



EASO EXPERT PANELS

A webinar series for  
judicial professionals

## EASO Expert Panels in cooperation with IARMJ, CJEU & ECtHR

### *The asylum judge in search of European convergence: Protecting what and how?*

#### Session 1

This session will explore two interrelated issues: 1. The ‘convergence issue’ (Should EU asylum law and the asylum-related case law of the ECtHR seek to align with each other?); and 2. The ‘pinch points issue’ (Are there divergences or at least ‘pinch points’ between EU-asylum law and asylum-related ECHR law?).

#### 1. THE CONVERGENCE ISSUE

Applied to the context of international protection, ‘convergence’ describes the principle that whilst the asylum-related provisions of both legal orders cannot be identical, they should seek to align closely with one another, so as to ensure legal certainty for applicants and avoid fragmentation within public international law. The case for convergence is in summary as follows.

EU asylum law and ECHR asylum-related law heavily overlap. The lynchpin is Article 9(1) of the QD (recast) which prescribes that acts of persecution are to be understood as severe violations of basic human rights and specific reference is made to the ECHR. This gives added impetus to the EU law requirement set out in Article 52(3) of the Charter on Fundamental Rights that:

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.<sup>1</sup>

Among the Charter rights that so correspond is Article 4.<sup>2</sup>

<sup>1</sup> CJEU *MP*, C-353/16, para. 37.

<sup>2</sup> Article 4 of the Charter states that ‘[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.’

In dealing with asylum-related cases, the two legal systems frequently apply the same or similar concepts, such as ‘internal protection’/ ‘internal relocation alternative’ and sur place activities. Both recognise risks stemming from non-State actors.<sup>3</sup> Both share a similar notion of surrogacy in viewing protection as something that should only be made available if an applicant is in genuine need of it.<sup>4</sup> At the level of Member States, the two systems closely intersect jurisdictionally, with individual applicants often pursuing the same claim under both legal systems, seeking international protection first and, if unsuccessful protection against ill-treatment contrary to Article 3 ECHR.

Both legal orders acknowledge that they operate within the framework of international law and subscribe to basic norms of the international legal order. In the EU legal order, Article 78, TFEU establishes a specific obligation of accordance with the Refugee Convention and other relevant treaties. The EU asylum legislation specifically treats the Refugee Convention as the ‘cornerstone’ of the international protection regime’ and states that the criteria governing subsidiary protection (which is ‘complementary and additional to the refugee protection enshrined in the [Refugee] Convention’) ‘should be drawn from international obligations under human rights instruments and practices existing in Member States.’<sup>5</sup>

It remains, however, that only EU asylum law is directly concerned with interpreting and applying the Refugee Convention. The ECtHR has no jurisdiction to interpret it. But the CJEU does indirectly - by virtue of the commonalities between the Refugee Convention definition of refugee and that set out in Article 2(d) QD (recast) and elaborated upon in other provisions of the Directive.<sup>6</sup>

The case against convergence would in essence be that each legal order must apply its own distinctive provisions constructed out of its respective legal bases in treaty law and that each has a distinct object and purpose. From this perspective it is inappropriate to try and ‘shoehorn’ the criteria of one into the other.

## 2. ‘PINCH POINTS’

Two possible points of divergence will be examined:

### **(a) Protection against persecution/serious harm/ill-treatment - are there divergent concepts of effective protection?**

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<sup>3</sup> See Article 6(c) QD(recast); *HLR v France*, No 24573/94, §40., *JK and Others v Sweden*, No 59166/12, §50.

<sup>4</sup> *M’Bodj*, Case C-542/13, paras 43-44.

<sup>5</sup> QD(recast, recitals (4),, (32), (34).

<sup>6</sup> *Alo and Osso*, joined cases C-443/14 and C-444/14, EU:C:2016:127, CJEU (GC), judgment of 14 May 2019, *M v Ministerstvo vnitra and X, X v Commissaire général aux réfugiés et aux apatrides*, joined cases C-391/16, C-77/17 and C-78/17, EU:C:2019:40, 2019, *M, X and X*, para. 74; *Shajin Ahmed v Bevándorlási és Menekültügyi Hivatal*, C-369/17, EU:C:2018:713, judgment of 13 September 2018, para 40.

Both legal orders consider that an applicant cannot succeed unless able to show that his or her home state would be unable and unwilling to provide effective protection against persecution/serious harm/ill-treatment.<sup>7</sup>

EU law position. In *O.A.*, the CJEU reached the obvious conclusion that private actors such as families or clans cannot be ‘actors of protection’. However, it also concluded that any protective functions performed by such private actors – whether social or financial or security-related - were also ‘irrelevant’ to the issue of whether protection was **effective**.<sup>8</sup>

ECHR position. In ECtHR cases, by contrast, the approach to the question of whether protection is effective has been a factual one. For example, in *R.H. v Sweden*, the Court concluded that in R.A.’s case she would not face a real risk of ill treatment contrary to Article 3 because the evidence was that she had access to ‘both family support and a male protection network’.<sup>9</sup> In *Sufi and Elmi* the ECtHR treated as relevant to the protection issue the lack of ‘close family connections’.<sup>10</sup>

### **(b) ‘Internal protection’/‘internal flight alternative’ – different thresholds?**

Despite using different terminology, both legal orders consider<sup>11</sup> that in order to succeed in a claim it is not enough for an applicant to establish that he or she faces persecution/serious harm/ill-treatment in their home region. An applicant must also show that they do not have a viable internal protection alternative (IPA)/internal flight alternative (IFA).<sup>12</sup> However, there appears to be a key difference in the **threshold** each imposes in relation to the putative alternative protection area.

EU law position. The CJEU has yet to deal with any questions of interpretation regarding Article 8 QD(recast), but the text of this provision makes clear that even if an applicant will not face a well-founded fear of persecution/real risk of serious harm in the alternative protection area (and even if it is accessible), he or she can still succeed if able to show that it would be **unreasonable** to expect them to settle there.<sup>13</sup> Thus the threshold of likely harm in the IPA is at a level **less than** persecution/serious harm/ill treatment.

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<sup>7</sup> Article 6(c) and Article 7 QD (recast); *H.L.R. v. France*, § 40; *Salah Sheekh*, §137.

<sup>8</sup> CJEU, 2021, Case C-255/19 *O.A.*, paras. 48, and 52-53.

<sup>9</sup> *R.H. v Sweden*, app.no.4601/14), §73.

<sup>10</sup> *Sufi and Elmi*, §267.

<sup>11</sup> Article 8QD (recast) gives Member States the option of whether to apply an IPA, but almost all do.

<sup>12</sup> Article 8(1) QD(recast); *Salah Sheekh v. the Netherlands*, no. 1948/04, § 141, ECHR 2007-I (extracts); *Chahal v. the United Kingdom*, § 98, *Reports of Judgments and Decisions* 1996-V; *Hilal v. the United Kingdom*, no. 45276/99, §§ 67 – 68, ECHR 2001-II); *Sufi and Elmi*, §265.

<sup>13</sup> Article 8(1) provides that ‘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.’ (emphasis added).

ECHR position. For the ECtHR, by contrast, it appears that an applicant must show that in this alternative protection area itself they would also face harm at the level of serious harm/ill-treatment. Thus, *Salah Sheekh* and *Sufi and Elmi* appear to treat the key criterion as being whether the applicant would be exposed to treatment contrary to Article 3 ECHR *in the internal protection area*.<sup>14</sup>

## **POSSIBLE RESPONSES**

The aim of the discussion will be to interrogate possible responses to these pinch points and to reflect further upon the issue of the desirability or otherwise of convergence and on possible ways they could be resolved.

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<sup>14</sup> *Salah Sheekh*, §145; *Sufi and Elmi*, §§266, 277. The ECtHR has made use of the concept of reasonableness in the internal flight context – see e.g. *A.A.M v. Sweden*, Application no. 68519/10, §73-74; see also §68 - but only, it seems, as an element in assessing whether there is an Article 3 risk in the alternative protection area: see also *D.N.M v Sweden* app no 28379/11, §46.