European Asylum Support Office

EASO EXPERT PANELS

A webinar series for judicial professionals

Balancing mutual trust and fundamental rights in inadmissibility cases: An increasing challenge for international protection judges?

Background information for the Pilot session
18 June 2021, 9:30 – 11:30

Introduction

In accordance with its mandate to support judicial training in the field of international protection[1] and the wishes expressed by the EASO Courts and Tribunals Network[2], EASO is increasing the roll-out effect of its Professional Development Activities through "EASO Expert Panels" online sessions. This new format is to allow members of courts and tribunals to deepen their expert knowledge on specific areas of the CEAS, through Expert Panels involving a wide range of judicial professionals and experts.

Amongst the various **topics proposed by the Network**, the following have been selected for this pilot session:

- "Claims related to 'extreme material poverty' in inadmissibility cases - interpreting the decision of the CJEU in Joined cases C-297/17, C-318/17, C-319/17 and 438/17 Ibrahim et al"
- "Systemic deficiencies and the principle of mutual trust in Dublin III transfer appeals"
- "The inadmissibility of applications under art. 33 of the procedures directive 2013/32/EU"

Framing the topic

Article 33(2)(a) of the 'Procedures Directive' extends the option, previously provided for by Directive 2005/85, to reject an application as being inadmissible where another Member State (MS) had previously granted refugee status, in also allowing such rejection where subsidiary protection had been granted.

[1] See article 6 of the EASO Regulation
[2] As proposed by the Network during last ACPM. See EASO Courts and Tribunals Network, Report of the Annual Coordination and Planning Meeting, 23-24 January 2020, p. 17.

In such scenarios, in line with the foundations of the Dublin III Regulation, the principle of *mutual trust* applies. According to this principle, all Member States should be considered as compliant with EU law and fundamental rights, and thus as safe countries. This means that in practice, the transfer of an applicant for IP or of a beneficiary of IP to the responsible Member State should be done without the in-merit examination of their claim.

However, inter-state trust and the presumption of conformity with human rights is not absolute. Notably, Article 4 of the Charter (and the corresponding Article 3 of the ECHR) has been recognised by the CJEU to act as a barrier to a Dublin transfer or to a rejection of the application for IP as inadmissible, in both systemic deficiencies and individual violations cases. The expected living conditions of applicants of and beneficiaries of IP in that MS can represent such a barrier.

Several questions arise with regards to the practical application of such an exception, but also to its interaction with other EU law provisions and national-law particularities (for instance, with regards to subsequent applications). The case-law of the two European courts provide some answers, but other issues still remain unsolved.

The aim of this first session of EASO Expert Panels is to examine these issues in depth with the help of qualified experts in the field.

Relevant legal provisions[3] and European case-law[4]

Relevant legal provisions	Case-law of the CJEU and ECtHR
Article 33(2)(a) of Directive 2013/32	**CJEU: *Ibrahim and Others* [GC] - 19/03/2019** An applicant for asylum may be transferred to the Member State which is normally responsible for processing his application or which has already granted him subsidiary protection unless the expected living conditions for beneficiaries of international protection would expose him there to a situation of extreme material poverty, in breach of the prohibition of inhuman or degrading treatment.
	CJEU: *Abubacarr Jawo* [GC] - 19/03/2019

[3] For the full text of the legal provisions see Annex I hereunder.
[4] For details on the cases decided by the CJEU and the ECtHR see Annex II hereunder.

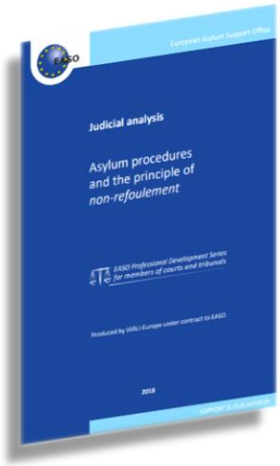
Article 25(2) of Directive 2005/85/EC	An asylum seeker may be transferred to the Member State which is normally responsible for processing his application or which has already granted him subsidiary protection unless the expected living conditions of beneficiaries of international protection would expose him there to a situation of extreme material poverty, contrary to the prohibition of inhuman or degrading treatment.
Article 4 of the Charter of Fundamental Rights of the EU	**CJEU: *Hamed and Omar* [order]- 13/11/2019** Article 33(2)(a) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection must be interpreted as precluding a Member State from exercising the option under that provision to reject an application for international protection as being inadmissible on the ground that the applicant has already been granted refugee status by another Member State where the living conditions which the applicant could be expected to encounter as a refugee in that other Member State would expose him or her to a serious risk of suffering inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union.
Article 18 of the Charter of Fundamental Rights of the EU **Article 3 (2) of EU Regulation 604/2013 (Dublin III)**	**CJUE, M.S. and Others v Minister for Justice and Equality - 10/12/2020** Article 25(2) of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status must be interpreted as not precluding legislation of a Member State which is subject to Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, but which is not bound by Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, in accordance with which an application for international protection is considered to be inadmissible where the applicant benefits from subsidiary protection status in another Member State.
	ECtHR, Ilias and Ahmed v. Hungary [GC] - 21/11/2019 In all cases of removal of an asylum-seeker from a Contracting State to a third intermediary country without examination of the asylum

Article 3 of the European Convention on Human Rights	requests on the merits, regardless of whether the receiving third country is an EU member State or not or whether it is a State Party to the Convention or not, it was the duty of the removing State to examine thoroughly the question whether or not there was a real risk of the asylum-seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against refoulement, that is, being removed, directly or indirectly, to his or her country of origin without a proper evaluation of the risks he or she faced from the standpoint of Article 3. If it was established that the existing guarantees in this regard were insufficient, Article 3 implied a duty that the asylum-seekers should not be removed to the third country concerned. In addition to this main question, where the alleged risk of being subjected to treatment contrary to Article 3 concerned, for example, conditions of detention or living conditions for asylum-seekers in a receiving third country, that risk was also to be assessed by the expelling State.
	ECtHR, M.T. v. the Netherlands [dec] - 23/03/2021 Transfer to Italy of asylum seeker and her minor children pursuant to Dublin III Regulation, not involving severe risk of hardship in light of recent amendments to Italian reception regime: inadmissible. By virtue of the latest legislative amendments to the Italian reception system which had taken effect on 22 October 2020 - Decree no. 130/2020 subsequently converted to Law no. 173/2020- applicants for international protection, within the limits of places available, had access again to the second-tier reception facilities within the SAI (*Sistema di accoglienza e integrazione*); a modification welcomed by UNHCR. In view of the above, the Court considered that the applicant had not demonstrated that her future prospects, if transferred to Italy with her children, whether looked at from a material, physical or psychological perspective, disclosed a sufficiently real and imminent risk of hardship that was severe enough to fall within the scope of Article 3.

Relevant national case-law

For an overview of relevant national case-law, see Annex III hereunder.

EASO materials examining the topic



- **EASO Judicial Analysis on Asylum procedures and the principle of non-refoulement, 2018** (*currently being updated*)

Part 5: procedures at the administrative level, Section 5.2. Inadmissible application (pp. 112 et ss.), in particular sub-section 5.2.2.1. International protection granted by another Member State, pp. 114-116.

Issues proposed for debate

The questions asked by registered participants to the panel of experts have been compiled and grouped under the following categories (for the list of questions, see Annex IV hereunder).

A. *Introduction of the topic/ framing the topic*
B. *Procedural issues (proof, sources) in the decision-making process of balancing mutual trust*
C. *The specific role of judges (national and European)*
D. *Vulnerability aspects in the decision-making process*
E. *Questions pertaining to concrete examples*
F. *Transversal/other procedural issues*

Experts shall address the questions during the online session, aiming to cover as much as possible all issues raised, within the time-limits of the webinar.

ANNEX I
Relevant legal provisions

Article 33(2)(a) of Directive 2013/32 (the 'Procedures Directive')[5]:

'Article 33 - Inadmissible applications

[…]

2. Member States may consider an application for international protection as inadmissible only if:

(a) another Member State has granted international protection;

[…]

(d) the application is a subsequent application, where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95/EU have arisen or have been presented by the applicant;

[…]'

Article 25(2) of Directive 2005/85/EC[6]

'Article 25 - Inadmissible applications

[…]

2. Member States may consider an application for asylum as inadmissible pursuant to this Article if:

(a) another Member State has granted refugee status;

[…]

(f) the applicant has lodged an identical application after a final decision;

[…]'

[5] Directive 2013/32
[6] Directive 2005/85/EC

Article 4 of the Charter of Fundamental Rights of the EU[7]

Prohibition of torture and inhuman or degrading treatment or punishment

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

Article 18 of the Charter of Fundamental Rights of the EU[8]

Right to asylum

'The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties').'

Article 3 (2) of EU Regulation 604/2013[9] **(Dublin III)**

Access to the procedure for examining an application for international protection

2. […]

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

[…]

Article 3 of the European Convention on Human Rights (ECHR)[10]

Prohibition of torture

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

[7] Charter of Fundamental Rights of the EU
[8] Charter of Fundamental Rights of the EU
[9] Regulation 604/2013
[10] European Convention on Human Rights

ANNEX II
Relevant case-law of the CJEU and ECtHR

- **CJEU:** *Ibrahim and Others*, **Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17[11], GC, judgment of 19/03/2019**

Facts, national proceedings

In the cases in the main proceedings, subsidiary protection had been granted to a number of third-country nationals, in Poland and Bulgaria respectively. Subsequently, those persons had travelled to Germany, where they had submitted applications for asylum between 2012 and 2013.

After unsuccessfully requesting the competent Polish and Bulgarian authorities to take back those persons, the German authorities rejected the applications for asylum without examining their substance, which the parties concerned challenged by court proceedings.

Preliminary questions submitted to the CJEU

'(1) Does the transitional provision contained in the first paragraph of Article 52 of [the Procedures Directive] preclude the application of national legislation which, in transposition of the power conferred in Article 33(2)(a) of [the Procedures Directive], which is more extensive than that conferred in the directive that preceded it, provides that an application for international protection is inadmissible if the applicant has been granted subsidiary protection in another Member State, in so far as the national legislation, in the absence of any national transitional provisions, is also applicable even to applications lodged before 20 July 2015?

In particular, does the transitional provision contained in the first paragraph of Article 52 of [the Procedures Directive] allow the Member States, in particular, to transpose the extended power conferred in Article 33(2)(a) of [the Procedures Directive] retroactively, with the result that even applications which were lodged before that extended power was transposed into national law but which were not yet the subject of a final decision at the time of transposition are inadmissible?

(2) Does Article 33 of [the Procedures Directive] confer on the Member States a right to choose whether to reject an application for asylum as inadmissible either on the basis that responsibility lies with another Member State (the Dublin Regulation) or on the basis of Article 33(2)(a) of [the Procedures Directive]?

(3) If the answer to Question 2 is in the affirmative, does EU law prevent a Member State from transposing the power conferred by Article 33(2)(a) of [the Procedures Directive] so as to reject an

[11] CURIA - Case information (europa.eu)

application for international protection as being inadmissible on the ground that subsidiary protection has been granted in another Member State, where:

(a) the applicant seeks to have the subsidiary protection granted to him in another Member State enhanced (by recognition of refugee status) and the asylum procedure in the other Member State was (and continues to be) vitiated by systemic flaws, or

(b) the form which the international protection takes, that is to say the living conditions of those benefiting from subsidiary protection, in the other Member State which has already granted the applicant subsidiary protection,

– is contrary to Article 4 of the [Charter] and to Article 3 of the ECHR, or

– does not satisfy the requirements of Article 20 et seq. of [the Qualification Directive] but does not in and of itself infringe Article 4 of the Charter or Article 3 of the ECHR?

(4) If Question 3(b) is to be answered in the affirmative, is this also the case where, although the persons qualifying for subsidiary protection do not receive any subsistence benefits or those which they do receive are markedly inferior to those available in other Member States, they are in that regard not treated any differently from nationals of that Member State?

Reply of the CJEU to the preliminary questions

An applicant for asylum may be transferred to the Member State which is normally responsible for processing his application or which has already granted him subsidiary protection unless the expected living conditions for beneficiaries of international protection would expose him there to a situation of extreme material poverty, in breach of the prohibition of inhuman or degrading treatment.

The Court held that, where a third-country national has been granted subsidiary protection and subsequently lodges an application for asylum in another Member State, that State can dismiss that application as being inadmissible, without being obliged or being able to have recourse, as the first resort, to the take charge or take back procedures provided for by Regulation No 604/2013.

Finally, the Court examined the conditions under which a Member State could be precluded, pursuant to the Charter of Fundamental Rights of the European Union, from exercising the option granted by Article 33(2)(a) of the Procedures Directive. In that regard, making reference to its *Jawo* judgment of the same day, the Court stated that when an applicant faces, in a Member State, a risk of suffering inhuman or degrading treatment in breach of Article 4 of the Charter of Fundamental Rights, that precludes his transfer to that State, regardless of whether that risk exists at the very time of transfer, in the course of the asylum procedure or on the conclusion of that procedure. By analogy, the Court held that a Member State may not rely on the additional ground for inadmissibility where the expected living conditions of the applicant in the Member State that had granted him subsidiary protection would expose him, as a beneficiary of that protection, to a serious risk of inhuman or degrading treatment. The deficiencies concerned must, however, attain a particularly high level of severity, characterised by the exposure of the person concerned to a situation of extreme material poverty.

Likewise, the fact that, in the Member State which granted the party concerned subsidiary protection, the beneficiaries of such protection do not receive any subsistence allowance or such allowance as they receive is markedly inferior to that in other Member States, though they are not treated differently from nationals of the Member State concerned, does not allow a finding of a breach of Article 4, unless the applicant is, because of his particular vulnerability and regardless of his personal will and choices, in a situation of extreme material poverty.

Moreover, the Court stated that, where the Member State which granted subsidiary protection systematically refuses, without real examination, to grant refugee status to applicants who nevertheless fulfil the conditions laid down in Directive 2011/95, the treatment of applicants cannot be considered to comply with the obligations arising from Article 18 of the Charter of Fundamental rights concerning the right to asylum. However, it is for the first Member State to resume the procedure for the obtaining of refugee status; the Member State to which the new application has been lodged may, for its part, reject it on the basis of Article 33(2)(a) of the Procedures Directive, read in the light of the principle of mutual trust.

- **CJEU:** *Abubacarr Jawo*, **Case C-163/17[12], GC, judgment of 19/03/2019**

Facts, national proceedings

In the present case, a Gambian national had entered the European Union via Italy and had lodged an application for asylum there before travelling on to Germany, where he made a new application. After having requested the Italian authorities to take back the person concerned, the German authorities had rejected his application for asylum and ordered his removal to Italy. A first transfer attempt had failed because the applicant was not present at the accommodation centre that had been allocated to him. The German authorities, having therefore found that he had absconded, had informed the Italian authorities that it was not possible to carry out the transfer and that the time limit had been extended, in accordance with Article 29(2) of the Dublin III Regulation. That article provides that the time limit for carrying out the transfer is 6 months, but that it may be extended up to a maximum of 18 months if the applicant absconds.

Subsequently, the person concerned had stated that he had visited a friend and that he did not know that it was necessary to report his absences. At the same time, he had brought an action against the transfer decision and, after that action was dismissed, he brought an appeal before the referring court. In that appeal, he claimed that, since he had not absconded, the German authorities were not entitled to extend the time limit for his transfer to Italy.

He also relied on the existence, in Italy, of systemic flaws in the asylum system that would impede his transfer to that State.

[12] CURIA - Case information (europa.eu)

Preliminary questions submitted to the CJEU[13]

Is transfer of the asylum seeker to the Member State responsible inadmissible if, in the event of international protection status being granted, he would be exposed there, in view of the living conditions then to be expected, to a serious risk of experiencing treatment referred to in Article 4 of the [Charter]?

Does this question as formulated still fall within the scope of application of EU law?

According to which criteria under EU law are the living conditions of a person recognised as a beneficiary of international protection to be assessed?

Reply of the CJEU to the preliminary questions

An asylum seeker may be transferred to the Member State which is normally responsible for processing his application or which has already granted him subsidiary protection unless the expected living conditions of beneficiaries of international protection would expose him there to a situation of extreme material poverty, contrary to the prohibition of inhuman or degrading treatment.

The Court examined the question whether Article 4 of the Charter of Fundamental Rights precludes the transfer of an applicant for international protection, where the living conditions of beneficiaries of such protection, in the Member State normally responsible for examining his application, are likely to constitute inhuman or degrading treatment.

First of all, the Court clarified that that question falls within the scope of EU law. Next, it emphasised that, in the context of the Common European Asylum System, and in particular the Dublin III Regulation, based on the principle of mutual trust, it must be presumed that the treatment of applicants respects their fundamental rights. However, as the Court previously held in the judgment in NS and Others (4) and as codified in Article 3(2) of the Dublin III Regulation, it is not inconceivable that the applicant risks, on account of, inter alia, systemic or generalised flaws or flaws affecting certain groups of people in the Member State to which the transfer is envisaged, suffering inhuman or degrading treatment in that Member State, which thus impedes that transfer. In that regard, although Article 3(2) of the Dublin III Regulation envisages only the situation underlying the judgment in NS and Others, in which that risk stems from systemic flaws during the asylum procedure, a transfer is however ruled out where there are substantial grounds for believing that such a risk is run, whether it is at the very moment of the transfer, during the asylum procedure or following it.

Lastly, the Court indicated that the existence of the alleged flaws must be assessed, by the national court or tribunal hearing an action challenging a transfer decision, on the basis of information that is objective, reliable, specific and properly updated and having regard to the standard of protection of fundamental rights guaranteed by EU law. Those flaws must attain a particularly high level of severity. As regards the living conditions of beneficiaries of international protection, that level is attained where

[13] Only those relevant for the topic under consideration.

the indifference of the national authorities would result in a person finding himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs and that undermines his physical or mental health or his human dignity. On the other hand, the fact that forms of support in family structures, available to the nationals of the Member State concerned to deal with the inadequacies of the social system, are generally lacking for the beneficiaries of international protection is not sufficient ground for finding that the applicant would, in the event of transfer to that Member State, be faced with such a situation. Likewise, the existence of shortcomings in the implementation of programmes to integrate those beneficiaries is not sufficient ground for such a finding. In any event, the mere fact that social protection and/or living conditions are more favourable in the requesting Member State than the Member State normally responsible for examining the application is not sufficient to conclude that there is a risk of inhuman or degrading treatment in the second Member State.

- **CJEU:** *Hamed and Omar*, **Joined Cases C-540/17 and C-541/17[14], order of 13/11/2019**

Facts, national proceedings

[only available in French]

Les défendeurs au principal sont deux ressortissants syriens qui, après avoir obtenu le statut de réfugié en Bulgarie, sont entrés en Allemagne au cours de l'année 2014 et y ont introduit une nouvelle demande d'asile.

Par des décisions des 24 novembre 2014 et 6 mai 2015, l'Office a rejeté ces demandes d'asile comme étant irrecevables au motif que les défendeurs au principal s'étaient déjà vu accorder le statut de réfugié, et a ordonné la reconduite de l'un d'entre eux à la frontière bulgare et averti l'autre qu'il s'exposait à une telle reconduite.

Par des jugements rendus respectivement le 21 juillet 2015 et le 9 février 2016, le Verwaltungsgericht Wiesbaden (tribunal administratif de Wiesbaden, Allemagne) et le Verwaltungsgericht Gießen (tribunal administratif de Giessen, Allemagne) ont rejeté les recours formés contre ces décisions.

Par des arrêts du 4 novembre 2016, le Hessischer Verwaltungsgerichtshof (tribunal administratif supérieur de Hesse, Allemagne) a annulé ces jugements et a enjoint l'Office d'ouvrir des procédures d'asile. Cette juridiction a, en effet, estimé que l'organisation de l'asile en Bulgarie présentait des défaillances systémiques pour les personnes dont le statut de réfugié a été reconnu et que, dans ces conditions, l'article 60, paragraphe 1, de l'Aufenthaltsgesetz et l'article 29, paragraphe 1, point 2, de l'AsylG devaient faire l'objet d'une interprétation conforme au droit de l'Union et aux droits de l'homme. Or, selon ladite juridiction, il serait incohérent de refuser à un demandeur d'asile ne pouvant, en raison de telles défaillances, être renvoyé dans l'État membre qui lui a reconnu le statut

[14] CURIA - Case information (europa.eu)

de réfugié l'ouverture d'une nouvelle procédure d'asile dans un autre État membre et de l'exclure, de ce fait, des bénéfices liés à la reconnaissance du statut de réfugié.

La République fédérale d'Allemagne a formé des recours en Revision contre ces arrêts devant le Bundesverwaltungsgericht (Cour administrative fédérale, Allemagne). Elle soutient notamment que les arguments tirés des conditions de vie en Bulgarie des personnes auxquelles le statut de réfugié a été reconnu et du non-respect par cet État membre des normes minimales prévues à cet égard par le droit de l'Union doivent être pris en considération par les autorités allemandes uniquement dans le cadre de l'examen d'interdictions de reconduite à la frontière et ne justifient pas l'obligation d'accomplir de nouvelles procédures d'asile en Allemagne.

Le Bundesverwaltungsgericht (Cour administrative fédérale) relève que, d'après les constatations de fait effectuées par la juridiction d'appel, le renvoi de réfugiés vers la Bulgarie est potentiellement contraire à l'article 4 de la Charte et à l'article 3 de la CEDH. En effet, les personnes auxquelles le statut de réfugié a été reconnu par cet État membre n'y auraient aucun droit à un hébergement dans un logement ni aucune chance réelle de se constituer un minimum vital. Ils ne rempliraient pas les conditions d'accès à un logement dans un logement municipal destiné aux personnes sans abri ou dans une habitation sociale. Or, dépourvus de lieu d'habitation, ils ne pourraient obtenir de certificat d'inscription, ce qui rendrait difficile l'établissement d'une pièce d'identité bulgare. En outre, ils n'auraient aucun accès aux prestations publiques ou médicales et ne pourraient exercer leurs droits. La juridiction d'appel n'ayant cependant pas porté d'appréciation en fait définitive sur l'atteinte qu'une reconduite des défendeurs au principal vers la Bulgarie porterait à l'article 4 de la Charte et à l'article 3 de la CEDH, l'affaire devrait être renvoyée devant celle-ci dans l'hypothèse où la recevabilité de la nouvelle demande d'asile devrait se déterminer à l'aune de ces dispositions.

Preliminary question submitted to the CJEU

[only available in French]

« Le droit de l'Union s'oppose-t-il à ce que, dans la mise en œuvre de l'habilitation conférée par l'article 33, paragraphe 2, sous a), de la directive [procédures] ou encore par la disposition devancière de l'article 25, paragraphe 2, sous a), de la directive [2005/85], un État membre (en l'espèce la République fédérale d'Allemagne) rejette une demande de protection internationale pour irrecevabilité en raison de la reconnaissance du statut de réfugié dans un autre État membre (en l'espèce la Bulgarie), lorsque la consistance de la protection internationale, et plus précisément les conditions d'existence des personnes qui obtiennent le statut de réfugié, ne satisfait pas, dans l'autre État membre qui a déjà accordé au demandeur une protection internationale (en l'espèce la Bulgarie), à l'article 4 de la [Charte] et à l'article 3 de la CEDH ? »

Reply of the CJEU to the preliminary question

Article 33(2)(a) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection must be interpreted as precluding a Member State from exercising the option under that provision to reject an

application for international protection as being inadmissible on the ground that the applicant has already been granted refugee status by another Member State where the living conditions which the applicant could be expected to encounter as a refugee in that other Member State would expose him or her to a serious risk of suffering inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union.

- **CJUE,** *M.S. and Others v Minister for Justice and Equality*, **Case C-616/19[15], Judgment of 10/12/2020**

Facts, national proceedings

M.S., M.W. and G.S. are third-country nationals who, having been granted subsidiary protection status in Italy, entered Ireland in the course of 2017 and there submitted applications for international protection to the International Protection Office (Ireland).

By decisions of 1 December 2017, 2 February 2018 and 29 June 2018, the International Protection Office rejected those applications on the ground that the interested parties had already been granted subsidiary protection status in another Member State, namely in Italy.

M.S., M.W. and G.S. each brought appeals against those decisions to the International Protection Appeals Tribunal (Ireland) which, by decisions of 23 May, 28 September and 18 October 2018 respectively, dismissed the appeals.

The applicants in the main proceedings brought actions before the High Court (Ireland) to annul those decisions.

Referring to paragraphs 58 and 71 of the judgment of 19 March 2019, Ibrahim and Others (C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219), the referring court observes that Article 33(2)(a) of Directive 2013/32 permits a Member State to reject an application for asylum as being inadmissible where the applicant has been granted international protection by another Member State, whether in the form of refugee status or subsidiary protection status. However, under Article 25(2)(a) of Directive 2005/85, that discretionary power was limited to cases where the applicant had been granted refugee status in another Member State.

Thus, under the combined application of Directive 2013/32 and the Dublin III Regulation, a Member State is not required to process an application for international protection in a case where that protection has already been granted in another Member State.

However, the referring court states that Ireland, whilst taking part in the adoption and application of the Dublin III Regulation, decided not to take part in the adoption and application of Directive 2013/32, with the result that that Member State is still bound by Directive 2005/85.

[15] CURIA - Case information (europa.eu)

Preliminary question submitted to the CJEU

Is Article 25 of Directive 2005/85 to be interpreted so as to preclude a Member State which is not bound by [Directive 2013/32] but is bound by [the Dublin III Regulation], from adopting legislation such as that at issue in the present case which deems inadmissible an application for asylum by a third-country national who has previously been granted subsidiary protection by another Member State?'

Where a third-country national has been granted international protection in the form of subsidiary protection in a first Member State, and moves to the territory of a second Member State, does the making of a further application for international protection in the second Member State constitute an abuse of rights such that the second Member State is permitted to adopt a measure providing that such a subsequent application is inadmissible?

Reply of the CJEU to the preliminary question

Article 25(2) of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status must be interpreted as not precluding legislation of a Member State which is subject to Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, but which is not bound by Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, in accordance with which an application for international protection is considered to be inadmissible where the applicant benefits from subsidiary protection status in another Member State.

- **ECtHR,** *Ilias and Ahmed v. Hungary* **[GC] - 47287/15[16], Judgment of 21/11/2019**

Facts

The applicants, Bangladeshi nationals, arrived in the transit zone situated on the border between Hungary and Serbia and submitted applications for asylum. Their applications were rejected and they were escorted back to Serbia.

In the Convention proceedings, they complained, inter alia, that their deprivation of liberty in the transit zone had been unlawful, that the conditions of their allegedly unlawful detention had been inadequate, and that their expulsion to Serbia had exposed them to a real risk of inhuman and degrading treatment.

[16] ILIAS AND AHMED v. HUNGARY (coe.int)

Law – Article 3 - General principles

The content of the expelling State's duties under Article 3 differed depending on whether the receiving country was the asylum-seeker's country of origin or a third country and, in the latter situation, on whether the expelling State had dealt with the merits of the asylum application or not.

The Court added that in all cases of removal of an asylum-seeker from a Contracting State to a third intermediary country without examination of the asylum requests on the merits, regardless of whether the receiving third country is an EU member State or not or whether it is a State Party to the Convention or not, it was the duty of the removing State to examine thoroughly the question whether or not there was a real risk of the asylum-seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against refoulement, that is, being removed, directly or indirectly, to his or her country of origin without a proper evaluation of the risks he or she faced from the standpoint of Article 3. If it was established that the existing guarantees in this regard were insufficient, Article 3 implied a duty that the asylum-seekers should not be removed to the third country concerned.

In addition to this main question, where the alleged risk of being subjected to treatment contrary to Article 3 concerned, for example, conditions of detention or living conditions for asylum-seekers in a receiving third country, that risk was also to be assessed by the expelling State.

If it was found ex post facto in national or international proceedings that the asylum-seeker did not run a risk in his or her country of origin, this could not serve to absolve the State retrospectively of the procedural duty described above. If it were otherwise, asylum-seekers who faced deadly danger in their country of origin could be lawfully and summarily removed to "unsafe" third countries. Such an approach would in practice render meaningless the prohibition of ill-treatment in cases of expulsion of asylum-seekers.

Findings in the present case

In the present case, based on the Hungarian Asylum Act which provided for the inadmissibility of asylum requests in a number of circumstances and reflected the choices made by Hungary in transposing the relevant EU law, the Hungarian authorities had not examined the applicants' asylum requests on the merits – that is to say, whether the applicants risked ill-treatment in their country of origin, Bangladesh. Instead, the Hungarian authorities had declared the asylum requests inadmissible on the basis that the applicants had come from Serbia, which, according to the Hungarian authorities had been a safe third country and, therefore, could take in charge the examination of the applicants' asylum claims on the merits.

As a consequence, the thrust of the applicants' complaints under Article 3 is that they had been removed despite clear indications that they would not have access in Serbia to an adequate asylum procedure capable of protecting them against refoulement.

The Hungarian authorities had relied on a list of "safe third countries" established by a government decree which had put in place a presumption that the listed countries were safe.

The Convention did not prevent Contracting States from establishing lists of countries which were presumed safe for asylum-seekers. Member States of the European Union did so, in particular, under the Asylum Procedures Directive. However, any presumption that a particular country was "safe", if it had been relied upon in decisions concerning an individual asylum-seeker, had to be sufficiently supported at the outset by an analysis of the relevant conditions in that country and, in particular, of its asylum system. However, in the instant case, the decision-making process in that respect had not involved a thorough assessment of the risk that was posed by the lack of an effective access to asylum proceedings in Serbia, including the risk of refoulement.

Moreover, in the applicants' case the expulsion decisions had disregarded the authoritative findings of the UNHCR as to a real risk of denial of access to an effective asylum procedure in Serbia and summary removal from Serbia to North Macedonia and then to Greece, and, therefore, of being subjected in Greece to conditions incompatible with Article 3.

Finally, as regards the Government's argument that all parties to the Convention, including Serbia, North Macedonia and Greece, had the same obligations and that Hungary would not bear an additional burden to compensate for their deficient asylum systems, this was not a sufficient argument to justify a failure by Hungary – which had opted for not examining the merits of the applicants' asylum claims – to discharge its own procedural obligation, stemming from the absolute nature of the prohibition of ill-treatment under Article 3.

- **ECtHR,** *M.T. v. the Netherlands* **[dec] - 46595/19[17], inadmissibility decision of 23/03/2021**

Facts

The applicant, an Eritrean national, and her two minor daughters, entered the Netherlands on 21 March 2018. Her asylum application was not examined by the Dutch authorities as it was found that the Italian authorities had been responsible for its processing pursuant to the Dublin III Regulation. It was held that the entry into force of Italian Law No. 132/2018, the "Salvini Decree" (which denied applicants for international protection access to second-tier receptions facilities) did not lead to the conclusion that the asylum proceedings and reception conditions in Italy were affected by such systemic shortcomings that reliance could no longer be placed on the mutual interstate trust principle.

The applicant complained that family's transfer under the Dublin III Regulation, without individual guarantees from the Italian authorities of adequate reception facilities and access to medical care, would breach Article 3 of the Convention.

Law – Article 3 - Findings in the present case

By virtue of the latest legislative amendments to the Italian reception system which had taken effect on 22 October 2020 - Decree no. 130/2020 subsequently converted to Law no. 173/2020- applicants

[17] M.T. v. THE NETHERLANDS (coe.int)

for international protection, within the limits of places available, had access again to the second-tier reception facilities within the SAI (*Sistema di accoglienza e integrazione*); a modification welcomed by UNHCR.

More specifically in the present case:

– As confirmed by the Italian Government, if transferred to Italy under the Dublin III Regulation, under the new regime, the applicant would be eligible for placement in the SAI network and would be given priority as, being a single mother with two minor children, she belonged to one of the categories of persons defined as "vulnerable" in Italian legislation.

– Even if, pending placement in SAI facilities, they would initially be accommodated in first-tier reception facilities, the latest amendments also included an extension of the range of services to be provided in those facilities and, according to UNHCR, effective access to essential services was guaranteed as the right of applicants for international protection to register their residence had been restored.

– There was no reason to assume that the Dutch authorities would not inform their Italian counterparts of their scheduled arrival date in Italy, their situation and any of their medical needs, as they had given such information previously. Further, and in this respect, the applicant had not argued that her youngest daughter required specialist treatment unavailable in Italy.

In view of the above, the Court considered that the applicant had not demonstrated that her future prospects, if transferred to Italy with her children, whether looked at from a material, physical or psychological perspective, disclosed a sufficiently real and imminent risk of hardship that was severe enough to fall within the scope of Article 3.

The Court also decided to lift the interim measure indicated to the respondent Government under Rule 39 of the Rules of Court.

Annex III
Relevant national case-law

Prior to the CJEU judgment *Ibrahim and others*

- **Council of State (Conseil d'Etat) (France), La Cimade et M. XXXXXXX**, nos 349735 and 349736, judgment of 13/11/2013[18]
- **Council of State (Conseil d'Etat) (France), OFPRA c M. S.**, No 369021, judgment of 17/06/2015[19]
- **Higher Administrative Court of Hessen (Germany),** 3 A 1292/16.A, judgment of 4/11/2016[20]
- **Supreme Administrative Court (Austria), A., B., C. vs Federal Administrative Court,** W205 2200857-1/7E, decision of 04/03/2019[21]

Subsequent to the CJEU judgment *Ibrahim and others*

- **Federal Administrative Court [Bundesverwaltungsgericht] (Germany), Applicant (Syria) vs Hessian Higher Administrative Court,** BVerwG 1 C 34.19 (1 C 37.16) VGH 3 A 1292/16.A, judgment of 20/05/2020[22]
- **Regional Administrative Court [Verwaltungsgerichte] (Germany), Applicant (Syria) vs Federal Office for Migration and Refugees (BAMF),** 1 K 373/18.A, judgment of 03/07/2020[23]
- **Regional Administrative Court [Verwaltungsgerichte] (Germany), Applicant (Somalia) vs Federal Office for Migration and Refugees (BAMF),** 6 A 243/20, judgment of 07/07/2020[24]
- **Council for Alien Law Litigation (Belgium), affaire X / X n° 239 684**, judgment of 13/08/2020[25]
- **Council for Alien Law Litigation (Belgium), affaire X /I no° 242 096,** judgment of 12/10/2020[26]

[18] See JA on Asylum procedures and the principle of non-refoulement, p. 115.
[19] See JA on Asylum procedures and the principle of non-refoulement, p. 115.
[20] See JA on Asylum procedures and the principle of non-refoulement, p. 116.
[21] https://caselaw.easo.europa.eu/pages/viewcaselaw.aspx?CaseLawID=931.
[22] https://caselaw.easo.europa.eu/pages/viewcaselaw.aspx?CaseLawID=1597.
[23] https://caselaw.easo.europa.eu/pages/viewcaselaw.aspx?CaseLawID=1324.
[24] https://caselaw.easo.europa.eu/pages/viewcaselaw.aspx?CaseLawID=1326.
[25] Microsoft Word - A239684.AN (rvv-cce.be)
[26] a242096.an_.pdf (rvv-cce.be)

- **Supreme Administrative Court [Nejvyšší správní soud] (Czech Republic), A.H. (Syria) vs Czech Ministry of the Interior (Ministerstvo vnitra**), 5 Azs 65/2020-31, judgment of 09/11/2020[27]
- **High Administrative Courts (Oberverwaltungsgerichte/Verwaltungsgerichtshöfe) (Germany), Applicant (Eritrea) vs Federal Office for Migration and Refugees (BAMF),** 11 A 1564 / 20.A, judgment of 21/01/2021[28]
- **Council of State [Afdeling Bestuursrechtspraak van de Raad van State] (Netherlands)**, **Applicant vs The Secretary of State for Justice and Security,** judgment of 28/01/2021[29]
- **Higher Administrative Court of Lower Saxony (Germany)**, 10 LB 244/20, judgment of 19/04/2021[30]
- **High Court of Ireland (Ireland),** Mah v Minister for Justice [2021] IEHC 302], judgment of 30/04/2021[31]

[27] https://caselaw.easo.europa.eu/pages/viewcaselaw.aspx?CaseLawID=1520.
[28] https://caselaw.easo.europa.eu/pages/viewcaselaw.aspx?CaseLawID=1510.
[29] https://caselaw.easo.europa.eu/pages/viewcaselaw.aspx?CaseLawID=1570.
[30] ELENA Weekly Legal Update - 07 May 2021 (mailchi.mp)
[31] pdf (courts.ie)

ANNEX IV
Questions from participants

A. Introduction of the topic/ framing the topic

1) Does the importance attached to the principle of mutual confidence (trust) in the context of fundamental rights protection risk to make it overly challenging in practice to establish a real risk of an infringement of absolute fundamental rights?
2) How are we to set the limits of mutual trust?
3) Why should a judge balance mutual trust-fundamental rights in "inadmissible applications" apart from 33 (2) (a) APD?
4) Is “mutual trust” divisible (pushbacks at the border/ mutual trust when granted IP)?

B. Procedural issues (proof, sources) in the decision-making process of balancing mutual trust

1) Mutual trust is not absolute. How to act if there is reasonable doubt in the asylum system of several Member States? What means of control are available to the court?
2) What is the best way to ascertain if a person will in fact receive essential services if returned to the Member State where they have recognition as a refugee? I am also looking for good objective sources of country information besides AIDA.
3) What level of proof/evidence regarding an appellant's situation in the first Member State do you require when assessing whether they were or would be at serious risk of suffering extreme material poverty at a level that would be contrary to Art 2 CFR and Art 4 CFR falling within the exceptions considered in Ibrahim et al.
4) Is there any common European definition of 'extreme material poverty'?
5) Is the decision of MS A to grant refugee status binding for MS B, if Art. 33 para. 2 lit. a Directive 2013/32/EU cannot be applied due to an imminent danger of a breach of Art. 4 ChFR (cp. C-297/17 and C-540/17)?
6) To what extent two Member States should, or must, presume each other’s human rights observance when they co-operate cross-border with each other?

C. The specific role of judges (national and European)

1) How can a unionwide consistent case law regarding the evaluation of living conditions for asylum seekers and beneficiaries of international protection in other MS be achieved? Can (de

lege lata)/Should (de lege ferenda) the ECJ (or another EU-Court) evaluate the living conditions?

2) How active do the CJEU and ECHR want judges to be in investigating whether beneficiaries of IP can claim their rights in other MS's (no ex officio powers in The Netherlands)?

3) Which are the roles of the national courts and of the EU legislator?

4) Does the burden of proof rest solely on the applicant to show that there are deficiencies which may be systematic or generalised, or which may affect certain groups of people and which can reach the particularly high level of severity required by Article 4 of the Charter? Or is it up to the asylum authority to verify this?

5) Do you request information/assurances from the asylum authority of your Member State and/or the Member State that has granted international protection?

6) If a Judge seeks an assurance from their own Member State to ensure that a beneficiary of international protection from another Member State will not face extreme material poverty on their return to that Member State, and if the host member state refuses to seek such an assurance, should the appeal be deemed admissible?

7) The CEAS assumes that judges apply European law the same way, but the outcome of proceedings differs. How can judges prevent arbitrariness?

8) What is it like for MS-judges if other MS-judge find breaches of the Charter/Convention?

9) To what extent do the courts of different Member States disagree on the question whether or not there exist serious systemic flaws in the asylum procedure and in the reception conditions for applicants of international protection in a certain Member State that result in a risk of degrading treatment? Do you have any figures on this?

D. Vulnerability aspects in the decision-making process

1) How to better integrate vulnerability criteria into the decision making?

2) To what extent should the applicant's vulnerability influence a finding that the living conditions which they could be expected to encounter as a refugee in another Member State would expose him or her to a serious risk of suffering inhuman or degrading treatment. For example, healthcare may be available in another Member State but be more difficult to access for those with an acute mental illness.

3) Which implications does the covid-pandemic or a comparable critical situation in a country of first arrival have in this context?

4) A family is granted IP in MS 1. Then moves to MS 2 and welcomes a baby. Authorities in MS 2 declare the family's (including the baby's) application as not admissible (33§2 a)). MS 1 states that all the members of the family who were granted IP before leaving MS 1 (hence excluding the baby) will still benefit from their IP status on their return, but the baby will "only" get "equivalent" rights. Should the application of the baby have been declared admissible as it isn't granted IP in MS1?

E. Questions pertaining to concrete examples

1) How would you judge an asylum decision where no assessment has been made of the situation in Greece for IP status holders and no COI has been included in the case file?
2) How to deal with applications of Refugees that have already granted international protection especially in Greece?
3) How to decide if a family fears deportation to Afghanistan because the member state that shall take them back has ordered their deportation to Afghanistan shortly before the family had left this member state? This family is vulnerable and likely to face inhuman treatment in Afghanistan according to Art. 3 ECHR

F. Transversal/other procedural issues

1) What can be learned (what can be methodologically used) from other fields of EU law and related case law of the CJEU, where the principle of mutual trust is applicable, as well (for example: based on Framework Decision on EAW; Dublin III Regulation), for the cases on (in)admissibility decisions under Procedures Directive, taking into account also case law of the ECtHR in relation to criteria/methodology from Bivolaru et Moldovan c. France (no. 40324/16 and 12623/17) on Article 3 ECHR?
2) Could you please elaborate on the impact of rule of law crisis in some MSs on international protection procedures? In a similar vein, could you please elaborate on recent CJEU case-law concerning EAW (European arrest warant) and if it is relevant for CEAS?
3) What is the meaning of the notion: [the applicant] has "not made an application for international protection AS SOON AS POSSIBLE", used by Article 31 pct. 8 letter (h) of the Directive 2013/32/EU. Is the obligation to lodge an application for international protection "as soon as possible" decisive for the decision of the authorities to deal with the application in an accelerated procedure in order to declare it as manifestly unfounded, according to Article 32 par. (2) of the Directive?
4) If you have time and it fits your schedule, could you include the topic of subsequent applications?
5) What do you see to be the biggest challenge when it comes to subsequent applications and admissibility at the moment? Are there any new "trends" or new phenomena related to subsequent applications and application grounds in Europe?