

“Preliminary references to the Court of Justice of the European Union (CJEU)”
- Hugo Storey, September 2010

[This paper is a working draft only. Deliberately so. It is hoped that as a result of further discussions and consultation at Lisbon and afterwards it will eventually be published as an EALJA Guidance Note. Although I will speak to this draft it is already a joint venture, since I draw particularly on the presentation on the preliminary reference (PR) procedure given by Harald Dorig, judge of the Supreme Federal Administrative Court in Germany (and subsequent discussions) at our Berlin Workshop in October 2009 and a paper written by Nicholas Blake, President of the Upper Tribunal (Immigration and Asylum Chamber) in the United Kingdom in preparation for a conference held in May 2010 in Luxembourg bringing together national judges¹ and judges of the Court of Justice of the European Union (CJEU) to discuss references.

It should be emphasised that the focus of this draft is solely on our legal responsibilities as national judges when we have to apply EU law. It does not take any position on whether EU law is a good thing: our stance is neither “pro-communautaire” nor “anti-communautaire”.

This draft draws heavily on the Information Note for National Courts issued by the Court of Justice [now CJEU], OJC 2009 C/297/01, 5 December 2009². It is designed to supplement, not substitute for, that Note. It is hoped that by focusing on the particular issues and problems that arise in the area of asylum and immigration our eventual Guidance Note will help increase the confidence of national judges when having to decide whether to make a reference in asylum-related cases.

In its eventual form the Guidance will be in two parts: an Explanatory Note and a Short Summary. What follows is just the Explanatory Note, together with a Table of Contents.]

¹ Key points of which are summarised in recent Upper Tribunal case of RM and Others (dealing with Article 15(c) of the Qualification Directive, shortly to be reported.

² This is attached as Appendix B [not included in this draft]. See also the Court’s information note on the urgent preliminary ruling procedure applicable to references concerning the area of freedom, security and justice. 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 on preliminary references’) and leading academic studies: see in particular, M Broberg and N Fenger, Preliminary References to the European Court of Justice, OUP 2010 (hereafter “B”); P Craig, G De Burca, EU Law: Text, Cases and Materials 4th Ed 2008 OUP (hereafter “C and D”) ch.13.

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EXPLANATORY NOTE

Why is the issue of PR important?

1. The coming into force of the Lisbon Treaty (TFEU)³ 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)⁴ limitations introduced by Title IV of the EC Treaty.

2. Previously, access to making a PR regarding Title IV of the EC Treaty was regulated by Art 68, which modified Art 234 so references could only be made by national courts “against whose decision there is no judicial remedy under national law”. Title IV was a third pillar (justice and home affairs). However, there was a great deal of criticism of this limitation, there being a particular worry that it fragmented the PR scheme, was detrimental to the rule of law and could lead to a vital area of EU law being left outside proper ECJ/CJEU supervision⁵. Now, however, the pillar system has been abolished and the reference procedure is open to all courts and tribunals.

3. The preliminary rulings of the CJEU are increasingly becoming the governing case law on EU asylum law for all national courts. A decision of the CJEU has a precedential impact on all national courts within the Union⁶. It is only by participating in the reference system (in one way or another) that national courts can influence the overall case law.

Rationale of PR procedure?

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

5. The PR procedure is traditionally known as the “Article 234” procedure, but it is now the “Article 267” procedure (as renumbered by the Treaty on the Functioning of the European Union): for text of Art 267 see Appendix A.

6. The effect of a national court making a reference is that the national proceedings are stayed/suspended/adjourned to await the Court’s preliminary ruling.

³ Treaty on the Functioning of the European Union.

⁴ 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.

⁵ B, p.99.

⁶ C and D, pp.471-474.

7. The ECJ/CJEU regards the PR procedure as an aspect of the fundamental right to effective judicial protection (a right now reinforced by Article 47 of the Charter). It is also seen as an essential form of partnership, co-operation and interaction between the European Court judges and national judges⁷. The procedure places the initiative on the national court and depends entirely on the national court's own assessment as to whether such a reference is appropriate and necessary: that assessment does not depend on the parties agreeing to it or even on them raising the possibility in the first place.

8. When the Court Registry receives a request by a referring court for a PR it publishes a brief statement for information purposes in the Official Journal series C. This information normally takes the form of stating the questions asked.

9. The response by the CJEU to a reference is normally given in the form of a judgment or ruling which is addressed only to the referring court. But it is important to understand what the CJEU ruling is not.

10. The CJEU is not a fact-finding body. A national court cannot refer a question to the ECJ about the correct interpretation of the facts in the main proceedings. Assessment of the facts is a matter for the national court.

11. The CJEU is not a court of appeal which rules on the outcome of the main proceedings before the national court. Art 267 [previously 234] does not give the CJEU jurisdiction to decide on the validity of the laws of the Member States. Under the provisions of Art 234 it is for the national courts to interpret national rules. The Court's function is only to give national courts help in resolving interpretative issues concerning EU law.

12. Although, therefore, the CJEU lacks jurisdiction to give advisory opinion on general issues, its rulings are effectively binding on all national courts and tribunals. It helps ensure the uniform application of EU law throughout the Union.

13. The PR procedure has been the principal engine through which the ECJ/CJEU has built up EU case law. 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, different national and constitutional traditions. On 2008/9 figures, graphs for references per year per country show the following: Germany 55, Netherlands 22, UK 18, and France 16 Sweden 5.5. Portugal 3.6. German and Italian courts make more than twice as many PRs per inhabitants as do French and UK courts. Dutch courts make four times as many references as Portuguese courts⁸. However, high or low

⁷ Case 166/73 Rheinmuhlen [1974] ECR 33 at 38. See also Council Resolution 2008/C299/01 on the training of judges.

⁸ See B, p.43.

figures do not necessarily tell us whether or not there is strong national compliance or considerable EU expertise at a national level⁹.

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

14. Even under the limited Article 68 procedure formerly in place, several national courts of final instance were making references: see e.g. Elgafaji, Abdullah and Bolbol. Already it can be seen that the result has considerably assisted national courts and tribunals in applying EU asylum law¹⁰: see e.g. the Czech Republic Supreme Administrative Court case of March 13, 2009, n° 5 Azs 28 : 2008, the UK case of QD (Iraq) [2010] EWCA and the German case of BVerwG 10 C 4.09 VGH 8 A 611/08.A, 27 April 2010, all three of which both build on Elgafaji.

15. There are a number of reasons why national judges should be making references.

- (a) In general terms the CJEU has reaffirmed its belief that national courts and tribunals should make use of the PR procedure.
- (b) If they decide not to make a reference in an appropriate case it may take some time before the matter is eventually dealt with by the CJEU, causing domestic legal uncertainty meanwhile.
- (c) In legal terms, for court of final instance there is an obligation to make a reference (Article 267, Article 234(3)) in all situations where a case gives rise to a question of the interpretation or validity of Community law¹¹. For all others although there is discretion it is discretion governed by law.
- (d) The CJEU sees a particular utility in references being made in the field of asylum and immigration because it is a new area of EU law. Not only are we still in a period when the new asylum-related directives are “bedding-down”, but we are shortly to be faced with implementation of “recast” Directives and, further, as a result of the Lisbon Treaty, there is now legal power for the Council (when it chooses) to introduce new EU asylum and immigration law through Regulations, which do not require national transposition.
- (e) Making a reference also has the advantage of making it possible for the Court to receive observations from the Community/Union institutions

⁹ Low figures for some countries have been said to reflect a national court/ECJ relationship rather like than between “an old married couple who do not need to talk to each other explicitly to know what the other requires”: see C. Fitzpatrick cited in B, 57.

¹⁰ See Appendix C for list of cases.

¹¹ Case 6/64 Costa [1964] ECR 585.

and all Member States (if they choose), so that there is an engagement at various levels within Member States.

- (f) We know that there are currently significant divergences¹²: e.g. in relation to Article 15(c) as to the role of international humanitarian law (IHL) as a tool for interpreting key terms such as “indiscriminate violence”. On the one hand the English Court of Appeal in OD (Iraq) has held that IHL is not to be used as an interpretive tool; on the other hand the German Supreme Administrative Court has expressly disagreed with the English Court of Appeal¹³.
- (g) A national court which fails to make a reference in a case where it should can face several types of possible legal consequences: infringement proceedings initiated by the Commission; the ECJ ruling in another case that the national court had been wrong in not making a reference; a higher-up national court ruling the refusal invalid under Community law; an action for damages based on EU law being awarded for a failure to refer¹⁴ ; or the failure to refer being considered by the ECtHR to be contrary to Article 6 of the ECHR¹⁵.

16. It is important nonetheless to note that not all commentators are agreed on the utility of reference-making in the field of asylum law.

- (i) There have been concerns voiced both by some commentators (including certain individuals within both UNHCR and the IARLJ) about the impact on international 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 ECJ 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 CJEU will furnish a “Eurocentric” rather than an international approach to interpreting of the Refugee Convention, which is a global, not a regional, international treaty. It is feared that many other countries will be likely to adopt or

¹² 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 UNHCR publication, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice*, March 2010.

¹³ Judgment of Federal Administrative Court (Bundesverwaltungsgericht) BVerwG 10 C 4.09 VGH 8 A 611/08.A, 27 April 2010, paras 2223, 33-34.

¹⁴ See C-224/01 Kobler [2003] ECR-I-10239.

¹⁵ 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 Court confirmed that the refusal to refer a case to the ECJ for a preliminary ruling under Article 234 could infringe the fairness of proceedings within the meaning of Article 6 ECHR if it appeared to be arbitrary.

defer to that interpretation. Such concerns have been strengthened by the lack of any procedure within the CJEU system for UNHCR or other bodies concerned with international refugee law to make third party interventions¹⁶.

(ii) There have much more practical, immediate concerns expressed about the delays (and costs) that can be caused by making a reference to pending cases both in a court's own country and in other countries¹⁷. 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 C-175/08 Abdullah the reference from the German court made in early 2008 did not receive a ruling by the Court until 2 March 2010.

17. However, in relation to (i), ECJ references are not binding on the international interpretation of the Refugee Convention. Thus even if the case of Bolbol which concerned a specific reference in the Qualification Directive to Art 1D of the Refugee Convention, the Court's ruling is, evidently, authoritative only in respect of the Directive¹⁸.

18. In addition, the early evidence is that the ECJ can have a progressive effect (because of its highly purposive approach to international law). In Case C-31/09 Bolbol, the Court followed the Opinion of Advocate General Sharpston (4 March 2010) which had adopted an interpretation of Article 1D which is more generous to potential Palestinian refugees than that set out by UNHCR¹⁹.

19. As regards (ii) concerning delay, the CJEU has introduced from 2008 an urgent procedure specifically designed for cases falling in the area of justice and home affairs (the area within which asylum cases fall). This can result in a ruling taking as little as two months: see below.....

The PR procedure - main stages

20. The main stages of the PR procedure are usually: (1) order for a reference made by national "referring court"; (2) submissions from the parties/interested others; (3) Advocate General (A-G) Opinion; (4) oral hearing; (5) ruling/judgment; completion by national referring court of the main proceedings.

¹⁶ But see below for suggestions as to how UNHCR may nevertheless be joined either as an intervener or as an amicus curiae.

¹⁷ The UK courts deferred listing of lead cases on Article 15(c) to await the outcome of the Dutch reference to the ECJ in the Elgafaji case. At the time of writing the Dutch courts have deferred deciding cases on Dublin II pending the outcome of a UK reference to the CJEU.

¹⁸ Case C-31/09 Bolbol Opinion of Advocate General Sharpston 4 March 2010 n.38.

¹⁹ Also more generous than the interpretation adopted by the English Court of Appeal in El-Ali [2003] 1 WLR 95.

21. However, in an increasing number of cases (40%) there is no A-G opinion.

22. As already noted, the procedure currently can take over 12 months (it currently takes on average some 16 months), but in justice and home affairs (including asylum) cases, there is a special urgent cases procedure which can mean a judgment is completed in 1-2 months: see below. ..

Who can make a reference?

23. As already noted, prior to 1 December 2009 only court of final instance could make a reference, but now any level can.

24. ECJ/CJEU applies a Community 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 administrative appeal boards may well qualify: see e.g. El-Yassine [1999] ECR I-1209: the ECJ/CJEU makes a factual assessment of whether the body has the necessary independence to qualify²⁰.

Should lower courts leave PRs to higher courts?

25. Statistics show that 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 Community/Union law²¹. Around three quarters of PRs have come from courts other than those of final instance, most from intermediate levels²². ECJ jurisprudence would not have been as effective without those references²³.

26. Failure on the part of a lower court to make a reference may mean important questions of Community law may never reach the CJEU.

27. 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 the poor quality of the reference makes it difficult for the Court to address the core issues.

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

²⁰ See B, p.....; C and D, p.464ff.

²¹ See e.g. B p.33.

²² Ibid p.40.

²³ See B, p.55.

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

29. In Mecanarte Case C-348/89 [1991] ECR-I-3277 under Portuguese law the question of whether a Portuguese law was unconstitutional had to be referred to the Portuguese constitutional court. The ECJ 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 ECJ if they consider that an interpretation of Community law is necessary in a case before them.

30. The Court's position on this question appears to have shifted recently as a result of the judgment in Cartesio, Case C-210/06 Cartesio (ECJ 16 December 2008).

32. The pre-Cartesio position was that Community law allowed a decision to make a preliminary reference to be overturned by an appellate court according to national rules²⁴. Once the ECJ 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.

33. The post-Cartesio position is that a national rule under which a lower court is bound by a superior court's interpretation of Community law cannot of itself deprive the lower court of the possibility of making a reference to the ECJ for a preliminary ruling, even when the superior court had denied that a reference was necessary. It was, 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 particular to come to a conclusion as to whether it should maintain the reference or amend or withdraw it²⁵.

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

34. Schiemann, LJ, judge of the CJEU, in the EALJA discussions at the Berlin Workshop in 2009 said he hoped courts and tribunals with specialist expertise would be in the forefront of the reference-making in asylum-related cases but that this did not mean that non-specialist courts or tribunals should desist.

What if having made a reference my court discovers that a court of a different Member State has made a reference on the same question(s)?

²⁴ See e.g. R (on the application of A) v Secretary of State for the Home Department [2002] European Law Reports 580, cited in B, p.325.

²⁵ See discussion in B, pp.326-329

35. When this has arisen the Court will normally inform the referring court and give it the opportunity of deciding whether it wishes to pursue the reference in the light of the judgment given in the earlier case²⁶.

What if party withdraws/or the Government makes a grant of a residence permit, or something similar, to the asylum applicant?

36. After a settlement has been reached in the main proceedings then the referring court is expected to withdraw the reference on its own initiative and thereby save the CJEU time and expense. 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, Bernini Case 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 Community law on the persons concerned had not therefore been resolved) . In Bernini one of the referring courts decided to maintain the reference was that the questions were also relevant to other pending cases.

When is it appropriate to make a reference?

37. Some national judges may be anxious about “ mucking it up for others” but such anxieties are best addressed by consulting beforehand with colleagues either at the national level or through EALJA. Furthermore, reference-making does not require and is not intended to require specialist knowledge of EU law, since the whole purpose of the procedure is to enable the ECJ/CJEU to assist national courts. The approach of the CJEU is facilitative: e.g. if it considers the questions asked by the national court are unclear, they can ask for clarification or they can decide to reformulate them – as they did in Elgafaji.

Scope

38. 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 provision with direct effect: Mazzalai [1976] ECR 657; Maso Case C-373/95 [1997] ECR I-4051.

39. The fact that a directive is only a minimum standard directive (as are the QD and PD) cannot justify a refusal to interpret one of its provisions on the grounds that stricter national rules would in any case be compatible with the directive. 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-11453 paras 28-41²⁷ .

²⁶ 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.

²⁷ Cited in B, p.189.

40. A reference may be valid even when the cases are not covered ratione temporis by the relevant Directive (because cases concerned with applications made before the Directive entered into force). Thus in Case-175/08 Abdullah the Court 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...)”.

41. 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 dispute²⁸. 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: see e.g. in Bolbol 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 directly²⁹” (para 33).

42. However, a reference may be unnecessary (or the CJEU might rule it is unnecessary) if the question has already been answered in another reference case.

Criteria

43. The national courts in collaboration with the CJEU fulfil a duty entrusted to it to ensure interpretation and application of the Treaty is observed. One consequence 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 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 dispute³⁰.

²⁸ Case C-491/01 British American Tobacco [2002] ECR I11453, paras 28-41.

²⁹ Case C-31/09 Bolbol 17 June 2010. See also Elgafaji para.....

³⁰ However, the principle that rulings should not be given to hypothetical questions does not prevent the national court from referring several 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 decided which view it will take: Case C-297/89 Ryborg [1991] ECR I-1943 para 6 (cited B, p. 180). In Case 283/81 CILFIT [1982] ECR 3415, paras 16-20 the ECJ required that the national court 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. The approach in subsequent 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

Acte clair

44. A reference should not normally be made when the EU provision is “acte clair”. “Acte clair” covers 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 law³¹.

45. It will be rather difficult for a higher-level national court to be sure a provision is acte clair if judges in the lower court supported a diverging interpretation³².

Acte éclair

46. Nor should a reference normally be made when the case is “acte éclair”. “Acte éclair” means situations where in other cases the ECJ/CJEU has already made a decision on the question³³.

47. 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 Community authority 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; and that the question is one that is likely at some stage in the life of the case to need referral to the CJEU.

48. In addition there will also be practical or “commonsense” considerations such as expense and delay (but on the latter see below.....).

49. It will normally be appropriate for the national court to wait to make a reference until the facts of the case and the national legal context 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.

50. Normally, as well, the national *legal context* must be established.

Other preparatory steps

51. As already emphasised it is always a good rule to confer with other colleagues in one’s national judicial system as well as within ELAJA as to the merits and demerits of making any reference contemplated.

even were a national court of last instance considers an EU provision acte clair, it is not prevented from making a preliminary ruling: see Joined Cases C-428/06-434/06 UGT-Rioja [2008] ECR-I-6747, para 43, cited in B p.237. 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 the existence of acte clair is faced with.

³¹In Case 283/81 CILFIT [1982] ECR 3415, paras 16-20.

³²B, p.244.

³³Joined Cases 28-30/62 Da Costa [1963] ECR 31.

52. If lack of information is a problem it is also worth recalling that there is the possibility of request to Commission for information (Art 10 of EC Treaty general duty on Commission to loyally cooperate with national courts and to assist them when needed in order to ensure a correct application of Union law).

Drafting an order for reference

53. It is in everyone's interest that an order for reference is well-drafted so as to give the CJEU the best possible basis for furnishing a ruling that provides not just the referring court but judges in other Member States thorough and exhaustive guidance³⁴.

54. It will normally be useful for the national court to inform the parties in the proceedings that it is considering making a PR. 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 whether to adopt such proposals. There are no Court costs and legal aid is normally granted by the national court but can also be granted by the Court.

UNHCR as intervener/amicus curiae at the national level

55. (If it has not done so already), the national court or tribunal should consider whether to join UNHCR as an intervener or as an "amicus curiae" before making the reference. Despite UNHCR being identified in the asylum-related directives as being a source of "valuable guidance" (see e.g. recital 15 of the Qualification Directive) the CJEU Statute does not permit third-party intervention³⁵. If however, UNHCR is joined as an intervener at the national level, then the CJEU 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. In B it is contended that Article 23 includes not only interveners but also amici curiae in the main proceedings where this concept is recognised in the relevant national legal system³⁶.

56. If your current national rules do not permit your court or tribunal to join UNHCR as an intervener or amicus curiae, it may be a matter your head of judiciary might wish to take up with domestic legislators, to ensure it can happen in the future.

³⁴ Conversely, the ECJ/CJEU 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, see C and D, p. 490.

³⁵ The Court has taken a strict approach to Article 23 of its Statute : see e.g. Case 2/74 Reyners [1974] ECR 63; B, pp.344-345.

³⁶ B, 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.

57. It may sometimes be important to consider whether to join several cases together for the purposes of making a reference. Thus in Metock³⁷, 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.

58. There is no set form. For courts and tribunals the Court has prepared an Information Note: see Appendix B. It may sometimes be appropriate to inform the parties that the Court also has an Information Note to Counsel.

Form and contents

59. The order should be written in one document in simple, clear language with short sentences. It is highly desirable that it be kept to around 10 pages (if it is longer this may lead the Court to translate only a summary and can lead to interpreting delays). When preparing the reference the referring court should bear in mind that the information provided must be in such a form as to enable not only the Court but also the governments of the Member States and other interested parties to submit observations pursuant to Article 23 of the Statute of the Court³⁸. Only the orders for reference are noticed to the interested parties.

60. The order should be self-explanatory, i.e. it should be understandable without the need to refer to other documents. The points or paragraphs should be numbered.

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

62. The reference should state the names and addresses of the parties and their legal representatives.

63. The reference should be sent to the Registry of the Court of Justice, Boulevard Konrad Adenaur, I-2925 Luxembourg. There are no set deadlines but a strong expectation that the request is sent as soon as possible.

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

³⁷ Case C-127/08 Metock [2008] ECR I-6241.

³⁸ 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 Community institutions what the case is about: see Joined Cases 141/81-143/81 Holdijk [1982] ECR 1299, pas 5-8 cited in B, p.302.

65. The basic elements of an order can be gleaned from reading the summaries contained in the typical ECJ judgment. They are:

Facts (the order should set out in concise form the given facts of the main proceedings). Remember in the interpretation of Community law the ECJ relies on the facts presented by the national court.

Legal context:

This is best sub-divided into:

(a) National Law (the order should next set out the relevant national legal provisions). 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 CJEU nor the interested parties can be expected to be familiar with the national legal system concerned. If it is necessary to use a national provision it can assist to offer a paraphrase (e.g. in UK “leave to remain” is equivalent to a residence permit). In 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, they put in brackets an English translation (*real risk*), that being a standard that in their view was a similar, even if it is not exact, translation³⁹.

(b) Relevant EU law (since this will be known to all recipients, it will suffice in the main to identify numbers of Articles etc). It is best if the order can preface reference to relevant EU law with an *explanation of the reasons* for the choice of the EU provisions of which it requests an interpretation. Relevant EU law includes case law of the ECJ/CJEU.

(c) Any relevant case law of national courts or tribunals of other countries. We add this as a new sub-head because it is seen by EALJA as particularly important to ensure that the CJEU decides on references in asylum-related cases with as full knowledge of the case law on a Member-State-wide basis. Although the CJEU Registry has an information service, it is understood that its database of national case law in the asylum field is sketchy and incomplete and not up to date. Relevant cases can be found on the IARLJ website or through inquiry of EALJA members. In a small but growing number of cases national judges are beginning to refer to case law from other

³⁹ I am indebted to Hana Lupacova and James Simeon for their notes of the 2009 Berlin Workshop.

countries. Thus in March 2009 The Czech Supreme Administrative Court decided its first case relating to the QD⁴⁰. The Court referred in its judgment to Dutch, French German and UK case law. Two decisions were discussed in detail, a German⁴¹ and an English⁴² one.

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 has been joined as an intervener (see) then its position should be summarised here as well.

Questions (see below)

National Court's suggested answers (it is desirable but not essential⁴³ that the referring court set out its own suggested answers to the questions, as this helps the interested parties and the Advocate General in refining their input and may influence the Court's ruling). It is prudent to express such observations tentatively, not least to avoid damaging the credibility of the national court should its suggestions not be followed. The Court's information note concerning the special urgent preliminary procedure provided in Article 23a of the Court's Statute Article 104b of the Court's Rules of Procedure see input of this kind as important to ensuring the procedure is rapid.

Formulating the questions

66. A good place to start for guidance on how to draft questions is to look at recent ECJ judgments dealing with PR on the Qualification Directive.

67. The questions should be self-contained and self-explanatory since they will be notified to interested parties including other Member State government lawyers.

68. 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 Abdullah the first question asked was:

⁴⁰ Supreme Administrative Court, March 13, 2009, n° 5 Azs 28 : 2008.

⁴¹ Federal Administrative Court, BVerw G 10 C 43.07.

⁴² Asylum and Immigration Tribunal, KH (2008) UKIAT 00023. The Court found that it contained much valuable background information and annexed it to the judgment.

⁴³ C and D consider that it is asking too much for a referring court that is not a specialist or higher-level court to attempt to furnish answers.

“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 10(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?”

69. Questions should be formulated so that the ECJ is not requested to decide on the facts or to make a specific application of the law to the case. Instead, the formulation of the question should ensure that the ECJ can make an, in principle, abstract interpretation of the relevant Community rule.

70. Even though questions should not ask whether national law is compatible with EU law, the referring court may ask (where relevant) whether the relevant EU provision precludes a national provision with specific characteristics.

71. It will normally be important to keep the questions to EU 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 provision of the Refugee Convention, as happened in Bolbol in respect of Art 1D⁴⁴.

Urgency - need for a separate request

72. The Court’s Rules of Procedure now recognise that in the area of freedom, security and justice (which includes asylum), there should be a special urgent procedure. Where the referring court wishes to request urgency the request should be made 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 C-357/09 Kadzoev, a reference made by a Bulgarian court made on 10 August 2009 received a ruling from the Court on 30 November 2009 – so less than 4 months.

⁴⁴ The ECJ has stated that it does not have jurisdiction to make decisions on the interpretation of provisions under international law that were binding on the Member States outside the framework of Community law: Case 130 130/73 Vandeweghe [1973] ECR 1329. When the ECJ has done so – e.g. Orken Case 374/87 [1989] ECR 3283 (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 ECJ established the necessary basis for being able to give a preliminary ruling on the validity a given Community act. The Court’s decisions will therefore only be relevant to the validity of the Community act in question.

Also, 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.

73. The request should obviously be sent by post with originals but if urgent it should first be sent to the Court by email or fax. The request should state the reasons which, in the view of the referring court, justify the application of the exceptional procedure, e.g. the existence in national or EU law of mandatory time limits for giving ruling or the serious consequences which could result for the person concerned or for other cases that are pending awaiting the result of the reference. 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 Bolbol.

74. The request should also state the email address or any fax number which may be used by the Court together with email addresses or fax numbers of the representatives of the parties to the proceedings.

Task of referring court when CJEU has given its ruling

75. It will normally have been appropriate for the national court 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.

76. Not only the referring court but also any appeal court which decides on the case in the main proceedings is bound by a preliminary ruling on the case in question⁴⁵. However, the effect may not be binding if the ruling goes beyond the issue referred to it and has answered a question that, strictly speaking, had not been put to it by the referring court⁴⁶.

77. It is for the national court to apply the preliminary ruling to the facts in the main proceedings.

78. 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 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, thereby guaranteeing more international protection via Article 3 of the ECHR) than had been thought⁴⁷.

79. Although it is not the role of the CJEU to rule on national law and it does not decide the actual dispute, in practice its judgments do apply the abstract

⁴⁵ Case C135/77 Bosch [1978] ECR 855.

⁴⁶ Case C-206/01 Arsenal [2002] ECR I-10273.

⁴⁷ 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.

Community interpretation to the facts of the case, albeit formally the ruling is kept in general terms.

80. 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 (cited in B, p. 190).

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: Information Note of the Court of Justice, December 2009 [not included in this draft]

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Appendix C

ECJ/CJEU asylum-related cases

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 (implementation of the Dublin Regulation)

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

-C-175/08 and 179/08 Abdullah (GC) (cessation and Articles 11 and 7 of Qualification Directive), 2 March 2010

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

Pending

-Cases C-57/09 and C-101/09 B and D (exclusion clauses under Refugee Convention and under Qualification Directive) ⁴⁸

⁴⁸ NB in this case Advocate-General Mengozzi delivered an opinion in this case on 1 June 2010. His opinion was delivered in Italian and is available in a number of other languages here:

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&numaff=C-57/09&nomusuel=&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&docor=docor&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoor=docnoor&radtypeord=on&newform=newform&docj=docj&docop=docop&docnoj=docnoj&typeord=ALL&do maine=&mots=&resmax=100&Submit=Rechercher>

ECRE's Weekly Bulletin (4 June 2010) provides the following summary.

“On 1 June 2010, Advocate General Paolo Mengozzi of the Court of Justice of the EU (CJEU) stated in an opinion that EU Member States may still grant protection to non-EU nationals who are excluded from refugee status under Article 12§2 of Qualification Directive. A German court asked the CJEU to answer questions regarding the grounds for excluding someone from refugee status under Article 12§2b and c of the Qualification Directive, where that person was a former member of a group included in the EU list of suspected terrorist organisations.

The Advocate General finds that someone excluded from refugee status under Article 12§2 might not pose a threat to the community anymore, and that Member States must take into account the possible consequences of refoulement. He also stated that the Qualification Directive does not prevent a Member State from granting a protection status under its national law to someone otherwise excluded from

refugee status by Article 12§2, as long as the applicant is not being granted such protection under the Qualification Directive.”

Appendix D: Selected questions from past/pending cases

1) The Dutch questions as they were put in Elgafaji

The Council of State referred the following questions to the ECJ for a preliminary ruling:

“ 1. Is Article 15 (c) (of the Directive) to be interpreted as offering protection only in a situation in which Article 3 of the (ECHR) , as interpreted in the case-law of the European Court of Human Rights, also has a bearing, or does Article 15 (c), in comparison with Article 3 of the (ECHR), offer supplementary or other protection ?

2. If Article 15(c) of the Directive, in comparison with Article 3 of the (ECHR) offers supplementary or other protection, what are the criteria in that case for determining whether a person who claims to be eligible for subsidiary protection status runs a real risk of serious and individual threat by reason of indiscriminate violence, within the terms of Article 15-(c) of the Directive, read in conjunction with Article 2 (e) thereof ?”

....”

2) The German questions as they are put in the reference C- 57/09 to the ECJ

1. Does a serious non-political crime or an act contrary to the purposes and principles of the United Nations within the meaning of Article 12 (2) b and c of Council Directive 2004/83/EC of 29 April 2004 exist if the applicant has belonged to an organisation that appears on the list of persons, groups and entities annexed to the Council Common Position on the Application of Specific Measures to Combat Terrorism, and that applies terrorist methods, and the applicant actively supported the armed struggle of that organisation?

2. In the event that Question 1 is to be answered in the affirmative: Does the exclusion from refugee status under Article 12 (2) b and c of Directive 2004/83/EC presuppose that the applicant still represents a danger?

[The applicant claims to have left the organization and to be seen as a traitor by it, this as well as some health issues, probably makes it less likely that he would again engage in activities for the organisation]

3. In the event that Question 2 is to be answered in the negative: Does the exclusion from refugee status under Article 12 (2) b and c of

Case C-39/10 Diouf (referred 5 Feb 2010, OJEU April 14, 2010 (Article 39 and right to an effective remedy)

Case C-57/09 Cemalettin Palat (Article 12(2) Qualification Directive (exclusion)

Case C-101/09 Ayhar Cifci (Art 14(3) of Qualification Directive (exclusion).

Directive 2004/83/EC presuppose a proportionality test referred to the individual case?

4. In the event that Question 3 is to be answered in the affirmative:

a) Should the proportionality test take into account that the applicant benefits from protection against deportation under Article 3 of the European Convention on the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, or under national law?

b) Is exclusion disproportionate only in special cases?

5. Under the terms of Article 3 of Directive 2004/83/EC, is it compatible with the Directive for an applicant to be entitled to asylum under national constitutional law, in spite of the existence of a reason for exclusion under Article 12 (2) of the Directive?[They hardly mean asylum proper, as in refugee status, rather that the person can be entitled to permanent residency, or do they have also an alternative protection ground that is asylum but not refugee?]