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"Current Issues in Asylum Law"

Friday Session: The Lisbon Treaty: Its Implications for Asylum Law

Panel Discussion: speech delivered[1] by Prof. Dr Boštjan Zalar,
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On Wednesday, I had some free time in Lisbon and I visited the house of Fernando Pessoa. It is a small museum. There is an interesting exhibition and a library the second floor. I told a man in the library that I knew almost nothing about Fernando Pessoa and that I would like some brief information about his work and life. Probably, he thought I was one of those crazy tourists from the other side of the planet. The man was very helpful. He gave me three books and I found a letter that Fernando Pessoa wrote in 1930 to one of his friends and colleagues:

He wrote: *"Don't trust what you feel or think until you have stopped feeling or thinking it. Then you will use your sensibility in a way that naturally works to your own and everyone else's benefit."*

I wonder whether we judges are really so different from poets?
I listened very carefully to Antonio Vitorino's presentation,[2] because it is rare to hear someone who has such rich professional experience in all three branches of government at both national and European levels, not to mention his valuable activities in international civil-society networks promoting the rule of law. As an active judge, I will not make a direct comment on Mr Vittorino's presentation. Instead, I will put my 10 minutes of remarks in the context of our broader past and future discussions and activities in relation to the Lisbon Treaty.
Usually, debates in this field – and not only political debates – take as a major current problem the incoherence or inconsistencies in adjudication on asylum among Member States. I too will take this assumption as a starting point.

The existing and forthcoming secondary law on procedural and material asylum law will not lead judiciaries to improve the situation with regards to equality before the law, because even proposals to recast the existing Procedures Directive and Qualification Directives rest on the principle of

[1] This version of the speech is more extensive than that presented at the panel discussion.
[2] Mr Vitorino is a former member of the EU Commission.

harmonisation of only minimum standards. Therefore, we will still have a list of permissible interpretations or reasonable interpretations of the EU asylum law, although this is not in line with the alphabet of the customary international law, as the U.K. House of Lords so rightly pointed out in the Adan case.

Secondly, the establishment of the EASO will affect judiciaries to a very limited extent. This would not be the case with the criteria for assessment of COI, because these are already regulated in the secondary law of the EU and in the case law of the ECtHR. The EASO might contribute to higher convergence of national case law by gathering a database of national case law, through determination of the relevant COI and by supporting training of judges. However, given the institutional structure of the EASO, it will be a challenge for international associations of judges to co-operate with the EASO in the field of training and the use of COI while ensuring that the outcomes of this co-operation will be of sufficient quality, without jeopardising judicial independence.

Mutual recognition of judgments across Europe might be an additional mechanism for greater uniformity in the field of asylum between Member States. But this is not realistic, given that mutual recognition depends on a sufficient level of approximation, although certain aspects of this idea may be traced in the Dublin Regulation.

Fourthly, based on the Lisbon treaty, in the long term we may get a specialised court for asylum in the EU. This is promising, because it is clear that specialisation and institutional centralisation in this field is inevitable. However, judges of any future specialised court will be appointed for a short period of time and a specialised court will adjudicate only at the first judicial level. A non-specialised court will review judgments of the specialised court.[3] This will lead to a higher level of consistency in adjudication on asylum in Europe, but not necessarily to a higher quality of all relevant parts of the rule of law.

Since the Lisbon Treaty has opened up the possibility of lower national courts sending an order for a preliminary ruling, the idea put forward by our colleague Judge Dr Hugo Storey, that we should increase the confidence of national judges in the preliminary-ruling procedure through guidelines provided within the IARLJ, is of great interest. However, it touches on the sensitive area of power

[3] The legal ground for the establishment of a specialised court within the EU on asylum is in Art. 257, 253 and 255 of the Treaty on the Functioning of the EU (TFEU).

relations between the lower and higher national courts, and also touches on the issue of separation of powers between the CJEU and referring national courts in cases where the IARLJ's role would be to guide colleagues to include the court's opinion on correct interpretation of EU law, as well as interpretations of other national courts.

In saying this, I do not want to pass up an opportunity to draw attention to the advantages of judicial networking as a mechanism for harmonising the case law of national courts. Although this mechanism has nothing to do with the Lisbon Treaty, I wish to emphasise that this is not because networking of this kind is the most pleasant mechanism for harmonisation of all those previously mentioned, but especially because it is highly useful and very legitimate. It leads to a sharing of knowledge and experience between judges, and when information technology is used to make this even more efficient, a considerable power can be brought to judiciaries vis-à-vis the executive branch of government. A balance of power is a *conditio sine qua non* for democratic regimes and the rule of law. Here, I would like to mention that politicians do not want a cross-fertilisation between courts. In some democratic regimes, even a judge of the Supreme Court can be impeached for making reference to judgments of foreign courts.

Allow me to make my final remarks by going back to our initial assumption.
I do not think that the assumption that the main problem of asylum law in Europe is a lack of coherence between national practice and case law is correct. I rather choose to focus on the problem of quality of adjudication in general. In this respect, and in the light of the implications of the Lisbon Treaty, the crucial point in my opinion is whether judges will take the fundamental rights from the Charter of Fundamental Rights of the EU (CFR) seriously. The CFR is indeed a great opportunity for better rule of law in the field of asylum and for achieving a higher level of harmonisation of national case law. But the CFR, if judges take it seriously, will actually substantially transform the legal system of the EU. This is why the CFR is also a great danger if we seek to establish a very close partnership between law and politics in the case of the charter. Since the CJEU will be the major actor in this respect, judging from the Elgafaji, Abdulla and Bolbol cases, and the opinion of AG Paolo Mengozzi in the case of the exclusion clause, I am not at all optimistic. From the perspective of human-rights law, there are some positive signs in those judgments and opinion. However, there are also several very important ambiguities and surprising positions,[4] which again show that EU law is intended to be special and distinct from the well-

[4] For concrete examples of those ambiguities and surprising positions, see the appendix.

established standards of international law and constitutional law of the democratic states.

(Appendix)

In the Elgafaji case, the CJEU says nothing about non-refoulement as a fundamental right from the CFR (Art. 19), although in some other non-asylum cases, the CJEU has referred to fundamental rights from the CFR.

In the Abdulla case, the CJEU cites a right to asylum from Art. 18 of the CFR. As part of the preliminary observation, the CJEU says that QD "*must be interpreted in a manner which respects the fundamental rights and the principles recognised in particular by the CFR."* However, the CJEU does not find the legal ground for this interpretation in primary law, but rather in secondary law – in recital 10 of the preamble to the QD. Furthermore, if someone wishes to explore more concrete legal consequences of the applicability of asylum as a fundamental right, he/she would only find very brief information under paragraph 90, where the CJEU says: "*The assessment of the extent of the risk must, in all cases, be carried out with vigilance and care, since what are at issue are issues relating to the integrity of the person and to individual liberties, issues which relate to the fundamental values of the Union."* "Vigilance" and "care" are moderately unusual terms for judges. This is not simply a matter of bad translation (because in Italian and French, the same terms are used). Even more strikingly, the CJEU in this sole paragraph does not use the term "fundamental right". Instead it uses the term "fundamental value". According to the CJEU, asylum is a fundamental value of the European Union. Again, this is not a bad translation, because the term "value" is taken from the new Art. 2 of the TEU. The introduction of the term "fundamental value" and its distinction in relation to the term "fundamental right in the primary law of the Treaty" may cause additional obstacles for taking rights seriously in legal terms of adjudication.

In the Bolbol case, too, the relevance of CFR is only mentioned again based on recital 10 of the QD and not based on the Lisbon Treaty as a primary law of the EU (para. 38).

The approach of AG Mengozzi in his opinion to the Court in the case of an exclusion clause is different from the previously mentioned judgments. AG Mengozzi clearly states that asylum is a fundamental right of the EU and that it forms part of the freedoms regulated in the CFR. Of course, it would be more correct to say that asylum is a fundamental right of an individual and not of the EU, but that is the problem of the title of the CFR. I hope that the fact that AG Mengozzi relates asylum also to humanitarian law does not bring additional ambiguities. For Mr Mengozzi, one consequence of the fact that asylum is a fundamental right is not only a need to approach these cases with particular care, but also that the exclusion clause must be interpreted restrictively. Furthermore, from the opinion of AG Mengozzi, it has become very clear what should be

considered in assessing these cases with particular care. He has set out very comprehensively what subjective and objective elements must be taken into account in adjudication on the exclusion clause, and by doing this he actually defines the main components of the proportionality principle. He ends by giving an important political concession to the Member States by saying that they have a certain margin of appreciation to follow their economic, political and military interests. Nevertheless, the structure of his argument is important: the Member States may apply a political margin of appreciation only after taking into account all subjective and objective circumstances of the case. Nevertheless, there is one important ambiguity in this opinion in the context of my argument for this panel. In the application of the proportionality test, AG Mengozzi did not rely on Art. 52(1) of the CFR, but rather on political terms of flexibility and dynamic application of human-rights law. This is strange, since when a competent authority establishes that the fundamental right to asylum is applicable, then an automatic proportionality test is applicable based on Art. 52 (1) of the CFR, rather than some political consideration, except perhaps if Art. 52(5) of the CFR prevents this. But, unfortunately, the meaning of Art. 52(5) of the CFR remained unclarified in the opinion offered by AG Mengozzi.