in the order for reference must thus be sufficient, on their own, to enable the Member States and Institutions to exercise their prerogatives.

Legal context:

This is best sub-divided into:

(a) National Law. The order should next set out the relevant national legal provisions with publication references to national official journals (it must be the relevant provision that apply *ratione temporis*). This is extremely important. Note that (apart from having set out the relevant provisions) it is particularly important to avoid as far as possible use of terminology that is particular to the legal system of the referring court as neither the CJ nor the interested parties can be expected to be familiar with terms peculiar to the national legal system concerned. If it is necessary to refer to a national provision it can assist to offer a paraphrase (e.g. in the UK “leave to remain” is equivalent to a residence permit). In Salahadin Abdulla the German referring court was conscious that its case law uses a specific probability standard for cessation of one’s refugee status (“relevant probability” in German). However, since no-one outside Germany uses it, it put in brackets an English translation (“*real risk*”), that being a standard that in their view was a similar, even if not exact, translation<sup>97</sup>.

(b) Relevant EU law. Since this will be known to all recipients, it will suffice in the main to identify the numbers of the relevant provisions (Article 2 of the Qualification Directive, for example). But it is best if the order can accompany its reference to relevant EU law with an *explanation of the reasons* for the choice of the EU provisions on which an interpretation is requested<sup>98</sup>. Relevant EU law in this context includes case law of the CJ.

(c) Any relevant case law of national courts or tribunals of other countries. We add this as a distinct sub-head because it is seen

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<sup>97</sup> Paper by Harald Dörig at 2009 IARLJ European Chapter Workshop in Berlin. I am indebted to Hana Lupacova and James Simeon for their notes of this event.

<sup>98</sup> It is essential that the national court or tribunal provides at least some explanation of the reasons for the choice of the Community/Union provisions which it requires to be interpreted and of the link which it establishes between those provisions and the national legislation applicable to the dispute in the main proceedings: see Case C-42/07 Liga Portuguesa, para 40. In Case C-457/12 S v Minister voor Immigratie, Integratie en Asiel the CJ commented at paragraph 31 on the failure to specify European legislation.

by the IARLJ European Chapter as particularly important to ensure that the CJ decides on references in asylum-related cases with as full knowledge as possible of the case law on a Member-State-wide basis. Relevant cases can be found, inter alia, on the IARLJ website, the Newsletter on European Asylum Issues for Judges (NEAIS), the EDAL network. The European Asylum Support Office (EASO) is currently preparing a pilot case law database on Article 15c of the Qualification Directive, with a view to a permanent and wide-ranging website being developed and maintained in subsequent years. Inquiry can also be made of IARLJ European Chapter members through the IARLJ Secretariat (based in the Netherlands). In a small but growing number of cases, national judges in EU Member States are beginning to refer to case law from other countries<sup>99</sup>. Thus in March 2009 The Czech Supreme Administrative Court decided its first case relating to the Qualification Directive<sup>100</sup>. The Court referred in its judgment to Dutch, French, German and UK case law. Two decisions were discussed in detail, a German<sup>101</sup> and an English<sup>102</sup> one. (However, none of these cases resulted in a PR). One way a national court or tribunal can seek to ensure it is familiar with lead cases of other Member State courts or tribunals is to request the parties to search for and supply it.

Summary of claims and arguments of parties: Giving a brief summary of the claims and arguments of the parties can assist the Court in identifying the critical issues in the case. If UNHCR or any other NGO/INGO has been joined as an intervener or *amicus curiae* (by virtue of having been joined at a national level: see paragraphs 64 and 65) then its position should be summarised here as well.

Questions: see below at paragraphs 78 to 83

National Court's suggested answers: It is desirable but not essential<sup>103</sup> that the referring court briefly sets out its own suggested answers to the questions, as this helps the interested parties and the AG in refining their input and may

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<sup>99</sup> See G. Goodwin-Gill and H. Lambert (eds.) The Limits of Transnational Law: refugee law, policy harmonisation and judicial dialogue in the European Union, CUP 2010.

<sup>100</sup> Supreme Administrative Court, March 13, 2009, n° 5 Azs 28: 2008.

<sup>101</sup> Federal Administrative Court, BVerw G 10 C 43.07.

<sup>102</sup> Asylum and Immigration Tribunal, KH (2008) UKIAT 00023. The Court found that it contained much valuable background information and annexed it to the judgment.

<sup>103</sup> Craig and De Burca, p.497 consider that it is asking too much for a referring court that is not a specialist or higher-level court to attempt to furnish its own suggested answers. The early 2013 paper by Carsten Zatschler, op.cit. suggests that it is an 'optional' element which adds value but will "depend on the time and resources available to the referring court whether they are included in the reference".



assist the Court's deliberations<sup>104</sup>. Specialist courts or tribunal should bear in mind the advice of Carsten Zatschler (op.cit) that "in more esoteric fields of law, the national judge will often have greater specific expertise of the subject matter concerned than the Member of the CJEU. That being the case, providing a signpost, as to how the national court sees a case developing can often have a decisive influence on the ruling of the CJEU".

It is prudent to express such observations tentatively<sup>105</sup>. It may also lead the national court to explain better the content of the national law and the motivation behind one or more of its questions. The Court's Recommendations concerning the special urgent preliminary procedure provided in Article 23a of the Court's Statute. Articles 24 of the Court's Recommendations and Article 107.2 of the Court's Rules of Procedure sees input of this kind as important to ensuring the procedure is rapid.

### Formulating the questions

78. The Court makes allowances for the fact that national courts and tribunals will not necessarily know how best to formulate their questions. For example in Case C-534/11, 30 May 2013 Mehmet Arslan the Court at paras 33-34 rejected in the following terms a submission by one of the member states to find the request by a Czech court for a PR inadmissible because its questions were not relevant:

"33..it is solely for the national court ...to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court...

34. The presumption of relevance attaching to questions referred for a preliminary ruling by a national court may be set aside only exceptionally, where it is quite obvious that the interpretation of the provisions of European Union law bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it..."

A good place to start for guidance on how to draft questions is to look at recent CJ PR rulings on the Qualification Directive.

79. The questions should be self-contained and self-explanatory since they will be notified to interested parties including other Member State government lawyers. It is prudent to aim to ask no more than two to five questions and to avoid too many internal sub-questions. "Overly detailed

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<sup>104</sup> Recommendations, para 24 states: "If it considers itself able to do so, the referring court or tribunal may, finally, briefly state its view on the answer to be given to the questions referred for a preliminary ruling. ...".

<sup>105</sup> Although concerns about the credibility of the national court being damaged should its suggestions not be followed would appear unfounded.

questions... serve no purpose and are likely to prove a waste of time<sup>106</sup>. Asking too many intricate questions or sub-questions normally leads to the Court reformulating them.

80. The questions should be open - leading questions would not be proper as questions should so far as possible be impartially worded. The focus of the questions should be on a request for an interpretation of specific provisions of EU law and the reasons why the national court considers such an interpretation is needed. For example, in Salahadin Abdulla and Others the first question asked was:

“Is Article 11(1)(e) of Council Directive 2004/83/EC of 29 April 2004 to be interpreted as meaning that -apart from the second clause of Article 1(c) (5) of the [Refugee Convention] - refugee status ceases to exist if the refugee’s well founded fear of persecution within the terms of Article 2(c) of that Directive, on the basis of which refugee status was granted, no longer exists and he also has no other reason to fear persecution within the terms of Article 2(c) of Directive 2004/83?”

81. Questions should be formulated so that the CJ is not requested to decide on the facts or to make a specific application of the law to the case<sup>107</sup>. Instead, the formulation of the question should ensure that the CJ can make an, in principle, abstract interpretation of the relevant EU/Union rule.

82. Even though questions should ideally not ask whether national law is compatible with EU law, the referring court or tribunal may ask (where appropriate) whether the relevant EU provision precludes a national provision with specific characteristics: see e.g. Case C-578/08, Chakroun. A possible form of such a question would be “Should Article X of EU Directive Y be interpreted in a way so as to preclude national legislation according to which....?” Even though formally the referring court or tribunal limits its questions to the interpretation of particular provisions of EU law, such a situation does not prevent the CJ from providing it with all the elements of interpretation of EU law which may be of assistance in adjudicating on the case before it, whether or not that court has specifically referred to them in the questions: see e.g. C-444/09 McCarthy, 5 May 2011, para 24.

83. It will normally be important to keep the questions to EU/Union law. However, since the asylum-related directives refer to certain provisions of the Refugee Convention, it may be appropriate to ask a question about a

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<sup>106</sup> See Carsten Zatschler, *op.cit.*, p.10.

<sup>107</sup> However, the early 2013 article by Carsten Zatschler makes the point that it is “in principle permissible for a reference to be made on the basis of a factual hypothesis, rather than after finding all the relevant facts. This can be particularly useful where it depends on the answers to the questions of Union law referred to the CJEU which facts actually need to be found, and whether particular facts are relevant at all. It would, e.g., be futile for the national court to investigate the intention of parties in carrying out particular actions if it is not clear that, as a matter of Union law, the intention of the parties is at all relevant”.

provision of the Refugee Convention, as happened in Bolbol in respect of Art 1D<sup>108</sup> at paras 5, 34.

#### Urgency and expedition– need for a separate request

84. Articles 107-8 of the Court's Rules of Procedure acknowledge that in the area of freedom, security and justice (which includes asylum), there should be a special urgent procedure.

85. It is important to observe that there are two different procedures, one on expedited procedure (Art 105), and the other on urgent procedure (Article 107). Both require that the circumstances are exceptional.

86. The expedited procedure under Article 105 is for matters where the circumstances referred to establish that a ruling on the question put to the Court is a matter of exceptional urgency. This procedure applies to all types of cases. This was the procedure used in the case of Metock where the time between the CJ's decision to apply it (17 April 2008) and its eventual judgment (25 July 2008) was less than three months. At para 38 of its Recommendations guidance the CJ states that:

“Since that procedure imposes significant constraints on all those involved in it, and, in particular, on all the Member States called upon to lodge their observations, whether written or oral, within much shorter time-limits than would ordinarily apply, its application should be sought only in particular circumstances that warrant the Court giving its ruling quickly on the questions referred. The large number of persons or legal situations potentially affected by the decision that the referring court or tribunal has to deliver after bringing a matter before the Court for a preliminary ruling does not, in itself, constitute an exceptional circumstance that would justify the use of the expedited procedure.”

87. The urgent procedure, by contrast, was introduced by Protocol No 3 to the TFEU to provide specifically for expedition of references for a PR relating to the area of freedom, security and justice, which includes asylum: see Article 23a of the Statute and Article 107 (formerly 104b) of the Rules of Procedure. The Article 107 procedure provides for the referring court to request urgency, although the Court may also activate the procedure of its own motion where that appears to be required. Judging by experiences so far<sup>109</sup>, the types of

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<sup>108</sup> See above, paragraph 18 and n34. Article 307 of EC Treaty states that the provisions of the Treaty do not affect the rights and obligations that arise from agreements concluded before the entry into force of the Treaty between one or more Member States on the one hand, and one or more third countries on the other.

<sup>109</sup> In 2010, requests for application of the urgent procedure made by both the English Court of Appeal in Case C-2010/0943, Saeedi 25 August 2010 and the Irish High Court in relating to the Dublin II Regulations and returns to Greece were refused (the CJEU reference being Joined Cases C-411/10 and 493/10 NS and ME, 21 December 2011). Given that the Court acknowledged that main objective of the Dublin II Regulation was to speed up the handling of asylum claims in the interest of both asylum seekers and the participating Member States

cases that the Court may consider to justify activating the urgency procedure may be more limited than perhaps the drafters of Art 107 and Protocol (No 3) had intended. The Court's Recommendations at para 39 highlights that it should be requested "only where it is absolutely necessary for the Court to give its ruling on the reference as quickly as possible". Two examples are given: that of a case referred to in the fourth paragraph of Article 267 TFEU, of a person in custody or deprived of his liberty, where the answer to the question raised is decisive as to the assessment of that person's legal situation; and that of proceedings concerning parental authority or custody of children, where the identity of the court having jurisdiction under European Union law depends on the answer to the question referred for a preliminary ruling<sup>110</sup>. It would seem from para 39 of the Court's Recommendations that the fact that large numbers of persons or legal situations maybe potentially affected by a reference is not at all decisive. The Article 107 procedure is described as imposing "even greater constraints on those concerned, since it limits in particular the number of parties authorised to lodge written observations and, in cases of extreme urgency, allows the written part of the procedure before the Court to be omitted altogether. The application of the urgent procedure should therefore be requested only where it is absolutely necessary for the Court to give tis ruling very quickly on the questions submitted by the referring court or tribunal".

88. The request for urgency should be made in unambiguous form in a document separate from the order for reference itself, or in a covering letter expressly stating the request. To illustrate the difference this can make to time, in Case C-357/09 Kadzoev a reference made by a Bulgarian court was registered at the CJ on 7 September 2009 and the request for Article 107 (then known as PPU) treatment was received 3 days later. The referring court received a ruling from the Court on 30 November 2009 – less than 3 months later. More recently, in Case C-383/13 MG & NR Statssecretaris van Veiligheid en Justitie the reference containing a request was made on 5 July 2013, and the Court's ruling was issued on 10 September 2013.

89. The request should obviously be sent by post with originals but should first be sent to the Court by email or fax and should state the e-mail address and any fax numbers of the representatives of the parties to the proceedings (Recommendations, para 45). The request should state the reasons which, in the view of the referring court, justify the application of the exceptional procedure, e.g. the serious consequences in human rights terms which could result for the person concerned or for other cases that are pending awaiting the result of the reference.

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(NS and ME, paras 75-79), it might be thought curious it refused these requests and also took over a year to give its judgment.

<sup>110</sup> See footnote to Article 38 which explains how examples of orders made under this procedure can be accessed (see below Appendix B).

90. It is not suggested that urgency will always be necessary in asylum-related cases: e.g. it may be that the reference affects only a very few cases. This was perhaps one consideration pertinent to the procedure followed in Case C-31/09 Bolbol. On the other hand, it might perhaps be thought that even in such cases, if they related to terrorism, for example, there would be a European public interest in urgent expedition.

91. Before leaving the topic of accelerated procedures (expedited or urgent) it should be borne in mind that even if the CJ decides to reject such applications, it may still decide to give informal priority to a case so that it moves through the different stages of the procedures more quickly than normal, although there will not necessarily be any notification of this fact to the parties.

92. Between the time it has sent off the reference and the time it receives a ruling the referring court or tribunal should bear in mind that on occasions it may be relevant to inform the CJ of any significant change in the factual circumstances, since the CJ depends upon the facts as given by the referring court. The referring court or tribunal is also well-advised to keep an eye on the latest case law of the CJ in similar cases, because the CJ might ask it at some point whether in the light of such developments it insists on its PR questions or wishes to reformulate them.

## IV. IMPLICATIONS FOR THE NATIONAL COURT

### **Tasks during period whilst the reference is pending**

As noted earlier, the effect of making a reference under Article 27 is to suspend or stay the national proceedings until receipt of a ruling from the CJ: see Article 23 of Protocol (No 3) of the Statute of the CJEU annexed to the Treaties.

93. As noted earlier, it is possible, and may sometimes be appropriate, for the referring court or tribunal to consider joining a third-party intervener even after the decision to stay or adjourn the case pending the order seeking a PR, although the time for doing so is necessarily limited: see above at paragraph 66.

94. The Court will notify the referring court or tribunal of ongoing proceedings and any relevant developments, for example whether the case has been joined with another, whether there has been a stay of proceedings pending another case. The Court's Registry will also send a copy of the observations that have been made by the Commission and by interested parties. It will also inform the national referring court or tribunal of relevant dates such as any date fixed for oral hearing, for delivery of an AG opinion (if any) for final judgment of the Court.

95. After having made an order for reference, it can happen (although not often) that the CJ requests further information to be provided within a specified time-limit, acting under Article 107 of the Rules of Procedure.

### **Task of referring court when CJ has given its ruling**

96. It will normally be appropriate for the national court or tribunal to have stayed further proceedings pending the reference unless there is a need for interim measures or there is a discrete point of national law that has resolved the dispute and made continuation of the reference proceedings inappropriate. In most cases, if the proceedings before the national court are resolved between the parties, the references will also be withdrawn and the CJ will not rule. Article 100 specifies that if the CJ has already given notice of a date on which its decision will be handed down, then the reference can only be withdrawn with the CJ's consent. The purpose of this is to allow the CJ to manage a 'pilot' case and hold back similar cases with a view to disposing of those by way of a reasoned order: see on latter ....

97. Not only the referring court but also any appeal court which decides on the case in the main proceedings is bound by a PR on the case in question<sup>111</sup>. However, the effect may not be binding if the ruling goes beyond the issue

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<sup>111</sup> Case C-135/77 Bosch [1978] ECR 855.

referred to it and has answered a question that, strictly speaking, had not been put to it by the referring court<sup>112</sup>.

98. Before concluding the case the referring court will need to take stock of whether there have been any other relevant legal developments since it made the reference. Thus in Case C-465/07 Elgafaji when the Dutch Council of State made the reference the European Court of Human Rights had not delivered its judgment in NA v UK<sup>113</sup>, thereby guaranteeing more international protection via Article 3 of the ECHR than had hitherto been envisaged<sup>114</sup>.

99. As noted earlier, it is not the role of the CJ to rule on national law and it does not decide the actual dispute; it is for the national court to apply the PR to the facts in the main proceedings. However, in practice its judgments do sometimes apply the abstract Community/EU law interpretation to the facts of the case, albeit formally the ruling is kept in general terms: see e.g. Case C-34/09 Zambrano, 8 March 2011; Case C-434/09 McCarthy, 5 May 2011.

100. The Court's Recommendations at para 35 emphasise the desirability of the national referring court or tribunal informing the CJ of its subsequent decision in the case: "[The Court] would welcome information from that court or tribunal on the action taken upon its ruling in the main proceedings, and communication of the referring court's or tribunal's final decision".

101. The authority of a preliminary ruling does not prevent the national court concerned from making a new reference before giving judgment in the main proceedings e.g. when the referring court encounters difficulties in understanding or applying the earlier preliminary ruling: see Case C-466/00 Kaba [2003] ECR-I2219, para 39<sup>115</sup>.

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<sup>112</sup> Case C-206/01 Arsenal [2002] ECR I-10273.

<sup>113</sup> Application no. 25904/07.

<sup>114</sup> Decision of July 13, 2009 2009023237/I/V2 Raad van Staat held that in the light of NA v UK, para 115 Article 3 ECHR includes the exceptional circumstances covered by Article 15(c) of the Qualification Directive as clarified by Elgafaji, para 43.

<sup>115</sup> Cited in Broberg and Fenger, p. 190.

## V. APPENDICES

### Appendix A

#### **Article 267 TFEU (formerly Article 264 EC)**

“The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) (b) the validity and interpretation of the institutions, bodies office or agencies of the Union

Where such a question is raised before any court or tribunal 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 Court to give a ruling thereon.

Where any such question is raised in a case pending before a court of tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to persons in custody, the Court of Justice of the European Union shall act with the minimum of delay.”



## **Appendix B**

### **Recommendations to national courts and tribunals in relation to the initiation of preliminary reference proceedings, Court of Justice (2012/C 338/01)**

#### RECOMMENDATIONS

##### COURT OF JUSTICE OF THE EUROPEAN UNION

These recommendations follow on from the adoption on 25 September 2012 in Luxembourg of the new Rules of Procedure of the Court of Justice (OJ L 265, 29.9.2012, p. 1). They replace the information note on references from national courts for a preliminary ruling (OJ C 160, 28.5.2011, p. 1) and reflect innovations introduced by those Rules which may affect both the principle of a reference for a preliminary ruling to the Court of Justice and the procedure for making such a reference.

#### RECOMMENDATIONS

##### **To national courts and tribunals in relation to the initiation of preliminary ruling proceedings**

(2012/C 338/01)

#### I – GENERAL PROVISIONS

##### **The Court's jurisdiction in preliminary rulings**

1. The reference for a preliminary ruling is a fundamental mechanism of European Union law aimed at enabling the courts and tribunals of the Member States to ensure uniform interpretation and application of that law within the European Union.
2. Under Article 19(3)(b) of the Treaty on European Union ('TEU') and Article 267 of the Treaty on the Functioning of the European Union ('TFEU'), the Court of Justice of the European Union has jurisdiction to give preliminary rulings on the interpretation of Union law and on the validity of acts adopted by the institutions, bodies, offices or agencies of the Union.
3. Article 256(3) TFEU provides that the General Court is to have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267 TFEU, in specific areas laid down by the Statute. However, since no provisions have been introduced into the Statute in that regard, the Court of Justice alone currently has jurisdiction to give preliminary rulings.
4. While Article 267 TFEU confers on the Court of Justice a general jurisdiction in that regard, a number of primary law provisions exist which lay down exceptions to or temporary restrictions on that jurisdiction. This is true, in particular, of Articles 275 TFEU and 276 TFEU and Article 10 of Protocol (No 36) on Transitional Provisions of the Treaty of Lisbon (OJEU 2010 C 83, p. 1) (1).EN 6.11.2012 Official Journal of the European Union C 338/1

( 1 ) Article 10(1) to (3) of Protocol No 36 provides that the powers of the Court of Justice in relation to acts of the Union adopted in the field of police cooperation and judicial cooperation in criminal matters before the entry into force of the Treaty of Lisbon, and which have not since been amended, are to remain the same for a maximum period of five years from the date of entry into force of the Treaty of Lisbon (1 December 2009). During that period, such acts may, therefore, form the subject-matter of a reference for a preliminary ruling only where the order for reference is made by a court or tribunal of a Member State which has accepted the jurisdiction of the Court of Justice, it being a matter for each of those States to determine whether the right to refer a question to the Court is to be available to all of its national courts and tribunals or is to be reserved to the courts or tribunals of last instance.

5. Since the preliminary ruling procedure is based on cooperation between the Court of Justice and the courts and tribunals of the Member States, it may be helpful, in order to ensure that that procedure is fully effective, to provide those courts and tribunals with the following recommendations.

6. While in no way binding, these recommendations are intended to supplement Title III of the Rules of Procedure of the Court of Justice (Articles 93 to 118) and to provide guidance to the courts and tribunals of the Member States as to whether it is appropriate to make a reference for a preliminary ruling, as well as practical information concerning the form and effect of such a reference.

### **The role of the Court of Justice in the preliminary ruling procedure**

7. As stated above, under the preliminary ruling procedure the Court's role is to give an interpretation of European Union law or to rule on its validity, not to apply that law to the factual situation underlying the main proceedings. That is the task of the national court or tribunal and it is not, therefore, for the Court either to decide issues of fact raised in the main proceedings or to resolve any differences of opinion on the interpretation or application of rules of national law.

8. When ruling on the interpretation or validity of European Union law, the Court makes every effort to give a reply which will be of assistance in resolving the dispute in the main proceedings, but it is for the referring court or tribunal to draw specific conclusions from that reply, if necessary by disapplying the rule of national law in question.

### **The decision to make a reference for a preliminary ruling**

#### *The originator of the request for a preliminary ruling*

9. Under Article 267 TFEU, any court or tribunal of a Member State, in so far as it is called upon to give a ruling in proceedings intended to arrive at a decision of a judicial nature, may as a rule submit a request for a preliminary ruling to the Court of Justice. Status as a court or tribunal is interpreted by the Court of Justice as a self-standing concept of European Union law, the Court taking account of a number of factors such as whether the body making the reference is established by law, whether it is permanent, whether its

jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.

10. Whether or not the parties to the main proceedings have expressed the wish that it do so, it is for the national court or tribunal alone to decide whether to refer a question to the Court of Justice for a preliminary ruling.

#### *References on interpretation*

11. Article 267 TFEU provides that any court or tribunal may submit a request for a preliminary ruling to the Court of Justice on the interpretation of a rule of European Union law if it considers it necessary to do so in order to resolve the dispute brought before it.

12. However, courts or tribunals against whose decisions there is no judicial remedy under national law must bring such a request before the Court, unless the Court has already ruled on the point (and there is no new context that raises any serious doubt as to whether that case-law may be applied in that instance), or unless the correct interpretation of the rule of law in question is obvious.

13. Thus, a national court or tribunal may, in particular when it considers that sufficient guidance is given by the case-law of the Court of Justice, itself decide on the correct interpretation of European Union law and its application to the factual situation before it. However, a reference for a preliminary ruling may prove particularly useful when there is a new question of interpretation of general interest for the uniform application of European Union law, or where the existing case-law does not appear to be applicable to a new set of facts.

14. In order to enable the Court of Justice properly to identify the subject-matter of the main proceedings and the questions that arise, it is helpful if, in respect of each question referred, the national court or tribunal explains why the interpretation sought is necessary to enable it to give judgment (EN C 338/2 Official Journal of the European Union 6.11.2012).

#### *References on determination of validity*

15. Although the courts and tribunals of the Member States may reject pleas raised before them challenging the validity of acts of an institution, body, office or agency of the Union, the Court of Justice has exclusive jurisdiction to declare such an act invalid.

16. All national courts or tribunals **must** therefore submit a request for a preliminary ruling to the Court when they have doubts about the validity of such an act, stating the reasons for which they consider that the act may be invalid.

17. However, if a national court or tribunal has serious doubts about the validity of an act of an institution, body, office or agency of the Union on which a national measure is based, it may exceptionally suspend application of that measure temporarily or grant other interim relief with respect to it. It

must then refer the question of validity to the Court of Justice, stating the reasons for which it considers the act to be invalid.

### **The appropriate stage at which to make a reference for a preliminary ruling**

18. A national court or tribunal may submit a request for a preliminary ruling to the Court as soon as it finds that a ruling on the interpretation or validity of European Union law is necessary to enable it to give judgment. It is that court or tribunal which is in fact in the best position to decide at what stage of the proceedings such a request should be made.

19. It is, however, desirable that a decision to make a reference for a preliminary ruling should be taken when the national proceedings have reached a stage at which the referring court or tribunal is able to define the legal and factual context of the case, so that the Court of Justice has available to it all the information necessary to check, where appropriate, that European Union law applies to the main proceedings. In the interests of the proper administration of justice, it may also be desirable for the reference to be made only after both sides have been heard.

### **The form and content of the request for a preliminary ruling**

20. The decision by which a court or tribunal of a Member State refers one or more questions to the Court of Justice for a preliminary ruling may be in any form allowed by national law as regards procedural steps. However, it must be borne in mind that it is that document which will serve as the basis of the proceedings before the Court and that it must therefore contain such information as will enable the Court to give a reply which is of assistance to the referring court or tribunal. Moreover, it is only the request for a preliminary ruling which is notified to the parties to the main proceedings and to the other interested persons referred to in Article 23 of the Statute, including the Member States, in order to obtain any written observations.

21. Owing to the need to translate it into all the official languages of the European Union, the request for a preliminary ruling should therefore be drafted simply, clearly and precisely, avoiding superfluous detail.

22. About 10 pages is often sufficient to set out in a proper manner the context of a request for a preliminary ruling. That request must be succinct but sufficiently complete and must contain all the relevant information to give the Court and the interested persons entitled to submit observations a clear understanding of the factual and legal context of the main proceedings. In accordance with Article 94 of the Rules of Procedure, the request for a preliminary ruling must contain, in addition to the text of the questions referred to the Court for a preliminary ruling:

- 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 referred are based;

– the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law ( 1 );EN 6.11.2012 Official Journal of the European Union C 338/3

( 1 ) The referring court or tribunal is requested to provide precise references for those texts and their publication, such as a page of an official journal or a specific law report, or a reference to an internet site.

– 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.

23. The European Union law provisions relevant to the case should be identified as accurately as possible in the request for a preliminary ruling, which should include, if need be, a brief summary of the relevant arguments of the parties to the main proceedings.

24. If it considers itself able to do so, the referring court or tribunal may, finally, briefly state its view on the answer to be given to the questions referred for a preliminary ruling. That information may be useful to the Court, particularly where it is called upon to give a preliminary ruling in an expedited or urgent procedure.

25. In order to make the request for a preliminary ruling easier to read, it is essential that the Court receive it in typewritten form. To enable the Court to refer to the request it is also very helpful if the pages and paragraphs of the order for reference – which must be dated and signed – are numbered.

26. The questions themselves should appear in a separate and clearly identified section of the order for reference, preferably at the beginning or the end. It must be possible to understand them on their own terms, without referring to the statement of the grounds for the request, which will however provide the necessary background for a proper understanding of the implications of the case.

27. Under the preliminary ruling procedure, the Court will, as a rule, use the information contained in the order for reference, including nominative or personal data. It is therefore for the referring court or tribunal itself, if it considers it necessary, to delete certain details in its request for a preliminary ruling or to render anonymous one or more persons or entities concerned by the dispute in the main proceedings.

28. After the request for a preliminary ruling has been lodged, the Court may also render such persons or entities anonymous of its own motion, or at the request of the referring court or tribunal or of a party to the main proceedings. In order to maintain its effectiveness, such a request for anonymity must, however, be made at the earliest possible stage of the proceedings, and in any event prior to publication in the *Official Journal of the European Union* of the notice relating to the case concerned, and to service of the request for a preliminary ruling on the interested persons referred to in Article 23 of the Statute.

### **The effects of the reference for a preliminary ruling on the national proceedings**

29. Although the national court or tribunal may still order protective measures, particularly in connection with a reference on determination of validity (see point 17 above), the lodging of a request for a preliminary ruling nevertheless calls for the national proceedings to be stayed until the Court of Justice has given its ruling.

30. In the interests of the proper conduct of the preliminary ruling proceedings before the Court and in order to maintain their effectiveness, it is incumbent on the referring court or tribunal to inform the Court of Justice of any procedural step that may affect the referral and, in particular, if any new parties are admitted to the national proceedings.

### **Costs and legal aid**

31. Preliminary ruling proceedings before the Court of Justice are free of charge and the Court does not rule on the costs of the parties to the proceedings pending before the referring court or tribunal; it is for the referring court or tribunal to rule on those costs.

32. If a party to the main proceedings has insufficient means and where it is possible under national rules, the referring court or tribunal may grant that party legal aid to cover the costs, including those of lawyers' fees, which it incurs before the Court. The Court itself may also grant legal aid where the party in question is not already in receipt of aid under national rules or to the extent to which that aid does not cover, or covers only partly, costs incurred before the Court. EN C 338/4 Official Journal of the European Union 6.11.2012

### **Communication between the Court of Justice and the national courts and tribunals**

33. The request for a preliminary ruling and the relevant documents (including, where applicable, the case file or a copy of it) are to be sent by the national court or tribunal making the reference directly to the Court of Justice. They must be sent by registered post to the Registry of the Court of Justice (Rue du Fort Niedergrünwald, L-2925 Luxembourg).

34. Until the decision containing the Court's ruling on the referring court's or tribunal's request for a preliminary ruling is served on that court or tribunal, the Court Registry will stay in contact with the referring court or tribunal, and will send it copies of the procedural documents.

35. The Court of Justice will send its ruling to the referring court or tribunal. It would welcome information from that court or tribunal on the action taken upon its ruling in the main proceedings, and communication of the referring court's or tribunal's final decision.

## **II – SPECIAL PROVISIONS IN RELATION TO URGENT REFERENCES FOR A PRELIMINARY RULING**

36. As provided in Article 23a of the Statute and Articles 105 to 114 of the Rules of Procedure, a reference for a preliminary ruling may, in certain circumstances, be determined pursuant to an expedited procedure or an urgent procedure.

### **Conditions for the application of the expedited and urgent procedures**

37. The Court of Justice decides whether these procedures are to be applied. Such a decision is generally taken only on a reasoned request from the referring court or tribunal. Exceptionally, the Court may, however, decide of its own motion to determine a reference for a preliminary ruling under an expedited procedure or an urgent procedure where that appears to be required by the nature or the particular circumstances of the case.

38. Article 105 of the Rules of Procedure provides that a reference for a preliminary ruling may be determined pursuant to an **expedited procedure** derogating from the provisions of those Rules, where the nature of the case requires that it be dealt with within a short time. Since that procedure imposes significant constraints on all those involved in it, and, in particular, on all the Member States called upon to lodge their observations, whether written or oral, within much shorter time-limits than would ordinarily apply, its application should be sought only in particular circumstances that warrant the Court giving its ruling quickly on the questions referred. The large number of persons or legal situations potentially affected by the decision that the referring court or tribunal has to deliver after bringing a matter before the Court for a preliminary ruling does not, in itself, constitute an exceptional circumstance that would justify the use of the expedited procedure ( 1 ).

39. The same applies *a fortiori* to the **urgent preliminary ruling procedure**, provided for in Article 107 of the Rules of Procedure. That procedure, which applies only in the areas covered by Title V of Part Three of the TFEU, relating to the area of freedom, security and justice, imposes even greater constraints on those concerned, since it limits in particular the number of parties authorised to lodge written observations and, in cases of extreme urgency, allows the written part of the procedure before the Court to be omitted altogether. The application of the urgent procedure should therefore be requested only where it is absolutely necessary for the Court to give its ruling very quickly on the questions submitted by the referring court or tribunal.

40. Although it is not possible to provide an exhaustive list of such circumstances, particularly because of the varied and evolving nature of the rules of European Union law governing the area of freedom, security and justice, a national court or tribunal might, for example, consider submitting a request for the urgent preliminary ruling procedure to be applied in the case, referred to in the fourth paragraph of Article 267 TFEU, of a person in custody or deprived of his liberty, where the answer to the question raised is decisive as to the assessment of that person's legal situation, or in proceedings concerning parental authority or custody of children, where the identity of the court having jurisdiction under European Union law depends on the answer

to the question referred for a preliminary ruling. EN 6.11.2012 Official Journal of the European Union C 338/5

( 1 ) For an insight into circumstances that have resulted in the approval or refusal of requests for the application of the accelerated procedure, made on the basis of Article 104a of the Rules of Procedure of the Court of Justice of 19 June 1991, as amended, see the orders made by the President of the Court of Justice, available at [www.curia.europa.eu](http://www.curia.europa.eu) (the orders can be found under 'Case-law', by selecting each of the following in turn in the search form: Documents - Documents not published in the ECR - Orders - Expedited procedure).

### **The request for application of the expedited procedure or the urgent procedure**

41. To enable the Court to decide quickly whether the expedited procedure or the urgent preliminary ruling procedure should be applied, the request must set out precisely the matters of fact and law which establish the urgency and, in particular, the risks involved in following the ordinary procedure.

42. In so far as it is able to do so, the referring court should briefly state its view on the answer to be given to the questions referred. Such a statement makes it easier for the parties to the main proceedings and the other interested persons participating in the procedure to define their positions and facilitates the Court's decision, thereby contributing to the rapidity of the procedure.

43. The request for the application of the expedited procedure or the urgent procedure must be submitted in an unambiguous form that enables the Court Registry to establish immediately that the file has to be dealt with in a particular way. Accordingly, the referring court or tribunal is asked to specify which of the two procedures is required in that particular case, and to mention in its request the relevant article of the Rules of Procedure (Article 105 for the expedited procedure or Article 107 for the urgent procedure). That mention must be included in a clearly identifiable place in its order for reference (for example, at the head of the page or in a separate judicial document). Where appropriate, a covering letter from the referring court or tribunal can usefully refer to that request.

44. As regards the order for reference itself, it is particularly important that it should be succinct where the matter is urgent, as this will help to ensure the rapidity of the procedure.

### **Communication between the Court of Justice, the referring court or tribunal and the parties to the main proceedings**

45. In order to expedite and facilitate communication with the referring court or tribunal and the parties before it, a court or tribunal submitting a request for the expedited procedure or the urgent procedure to be applied is asked to state the e-mail address and any fax number which may be used by the Court of Justice, together with the e-mail addresses and any fax numbers of the representatives of the parties to the proceedings.



46. A copy of the signed order for reference together with a request for the expedited procedure or the urgent procedure to be applied can initially be sent to the Court by e-mail (ECJ-Registry@curia.europa.eu) or by fax (+352 43 37 66). Processing of the reference and of the request can then begin upon receipt of the e-mailed or faxed copy. The originals of those documents must, however, be sent to the Court Registry as soon as possible.

(2009 C 297/01)

**Communication between the Court of Justice, the national court and the parties**

41. As regards communication with the national court or tribunal and the parties before it, national courts or tribunals which submit a request for an urgent preliminary ruling procedure are requested to state the e-mail address or any fax number which may be used by the Court of Justice, together with the e-mail addresses or any fax numbers of the representatives of the parties to the proceedings.

42. A copy of the signed order for reference together with a request for the urgent preliminary ruling procedure can initially be sent to the Court by e-mail (ECJ-Registry@curia.europa.eu) or by fax (+352 43 37 66). Processing of the reference and of the request can then begin upon receipt of the e-mailed or faxed copy. The originals of those documents must, however, be sent to the Court Registry as soon as possible.

(2009/C 297/02)

**Last publication of the Court of Justice in the *Official Journal of the European Union***

OJ C 282, 21.11.2009

**Past publications**

OJ C 267, 7.11.2009

OJ C 256, 24.10.2009

OJ C 244, 10.10.2009

OJ C 233, 26.9.2009

OJ C 220, 12.9.2009

OJ C 205, 29.8.2009

These texts are available on:

EUR-Lex: <http://eur-lex.europa.eu> EN C 297/6 Official Journal of the European Union 5.12.2009

## Appendix C

**Court of Justice (ECJ/CJEU) asylum-related cases [NB. This lists cases up until 8 May 2014].**

### Rulings (GC=Grand Chamber)

Case C-133/06 European Parliament v Council, 6 May 2008 (on respective powers of European Parliament and Council on the procedure of adoption of the common list of safe countries of origin)

Case C-19/08 Migrtionsverket v Petrosian, January 29 2009 (Dublin II, Article 20(1)(d) and 20(2))

Case C-465/07 Elgafaji (GC) 17 February 2009 (QD, Article 15(c))

Case C-357/09 Kadzoev, 30 November 2009

Case C-175/08 and 179/08 Abdullah (GC) 2 March 2010 (QD, Articles 11 and 7(cessation)),

Case C-31/09 Bolbol (GC) 17 June 2010 (QD, Article 12(1)(a); Article 1D of Refugee Convention)

Cases C-101/09 and C-57/09 and C-101/09, B and D, 09 November 2010, [2010] EUECJ (QD, Article 12(2)(b) a& (c); exclusion)

Case C-69/10 Samba Djouf, 28 July 2011 (PD, Article 39; right to an effective remedy)

Joined Cases C-411 and 493/10 N.S. and M.E 21 Dec 2011 (Dublin II, Article 3(2))

Case C-620/10 Kastrati, 3 May 2012 (Dublin II, Art 2(c))

Case C-71/11 and C-99/11, Y and Z, 5 September 2012 (QD Article 2(c) and 9(1) (a) (definition of refugee and of acts of persecution))

Case Case -277/11 M.M., 22 Nov 2012, 5 September 2012 (QD, Article 4(1) (assessment of claim)).

Case C-179/11 Cimade and GISTI, 27 September 2012 (Reception Directive and Dublin II)

Case C-245/11 K, 6 November 2012 (Dublin II, Art 15 and 3(2))

Case C-364/11 El Kott a.o., 19 Dec 2012 (QD Article 12(1)(a)(exclusion))

Case C-175/11, D and A, 31 Jan 2013 (PD, Arts 23(3), 23(4), 39)

Case C-528/11 Halaf, 6 June 2013 (Dublin II, Article 3(2))

Case C-648/11 M.A., 6 June 2013 (Dublin II, Article 6)

Case C-158/13 Rajaby, 25 June 2013 (Dublin II, Article 15(2))

Case C-86/12 Alopka, 10 October 2013 (TFEU, Articles 20 and 21 and Citizens Directive)

Case C-225/12 Demir, 07 November 2013 (EEC-Turkey Association, Article 13)

Cases C-199/12, C-200/12 and C-201/12 X, Y & Z, 07 November 2013 (QD, Article 10(1)(d))

Case C-4/11 Puid (GC), 14 November 2013 (Dublin II, Article 3(2))

Case C-394/12 Abdullahi (GC), 10 December 2013 (Dublin II, Articles 18 and 19)

Case C-378/12 Onuekwere, 16 January 2014 (Citizens Directive, Article 16)

Case C-400/12 MG, 16 January 2014 (Citizens Directive, Article 28(3)(a))

Case C-285/12 Diakite, 30 January 2014 (QD, Article 15(c))

Case C-79/13 Saciri and Others, 27 February 2014 (Reception Directive, Article 13)

Case C-456/12 O (GC), 12 March 2014 (TFEU, Article 21(1) and Citizens Directive)

Case C-457/12 S (GC), 12 March 2014 (TFEU, Article 45 and Citizens Directive)

Case C-604/12 HN, 8 May 2014 (QD, Articles 2 and 15)

Pending

Case C-148/13 A,B, C, (QD, Articles 9 and 10)

Case C-507/12 Jessy Saint Prix (Citizenship Directive, Article 7)

Case C-603/12 Pia Braun (TFEU, Articles 20 and 21)

Case C-202/13 McCarthy and others (Citizens Directive, Article 35)

Case C-91/13 Essent Energie Productie BV (EEC-Turkey Association, Article 13)

Case C-138/13 Naime Dogan (EEC-Turkey Association, Article 41)

Case C-373/13 HT (QD, Article 24)

Case C-472/13 Shepherd (QD, Article 9)

Case C-481/13 Qurbani (Geneva Convention relating to the Status of Refugees, Article 31)

Case C-562/13 Abdida (QD, Reception Conditions Directive and Asylum Procedures Directive)

Case C-542/13 M'Bodj (QD, Articles 2, 15, 18, 28 and 29)

## Appendix D

### ONLINE RESOURCES

There is a substantial amount of material available online at both the CJ's main website and also the ACA-Europe website.

A: CJ's website

The main website is at [curia.europa.eu](http://curia.europa.eu) which is accessible in all community languages. Clicking on the sub-heading "Court of Justice" in the left margin opens a sub-menu with links to the registry, to procedural rules and documents, and other similar material.

Clicking on the sub-heading "Caselaw" opens a sub-menu which gives access to a search engine which allows searching of pending cases. The link to the English language form is

<http://curia.europa.eu/juris/recherche.jsf?language=en>

Selecting the language in the box at the top right of the page allows users to change language.

Also within this sub-menu is a section headed "Annotations" which includes references to – annotations by legal commentators relating to the judgments delivered by the Court of Justice, the General Court and the Civil Service Tribunal since those courts were first established. The document exists only in French but the articles cited appear in the original language.

In addition, in the sub-menu "Library and Documentation" under the heading Legal Information of EU Interest there is access to "Réflets" a newsletter published by the Research and Documentation section of the CJ (<http://www.juradmin.eu/index.php/fr/reflets-fr>). "Réflets" is translated into English as well, but there is a delay in this being done.

B: ACA- Europe

The ACA- Europe<sup>116</sup> maintains a website which also has useful resources. The main website is at [www.juradmin.eu](http://www.juradmin.eu) and is available in French and English, but appears to work better in French.

The site gives access to the database of national decisions (<http://www.juradmin.eu/index.php/en/dec-nat-en>) which is searchable and is available in English and French.

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<sup>116</sup> Association of the Councils of State and Supreme Administrative Jurisdictions of the EU/Association des Conseils d' État et Jurisdictions administratives suprêmes de l'Union Européenne.

There is a guide to using the database of national decisions published by ACA-Europe in its newsletter no.17 <http://www.aca-europe.eu/index.php/en/newsletter-en/205-newsletter-17>.