



The European Legal System Regulating Asylum and Immigration: **Instruments and Case-Law**

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EU Primary Law – **Asylum**

Article 78(1) Treaty on the Functioning of the European Union (TFEU):

The Union shall develop a **common policy on asylum, subsidiary protection and temporary protection** with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be **in accordance with the Geneva Convention** of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

Article 78(2) TFEU

2. (...), the European Parliament and the Council, (...), shall adopt measures for a common European asylum system comprising:

- (a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
- (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
- (c) a common system of temporary protection for displaced persons in the event of a massive inflow;
- (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;

(...)

Article 78(2) TFEU

2. (...), the European Parliament and the Council, (...), shall adopt measures for a common European asylum system comprising:

(...)

(e) criteria and mechanisms for determining which MS is responsible for considering an application for asylum or subsidiary protection;

(f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;

(g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

EU Primary Law – **Asylum** (contd.)

Article 6 Treaty on the European Union (TEU)

1. makes the EU Charter binding on Member States as part of the primary law of the EU
2. mandate for the EU to accede to the European Convention on Human Rights (ECHR)
3. ‘fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law’

Article 18 Charter of Fundamental Rights of the EU (EU Charter): *‘[t]he right to asylum shall be guaranteed with due respect for the rules of the [Refugee Convention] in accordance with the [TEU] and the [TFEU] [...]’* ⇒ EU Charter binding not only on the EU institutions but also on Member States when they are implementing EU law (Art. 51(1))

Other Relevant **EU Charter Provisions**

Article 1 – Human dignity ⇒ cited by the CJEU in *A, B, and C* which concerned methods for assessing the credibility of the declared sexual orientation of an applicant

Article 4 – Prohibition of torture and inhuman or degrading treatment or punishment ⇒ considered by the CJEU in the cases of *NS, ME and others* which concerned the transfer of the applicants to Greece pursuant to the Dublin II Regulation which was considered in breach of Article 4 by reason of the conditions under which asylum applicants in Greece were living and were detained

Other Relevant **EU Charter Provisions** (Contd.)

Art. 19 – Protection in the event of removal, expulsion or extradition

⇒ in the case of *M'Bodj*, the CJEU noted the requirement to interpret Article 15(b) QD (now Article 15(b) QD (recast)) in a manner consistent with Article 19(2) of the Charter; however the Court found that as there was no risk of intentional deprivation of healthcare in the country of origin, the applicant did not fall within the scope of the Article 15(b) QD and consideration of Article 19(2) of the Charter did not call that interpretation into question.

Other Relevant **EU Charter Provisions** (Contd.)

Article 47 – Right to an effective remedy and to a fair trial

⇒ in the case of *MM* the issue was whether the applicant, who had been heard in the asylum procedure but who had received a negative decision, was entitled to be heard in the subsequent proceedings on his application for subsidiary protection; the CJEU set out that observance of the right of defence is a fundamental principle of EU law; it further noted that the right to be heard in all proceedings is inherent in that fundamental principle, as affirmed not only in Articles 47 and 48 of the Charter, but also in Article 41 thereof

EU Primary Law – **Asylum** (contd.)

Protocol No 24 on Asylum for Nationals of Member States of the European Union (Aznar Protocol): ‘Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters’.

⇒ A national of a Member State is not eligible to make an application for international protection pursuant to the provisions of the CEAS (Article 1 QD (recast)) which is restricted to third-country nationals and stateless persons. However, an application under the Refugee Convention, outside the CEAS, by a national of a Member State cannot be excluded. An EU national who fears persecution in the Member State of nationality and seeks protection against *refoulement* to that Member State may apply for recognition as a refugee under the Refugee Convention in another Member State.

EU Primary Law – **Asylum** (contd.)

Protocol No 30 regarding the application of the EU Charter provisions to Poland and UK:

- Article 1(1): the provisions of the Charter do not extend the ability of either the CJEU or the national courts or tribunals of Poland or the UK to find that their respective ‘laws, regulations or administrative procedures, practices or actions’ are inconsistent with the fundamental rights, freedoms and principles reaffirmed by the Charter;
- Article 1(2) affirms that ‘nothing in Title IV of the Charter [on solidarity] creates justiciable rights’ in either country except as provided for in their respective national laws;
- Article 2: when a provision of the EU Charter refers to national laws and practices, it shall apply in those countries only to the extent that the rights or principles concerned are recognised in their respective national laws or practices.

EU Secondary Law – **Asylum**

- Qualification for International Protection: **Directive 2011/95/EU of 13 December 2011 on *standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted*** (recast) (applicable since 21 December 2013)
- Asylum Procedures: **Directive 2013/32/EU of 26 June 2013 on *common procedures for granting and withdrawing international protection*** (recast) (applicable since 21 July 2015)
- Reception Conditions: **Directive 2013/33/EU of 26 June 2013 laying down *standards for the reception of applicants for international protection*** (recast) (applicable since 21 July 2015)

EU Secondary Law – **Asylum** (contd.)

- Dublin III: Regulation (EU) No 604/2013 of 26 June 2013 establishing the ***criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person*** (recast) (*applicable since 1 January 2014*)
- Eurodac: Regulation (EU) No 603/2013 of 26 June 2013 on the ***establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013*** establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on ***requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes***, and amending Regulation (EU) No 1077/2011 ***establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice*** (recast) (*applicable since 20 July 2015*)

And what about **‘Temporary Protection’**?

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

- minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin; promotion of a balance of effort between MS in receiving and bearing the consequences of receiving such persons (Art. 1)
- EU-wide measure of ‘exceptional character’ to provide immediate and temporary protection to persons in a mass influx situation (Art. 2(a))
- immediate short-term protection status without the need for individual assessment of qualification for international protection, thus alleviating pressure on the asylum procedure of MS
- voluntary but structured ‘burden-sharing’ mechanism whereby MS indicate their capacity to receive persons eligible for temporary protection (Art. 25(1))
- beneficiaries of temporary protection entitled to make an application for asylum at any time which, if rejected, shall not affect continuance of that temporary protection (Art. 17 and 19)
- implementation of temporary protection is a collective decision of the Council of Ministers of the EU and, (...), MS may not resort to it individually

Qualification for International Protection

Directive 2011/95/EU of 13 December 2011 on *standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted* (recast) –

**Adoption by
Denmark, UK, Ireland?**

	QD	QD (recast)
Denmark	X	X
Ireland	✓	X
UK	✓	X

Application for International Protection

Article 2(h) Qualification Directive (recast): “[A] request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek **refugee status** or **subsidiary protection status**, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately”.

Article 3(1) Asylum Procedures Directive (recast) defines the **territorial scope** of an application for international protection ⇒ applications must be made ***‘in the territory, including at the border, in the territorial waters or in the transit zones of the Member States’***

Refugee Status – Definition

Article 2(d) QD (recast) defines the term ‘refugee’ as follows:

‘[...] a **third-country national** who, owing to a **well-founded fear** of being **persecuted** for reasons of **race, religion, nationality, political opinion or membership of a particular social group**, is **outside the country of nationality** and is **unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country**, or a **stateless person**, who, being **outside of the country of former habitual residence** for the **same reasons** as mentioned above, is **unable or, owing to such fear, unwilling to return to it**, and to whom Article 12 does not apply’.

⇒ see term ‘refugee’ in Article 1A(2) of the Refugee Convention

Article 2(d) – **Well-Founded Fear**

Bundesrepublik Deutschland v Y (C-71/11), Z (C-99/11):

- ⇒ (...), when assessing whether, in accordance with Article 2(c) (...), an applicant has a well-founded fear of being persecuted, the ***competent authorities are required to ascertain whether or not the circumstances established constitute such a threat that the person concerned may reasonably fear***, in the light of his individual situation, ***that he will in fact be subject to acts of persecution*** (para. 76);
- ⇒ That assessment of the extent of the risk, which must, in all cases, be carried out with vigilance and care (*Salahadin Abdulla and Others*, paragraph 90), will be based solely on a ***specific evaluation of the facts and circumstances***, in accordance with the rules laid down in particular by Article 4 of the Directive (para. 77).

Article 2(d) – **Well-Founded Fear** (Contd.)

Bundesrepublik Deutschland v Y (C-71/11), ***Z*** (C-99/11):

⇒ (...), where it is established that, upon his return to his country of origin, the person concerned will follow a religious practice which will expose him to a real risk of persecution, he should be granted refugee status, (...). The fact that he could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant (para. 79)

The Standard of Proof

⇒ **'reasonable fear'**

(CJEU, *Bundesrepublik Deutschland v Y* (C-71/11), *Z* (C-99/11), para. 76)

⇒ The determination of whether an applicant's 'fear' – in the sense of forward-looking expectation of risk – is, or is not, 'well-founded' is (...) purely evidentiary in nature. It requires the state party assessing refugee status to determine whether there is a significant risk that the applicant may be persecuted. While the mere chance or remote possibility of being persecuted is insufficient to establish a well-founded fear, ***the applicant need not show that there is a clear probability that he or she will be persecuted.***

(The Michigan Guidelines on Well-Founded Fear, para. 6)

Significance of Past Persecution

⇒ Article 4(4) of the Qualification Directive (recast) sets out that:

“The fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, is ***a serious indication of the applicant’s well-founded fear of persecution*** or real risk of suffering serious harm, unless ***there are good reasons to consider that such persecution or serious harm will not be repeated***”.

International protection needs arising *sur place*

Article 5	Nature of the provision	Personal scope
<p>'1. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which have taken place since the applicant left the country of origin.'</p>	Mandatory	<p>Applicants for:</p> <ul style="list-style-type: none"> - refugee status; and - subsidiary protection.
<p>'2. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which the applicant has engaged in since he or she left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.'</p>	Mandatory	<p>Applicants for:</p> <ul style="list-style-type: none"> - refugee status; and - subsidiary protection.
<p>'3. Without prejudice to the Geneva Convention, Member States may determine that an applicant who files a subsequent application shall <u>not normally</u> be granted refugee status if the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin.'</p>	Optional	<p>Applicants for:</p> <ul style="list-style-type: none"> - refugee status.

Art 9(1)/(2) QD (recast) – Acts of Persecution

In order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, an act must: ‘(a) be **sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights**, in particular the rights from which derogation cannot be made under Article 15(2) of the [ECHR]; *i.e. freedom from torture, inhuman or degrading treatment or punishment, from slavery and servitude, and from retroactive criminal liability (Articles 3, 4(1) and 7 ECHR)*; or (b) be an **accumulation of various measures**, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a)’

⇒ decisive element of persecution is the **‘significant effect on the person concerned in order for it to be possible for the acts in question to be regarded as acts of persecution’** (see: Joined cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v Y and Z*, 5th September 2012, para. 59)

Acts of Persecution (Contd.)

‘Freedom of religion is one of the foundations of a democratic society and is a basic human right’.

‘Interference with the right to religious freedom may be so serious as to be treated in the same way as the cases referred to in Article 15(2) of the ECHR, to which Article 9(1) of the Directive refers, by way of guidance, for the purpose of determining which acts must in particular be regarded as constituting persecution’.

Joined cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v Y and Z*, 5th September 2012, para. 57

Acts of Persecution (Contd.)

Acts of persecution as qualified in Article 9(1) QD (recast) can, inter alia, take the form of:

- a) acts of **physical or mental violence**, including acts of sexual violence;
- b) **legal, administrative, police, and/or judicial measures which are in themselves discriminatory** or which are **implemented in a discriminatory manner**;
- c) **prosecution or punishment** which is **disproportionate or discriminatory**;
- d) **denial of judicial redress** resulting in a **disproportionate or discriminatory punishment**;
- e) **prosecution or punishment for refusal to perform military service** in a conflict, **where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12(2)**;
- f) acts of a **gender-specific** or **child-specific nature**

Disproportionate or Discriminatory Prosecution or Punishment

‘(...), the mere existence of legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution within the meaning of Article 9(1) of the Directive’.

‘(...), the term of imprisonment which accompanies a legislative provision which, (...), punishes homosexual acts is capable, in itself of constituting an act of persecution (...), provided that it is actually applied in the country of origin (...)’.

‘Such a sanction infringes Article 8 ECHR, to which Article 7 of the Charter corresponds, and constitutes punishment which is disproportionate or discriminatory within the meaning of Article 9(2)(c) of the Directive’.

*Minister voor Immigratie en Asiel v X (C-199/12), Y (C-200/12),
and Z v Minister voor Immigratie en Asiel (C-201/12),
7th November 2013, paras. 55-57*

Articles 9(3) and 10 QD (recast) – Reasons for Persecution

Article 2(d): ‘(...) race, religion, nationality, political opinion or membership of a particular social group, (...)’

Article 10(1)(a): ‘**Race**’ includes considerations of **colour**, **descent**, or **membership of a particular ethnic group**;

Article 10(1)(b): ‘**Religion**’ includes the holding of **theistic, non-theistic** and **atheistic beliefs**, the **participation in, or abstention from, formal worship** in **private or in public**, either **alone or in community** with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;

Article 10(1)(c): ‘**Nationality**’ shall **not be confined to citizenship or lack thereof** but shall, in particular, include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;

Reasons for Persecution (Contd.)

Article 10(1)(d) QD (recast):

A group shall be considered to form a ***'particular social group'*** where in particular:

- members of that group ***share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and***
- that ***group has a distinct identity*** in the relevant country, ***because it is perceived as being different by the surrounding society.***

Minister voor Immigratie en Asiel v X, Y, and Z v Minister voor Immigratie en Asiel

‘(...) the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group’ (para. 49)

‘(...) requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person’s identity that the persons concerned cannot be required to renounce it’. (para. 70)

(Cases C-199/12, C-200/12 and C-201/12, 7th November 2013)

Attribution of Characteristics

As laid down in Article 10(2) QD (recast), the critical focus must be on the **actions of the persecutor**:

‘When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is **attributed** to the applicant by the actor of persecution’.

Article 6 QD (recast) – **Actors of Persecution**

Actors of persecution (or serious harm) include:

- the State;
- parties of organisations controlling the State or a substantial part of the territory of the State;
- non-State actors, if it can be demonstrated that the actors mentioned in points (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution (or serious harm as defined in Article 7)

Non-State Entities as Actors of Persecution



Article 7 QD (recast) – **Actors of Protection**

⇒ **Protection against persecution (or serious harm) can only be provided by:**

- a) the **State**; or
- b) **parties or organisations**, including international organisations, **controlling the State or a substantial part of the territory of the State**; provided they are willing and able to offer protection in accordance with paragraph 2.

Art 7 QD (recast) – **Actors of Protection** (Contd.)

- ⇒ Protection against persecution or serious harm must be **effective** and of a **non-temporary** nature.
- ⇒ Such protection is generally provided when the actors mentioned [above] take **reasonable steps to prevent the persecution** (or suffering of serious harm), inter alia, by operating an **effective legal system** for the **detection, prosecution and punishment of acts constituting persecution** (or serious harm), and when the applicant has **access to such protection**

States' (Un)willingness and (In)ability to Protect: *Diverse Scenarios*

	Able	Unable
Willing	<p><i>Scenario 1</i></p> <p>⇒ Refusal of international protection</p>	<p><i>Scenario 2</i></p> <p>⇒ Grant of international protection</p>
Unwilling	<p><i>Scenario 3</i></p> <p>⇒ Grant of international protection</p>	<p><i>Scenario 4</i></p> <p>⇒ Grant of international protection</p>

***Abdulla & ors v BRDeutschland* (C-175/08)**

- **‘(...) the circumstances which demonstrate the country of origin’s inability or, conversely, its ability to ensure protection against acts of persecution constitute a crucial element in the assessment which leads to the granting of, or, as the case may be, by means of the opposite conclusion, to the cessation of refugee status. (para. 69)**
- **Consequently, refugee status ceases to exist where the national concerned no longer appears to be exposed, in his country of origin, to circumstances which demonstrate that that country is unable to guarantee him protection against acts of persecution against his person for one of the five reasons listed in Article 2(c) of the Directive. (...). (para. 70)**

Abdulla & ors v BRDeutschland (Contd.)

- (...), the **competent authorities**, by reference to Article 7(2) of the Directive, **must verify, having regard to the refugee's individual situation, that the actor or actors of protection of the third country in question have taken reasonable steps to prevent the persecution, that they therefore operate, inter alia, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection (...).** (*para. 71*)

Article 8 – Internal Protection

Art. 8(1): ‘As part of the assessment of the application for international protection, Member States *may* determine that an applicant is not in need of international protection **if in a part of the country of origin**, he or she:

- (a) has **no well-founded fear of being persecuted** or is not at real risk of suffering serious harm; or
- (b) has **access to protection against persecution** or serious harm as defined in Article 7; and he or she **can safely and legally travel to and gain admittance** to that part of the country and **can reasonably be expected to settle there**’.

Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie (Case C-465/07)

The CJEU has not yet had an opportunity to directly address Article 8 issues except the indirect references to internal protection in the *Elgafaji* case (at para. 40):

‘(...) in the individual assessment of an application for subsidiary protection, under Article 4(3) of the Directive, the following may be taken into account:

- the **geographical scope of the situation of indiscriminate violence and the actual destination of the applicant in the event that he is returned to the relevant country, (...), and**
- the existence, if any, of a serious indication of real risk, such as that referred to in Article 4(4) of the Directive, an indication in the light of which the level of indiscriminate violence required for eligibility for subsidiary protection may be lower’.



Subsidiary Protection – Definition

⇒ Article 2(f) QD (recast) defines a ‘person eligible for subsidiary protection’ as a:

“third-country national or a stateless person **who does not qualify as a refugee** but in respect of whom **substantial grounds** have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a **real risk of suffering serious harm** (...), and to whom Article 17(1) and (2) does not apply, and is **unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country**”

Article 15 QD (recast) – Serious Harm

- (a) the **death penalty** or **execution**;
- (b) or **torture or inhuman or degrading treatment or punishment** of an applicant in the country of origin;
- (c) or **serious and individual threat** to a **civilian's life or person** by reason of **indiscriminate violence** in situations of **international or internal armed conflict**

“(…) it must be noted that *the terms ‘death penalty’, ‘execution’ and ‘torture or inhuman or degrading treatment or punishment of an applicant in the country of origin’*, used in Article 15(a) and (b) of the Directive, *cover situations in which the applicant for subsidiary protection is specifically exposed to the risk of a particular type of harm*. By contrast, the harm defined in *Article 15(c) of the Directive* as consisting of a ‘serious and individual threat to [the applicant’s] life or person’ *covers a more general risk of harm*.

(CJEU, *Elgafaji v Staatssecretaris van Justitie*, C-465/07, 17th February 2009, paras. 32/33)

Article 15(c) QD (recast) – **Real Risk**

“(…), it should be added that, in the individual assessment of an application for subsidiary protection, under Article 4(3) of the Directive, the following may be taken into account: (…) the existence, if any, of a **serious indication of real risk**, such as that referred to in Article 4(4) of the Directive, an indication in the light of which the level of indiscriminate violence required for eligibility for subsidiary protection may be lower” (CJEU, *Elgafaji v Staatssecretaris van Justitie*, C-465/07, 17th February 2009, para. 40)

⇒ **Article 4(4) QD (recast)**: The fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, is a **serious indication of the applicant’s well-founded fear of persecution or real risk of suffering serious harm**, (...).

Complementarity and Objective of Subsidiary Protection

“(…) , the ***subsidiary protection*** provided by Directive 2004/83 ***is complementary and additional to the protection of refugees enshrined in the Geneva Convention***” (para. 32).

“That interpretation is also consistent with the objectives laid down by Article 78(2)(a) and (b) TFEU, which provide that the European Parliament and the Council of the European Union are to adopt measures for a common European asylum system comprising, inter alia, ***‘a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection’***”(para. 33).

(*HN v Minister for Justice, Equality and Law Reform, Ireland*,
C-604/12, 8th May 2014)

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Complementarity and Objective of Subsidiary Protection (Contd.)

“(…), it is, in principle, for the competent authorities to determine the status that is most appropriate to the applicant’s situation” (para.34).

“It is apparent from the foregoing considerations that an application for **subsidiary protection should not, in principle, be considered before the competent authority has reached the conclusion that the person seeking international protection does not qualify for refugee status**” (para. 35).

(HN v Minister for Justice, Equality and Law Reform, Ireland, C-604/12, 8th May 2014)



Exclusion from International Protection

From **Refugee Status**:

⇒ **Article 12** Qualification Directive (2011/95/EU) (recast)

⇒ **Articles 1D, 1E and 1F** Refugee Convention (1951)

From **Subsidiary Protection**:

⇒ **Article 17** QD (recast)

Origin of Exclusion Clauses

*“Recitals 3, 16 and 17 to Directive 2004/83 state that the 1951 **Geneva Convention** constitutes the **cornerstone** of the international legal regime for the **protection of refugees** and that the **provisions of the directive** for determining who qualifies for refugee status and the content of that status were adopted **to guide** the competent authorities of **the Member States** in the **application of that convention** on the basis of common concepts and **Criteria**”.*

*(see: **B & D vs Bundesrepublik Deutschland**, C-57/09 and C-101/09, 9th November 2010, para. 77)*

Rationale for Exclusion

Article 12(1) QD (recast): subsidiarity of international protection

➤ primacy & priority to be accorded to protection provided by country of nationality or by the State of former habitual residence

Article 12(2) QD (recast): protection and maintenance of the integrity and credibility of refugee status

➤ denial of refugee status to those who have committed acts so grave that they render their perpetrators undeserving of international protection

➤ refugee framework should not act as a barrier to serious criminals facing justice (prevention of abuse of refugee status by persons fleeing legitimate prosecution rather than persecution)

Art. 12(1) QD (recast): Exclusion from **Refugee Status**

A third-country national or a stateless person is excluded from being a refugee if:

- a) he or she falls within the scope of **Article 1(D) of the Geneva Convention**, relating to protection or assistance from organs or agencies of the UN other than the UNHCR. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the UN, those persons shall ipso facto be entitled to the benefits of this Directive;
- b) he or she is **recognised by the competent authorities of the country in which he or she has taken up residence as having the rights and obligations which are attached to the possession of the nationality of that country, or rights and obligations equivalent to those.**

Art. 12(2) QD (recast): Exclusion from **Refugee Status**

A third-country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:

- a) he or she has committed a **crime against peace**, a **war crime**, or a **crime against humanity**, (...);
- b) he or she has committed a **serious non-political crime outside the country of refuge prior to his or her admission as a refugee**, which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;
- c) he or she has been **guilty of acts contrary to the purposes and principles of the UN** (...).

Exclusion from **Subsidiary Protection**

Article 17 QD (recast) broadly similar to Article 12 but:

- Article 17(1)(b): refers to exclusion for having committed a **serious crime**
 - Encompasses both **non-political and political crimes**
 - **No temporal or territorial restriction**
- Article 17(1)(d): **danger to the community or security of the Member State**
 - mirrors Article 33(2) Refugee Convention
- Article 17(2): **identical principles and criteria as Article 12(3)**
- Article 17(3) = individual outside scope Article 17(1)
 - Addresses problem posed by fugitives from justice: ‘(...) *left his or her country of origin solely in order to avoid sanctions resulting from those crimes*’

Other Forms of Protection

Exclusion ⇒ not determinative in respect of whether an excluded person can be removed to his or her country of origin or former habitual residence

*'It is important to note that the exclusion of a person from refugee status pursuant to Article 12(2) of Directive 2004/83 does not imply the adoption of a position on the **separate question** of whether that person can be deported to his country of origin'.*

(see: CJEU: **B & D vs Bundesrepublik Deutschland**, C-57/09 and C-101/09, 9 November 2010, para. 77)

A green rectangular sign with rounded corners and a white border, tilted at an angle. The word "Immigration" is written in a bold, white, sans-serif font across the sign. The sign is supported by two vertical metal poles. The background is a bright blue sky with scattered white clouds and a lens flare effect in the top right corner.

Immigration

EU Primary Law - **Immigration**

Article 79(1) Treaty on the Functioning of the European Union (TFEU):

“The Union shall develop a **common immigration policy** aimed at ensuring, at all stages, the **efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States**, and the **prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings**”.

Article 79(2) TFEU

“(…), the European Parliament and the Council, (…), shall adopt measures in the following areas:

- a) the ***conditions of entry and residence***, and standards on the issue by MS of long-term visas and residence permits, including those for the purpose of family reunification;
- b) the ***definition of the rights of third-country nationals residing legally*** in a MS, including the conditions governing freedom of movement and of residence in other MS;
- c) ***illegal immigration and unauthorised residence***, including removal and repatriation of persons residing without authorisation;
- d) ***combating trafficking in persons***, in particular women and children.

Access to the Territory of the EU

- Convention implementing the 1985 **Schengen Agreement**, 19 June 1990
- **Visa List Regulation**, Regulation (EC) 539/2001
- **Visa Code**, Regulation (EC) 810/2009
- **Schengen Information System (SIS)**, set up by Title IV of the 1985 Convention implementing the Schengen Agreement
- **SIS II Regulation**, Regulation (EC) 1987/2006 and **SIS II Decision**, Council Decision 2007/533/JHA
- **Schengen Borders Code**, Regulation (EC) 562/2006

CJEU: *Koushkaki v Bundesrepublik Deutschland*

*“The competent authorities of a MS **cannot refuse, following the examination of an application for a Uniform visa, to issue such a visa to an applicant unless one of the grounds for refusal of a visa listed in those provisions can be applied to that applicant. Those authorities have a wide discretion in the examination of that application** so far as concerns the conditions for the application of those provisions and the assessment of the relevant facts, with a view to ascertaining whether one of those grounds for refusal can be applied to the applicant”.*

(see: Case C-84/12, 19th December 2013, para.79)

Preventing **Unauthorised Entry**

- **Carriers Sanctions Directive (2001/51/EC):**
 - provides for sanctions against those who transport undocumented migrants into the EU
- **Facilitation Directive (2002/90/EC):**
 - defines unauthorised entry, transit and residence and provides for sanctions against those who facilitate such breaches;
 - sanctions must be effective, proportionate and dissuasive (Article 3)
 - MS can decide not to sanction humanitarian assistance, but they are not obliged to do so (Article 1(2)).

Border Checks

- **Article 6 of the Schengen Borders Code** requires that border control tasks have to be carried out in full respect of ***human dignity***.
- ***Controls have to be carried out in a way which does not discriminate against a person*** on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
- ***More favourable rules exist for third-country nationals who enjoy free movement rights*** (Articles 3 and 7(6)).
- A mechanism has been set up to ***evaluate and monitor the application of the Schengen acquis*** (Regulation (EU) No. 1053/2013).

Residence in the EU

- **Resident Permits Format Regulation (EC) No. 1030/2002** (amended by Regulation (EC) No. 380/2008)
- **Long-term Residents Directive 2003/109/EC** (as amended by Directive 2011/51/EU)
- **Family Reunification Directive 2003/86/EC**
- **Students Directive 2004/114/EC and Scientific Researchers Directive 2005/71/EC** (\Rightarrow ***both to be replaced by:*** Directive (EU) 2016/801 on conditions of entry and residence of third-country nationals for research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (*to be transposed by 23rd May 2018 – no opt-in from IRL/UK*))
- **Blue Card Directive 2009/50/EC**
- **Single Permit Directive 2011/98/EU**
- **Intra-Corporate Transfer Directive 2014/66/EU** (*to be transposed by 29th November 2016 – no opt-in from IRL/UK*)

Students Directive – Entitlements?

*“Article 12 of Directive 2004/114 must be interpreted as meaning that the MS concerned is obliged to admit to its territory a third-country national who wishes to stay more than three months in that territory for study purposes, where that national meets the **conditions for admission exhaustively listed in Articles 6 and 7** of that directive and provided that that MS does not invoke against that person one of the grounds expressly listed by the directive as justification for refusing a residence permit”.*

(See: *Ben Alaya v Bundesrepublik Deutschland* C-491/13, 10th September 2014, para. 36)

Students Directive – Threat to Public Security?

When an authority of a MS establishes whether a third-country national is regarded as a threat to public security under Article 6(1)(d) of Council Directive 2004/114/EC, it shall, within the wide margin of discretion at its disposal,

- comprehensively ascertain, determine and investigate all the relevant facts;
- furnish concrete information as to why an individual is regarded as a threat to public security and
- undertake a comprehensive weighing of all relevant interests.

In such a situation, judicial review is limited to checking whether the boundaries of such discretion have been respected.

Opinion: AG Szpunar (Case C-544/15, *Sahar Fahimian v Federal Republic of Germany*, 29th November 2016)

Long-Term Residence – **Conditions?**

CJEU, *Commission v the Netherlands*, C-508/10, 26th April 2012, paras. 64-66:

- Principal purpose of the Directive: “(...) **integration of third-country nationals who are settled on a long-term basis in the MS**
- MS may make the issue of the residence permits (...) subject to the payment of charges and that, in fixing the amount of those charges, they enjoy a **margin of discretion**.
- However, the discretion granted to MS (...) in that respect is not unlimited. They **may not apply national rules which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness** (see, to that effect, Case C-61/11 PPU EI Dridi [2011] ECR I-3015, paragraph 55)”.

⇒ See also: **CGIL, INCA v Presidenza del Consiglio dei Ministri & ors**, C-309/14, 2 September 2015

Family Reunification – Discretion?

Article 4(1) of Directive 2003/86/EC provides that: “The MS **shall** authorise the entry and residence, (...), of the following family members:

- (a) the sponsor's spouse;
- (b) the minor children of the sponsor and of his/her spouse, (...);
- (c) the minor children including adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her. (...);
- (d) the minor children including adopted children of the spouse where the spouse has custody and the children are dependent on him or her. (...).”

Chakroun v Minister van Buitenlandse Zaken

Article 4(1) of Directive 2003/86/EC *“imposes precise positive obligations, with corresponding clearly defined individual rights, on the MS, since it **requires them**, in the cases determined by the Directive, **to authorise family reunification of certain members of the sponsor’s family, without being left a margin of appreciation** (Case C-540/03 Parliament v Council [2006] ECR I-5769, paragraph 60)”*.

*“However, that provision is **subject to compliance with the conditions referred to, in particular, in Chapter IV of the Directive.** Article 7(1)(c) of the Directive forms part of those conditions and allows MS to require evidence that the sponsor has stable and regular resources which are sufficient to maintain himself and the members of his family without recourse to the social assistance system of the MS concerned. That provision also states that MS are to evaluate those resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members”*.

(See: C-578/08, 4th March 2010, paras. 41/42)

Chakroun v Minister van Buitenlandse Zaken (Contd.)

- “Since **authorisation of family reunification is the general rule**, the faculty provided for in Article 7(1)(c) of the Directive must be interpreted strictly.
- (...), **the margin for manoeuvre which the MS are recognised as having must not be used by them in a manner which would undermine the objective of the Directive**, which is to promote family reunification, and the effectiveness thereof.
- (...) **measures concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life** enshrined in many instruments of international law.
- **The Directive respects the fundamental rights and observes the principles recognised in particular in Article 8 of the ECHR and in the Charter**. It follows that the provisions of the Directive, particularly Article 7(1)(c) thereof, must be interpreted in the light of the fundamental rights and, more particularly, in the light of the right to respect for family life enshrined in both the ECHR and the Charter. (...).”

(See: C-578/08, 4th March 2010, paras. 43/44)

Chakroun v Minister van Buitenlandse Zaken (Contd.)

Article 2(d) of Directive 2003/86/EC defines family reunification without drawing any distinction based on the time of marriage of the spouses, since it states that that reunification must be understood as meaning the entry into and residence in the host MS by family members of a third-country national residing lawfully in that MS in order to preserve the family unit, ***‘whether the family relationship arose before or after the resident’s entry’***.

⇒ Only Article 9(2) of the Directive, which applies to refugees, provides that ***‘MS may confine the application of [the provisions of Chapter V of the Directive] to refugees whose family relationships predate their entry’***. (...).”

(See: C-578/08, 4th March 2010, paras. 43/44)

Khachab v Subdelegación del Gobierno en Álava

Article 7(1)(c) of Directive 2003/86/EC must be interpreted as *allowing the competent authorities of a MS to refuse an application for family reunification on the basis of a prospective assessment of the likelihood of the sponsor retaining, or failing to retain, the necessary stable and regular resources which are sufficient to maintain himself and the members of his family, without recourse to the social assistance system of that MS, in the year following the date of submission of that application*, that assessment being based on the pattern of the sponsor's income in the six months preceding that date.

(C-558/14, 21st April 2016, para. 48)

Family Reunification – Age Requirements

Article 4(5) Directive 2003/86/EC: ***“In order to ensure better integration and to prevent forced marriages MS may require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her”.***

“(…) that provision does not preclude a rule of national law requiring that spouses and registered partners must have reached the age of 21 by the date when the application seeking to be considered family members entitled to reunification is lodged”.

(See: *Marjan Noorzia v Bundesministerin für Inneres* (C-338/13, 17th July 2014, para. 19)

Article 15 Directive 2003/86/EC

- Not later than after five years of residence, and provided that the family member has not been granted a residence permit for reasons other than family reunification, the spouse or unmarried partner and a child who has reached majority shall be entitled, upon application, if required, to an **autonomous residence permit**, independent of that of the sponsor.
- MS may limit the granting of the residence permit (...) to the spouse or unmarried partner in cases of breakdown of the family relationship.
- MS may issue an autonomous residence permit to adult children and to relatives in the direct ascending line to whom Article 4(2) applies.

Article 15 Directive 2003/86/EC (Contd.)

- In the event of **widowhood, divorce, separation, or death of first-degree relatives in the direct ascending or descending line**, an **autonomous residence permit *may be issued***, upon application, if required, to persons who have entered by virtue of family reunification.
- Member States ***shall*** lay down provisions ensuring the granting of an autonomous residence permit in the event of ***particularly difficult circumstances***.



Irregular Migration & Return

- **Employer Sanctions Directive 2009/52/EC**
- **Return Directive 2008/115/EC**
- **Facilitation Directive 2002/90/EC**
- **Carrier Sanctions Directive 2001/51/EC**

Return Directive – **General Principles**

Z. Zh. v Staatssecretaris voor Veiligheid en Justitie
(C-554/13, 11th June 2015, paras. 47/48):

*“In accordance with Article 79(2) TFEU, the objective of Directive 2008/115 is, as is apparent from recitals 2 and 11 in the preamble thereto, to **establish an effective removal and repatriation policy**, based on **common standards and common legal safeguards**, **for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity** (see judgment in *Mahdi*, C-146/14, para. 38)”*.

*“(...) in the EU context and particularly when relied upon as a justification for derogating from an obligation designed to ensure that the fundamental rights of third-country nationals are respected when they are removed from the EU, those **requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each MS without any control by the institutions of the EU** (see, by analogy, judgment in *Gaydarov*, C-430/10, para. 32)”*.

Return Directive – Definition of ‘illegal stay’

According to Article 3(2) ‘illegal stay’ means:

⇒ the presence on the territory of a MS, of a third-country national who **does not fulfil**, or **no longer fulfils** the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that MS

It follows from that definition that any third-country national who is present on the territory of a MS without fulfilling the conditions for entry, stay or residence there is, by virtue of that fact alone, staying there illegally, without such presence being subject to a condition requiring a minimum duration or an intention to remain on that territory. (...).”

(See: *Affum v Préfet du Pas-de-Calais & anor*, C-47/15, 7th June 2016, para. 48)

Return Directive – Detention

*“Directive 2008/115 must be interpreted as **precluding legislation** of a MS **which permits a third country national** in respect of whom the return procedure established by that directive has not yet been completed **to be imprisoned merely on account of illegal entry across an internal border**, resulting in an illegal stay.*

That interpretation also applies where the national concerned may be taken back by another MS pursuant to an agreement or arrangement within the meaning of Article 6(3) of the directive”.

*(See: **Affum v Préfet du Pas-de-Calais & anor**, C-47/15, 7th June 2016, para. 93)*

Return Directive – **Voluntary Departure**

Article 7(1): A return decision shall provide for an appropriate ***period for voluntary departure of between seven and thirty days***, (...).

Article 7(2): MS ***shall***, where necessary, ***extend the period for voluntary departure*** by an appropriate period, ***taking into account the specific circumstances of the individual case***, such as the length of stay, the existence of children attending school and the existence of other family and social links.

Article 7(3): Certain ***obligations aimed at avoiding the risk of absconding***, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure.

Voluntary Departure (Contd.)

Article 7(4): *“If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, MS may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days”*.

⇒ *it is only in particular circumstances, such as where there is a risk to public policy, that MS may grant a period shorter than seven days for voluntary departure or even refrain from granting such a period* (see, to that effect, judgment in *El Dridi*, C-61/11, para 37). (...), to be able to rely on the derogation provided for in that provision on the ground that there is a risk to public policy, a **MS must be able to prove that the person concerned in fact constitutes such a risk**

Z. Zh. v Staatssecretaris voor Veiligheid en Justitie
(C-554/13, 11th June 2015)

‘Closing the Circle’ – Non-Refoulement

Article 5 of Directive 2008/115 requires that: ***“When implementing this Directive, Member States shall take due account of:***

- (a) the best interests of the child;***
- (b) family life;***
- (c) the state of health of the third-country national concerned,***

and respect the principle of non-refoulement”.

C-562/13: *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida*

Para. 63: “Articles 5 and 13 of Directive 2008/115, taken in conjunction with Articles 19(2) and 47 of the Charter and Article 14(1)(b) of that directive, are to be interpreted as ***precluding national legislation*** which:

- does not endow with ***suspensive effect an appeal against a decision ordering a third country national suffering from a serious illness to leave the territory of a MS***, where the enforcement of that decision may expose that third country national to a **serious risk of grave and irreversible deterioration in his state of health**, and
- does not make **provision**, in so far as possible, ***for the basic needs of such a third country national to be met***, in order to ensure that that person may in fact avail himself of **emergency health care and essential treatment of illness during the period in which that MS is required to postpone removal** of the third country national following the lodging of the appeal.

A person wearing glasses is shown in profile on the left side of the frame, holding a document. Their right hand is resting on a window frame. The background is a bright, slightly blurred window with vertical panes. The text 'THANK YOU' and 'QUESTIONS?' is overlaid in the center in a bold, red, sans-serif font.

THANK YOU
QUESTIONS?