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?

Questions to the experts from registered participants
18 November 2021, 14:00 – 16:30

Session 1 (Convergence and divergence in CJEU/ECtHR case-law), *moderated by Hugo STOREY*

A. The 'convergence issue' – Should EU asylum law and the asylum-related case law of the ECtHR seek to align with each other?

1) Article 9(1)(a) QD (recast) requires a violation of 'basic' human rights but does not define the concept of 'basic' human rights. Article 9(1)(a) refers to non-derogable rights under Article 15(2) ECHR. What are those 'basic' human rights in relation to:
   - human dignity, guaranteed in Article 1 of the EU Charter?
   - What about article 78 TFEU that authorises reference to 'other relevant treaties'.

2) According to the Austrian Supreme Administrative Court reasonable settlement in a part of the country is an additional requirement for IFA/IPA (Ra 2018/18/0001). Art. 53 ECHR safeguards existing human rights by stating that nothing in this Convention shall be construed as limiting or derogating from any of the human rights which may be ensured i.a. under any other agreement to which any High Contracting Party is a party. Therefore, convergence between the two positions could be reached.

3) If the CJEU and the ECtHR do not align with each other, national courts are more often "forced" to ask for a preliminary ruling in order to learn if the Charter provides more extensive protection. Why would someone choose a very formal approach by stating that "each legal order has a distinct object and purpose"? Asylum judges deal with fundamental rights and the protection and safeguarding of these rights, why bother about academic legal discussions?

4) With regards to the assessment of eligibility to conventional or subsidiary protection, is there any equivalence of threshold between existing Members states' various criteria, such as the German "*beachtliche wahrscheinlichkeit*" (substantial probability) or common law countries' principle of "balance of probabilities"? Is the CJUE judgment in the Y and Z (2012) case preventing or instead facilitating the equivalence of threshold between these various national criteria?

5) In what cases does Union law, namely by the application of art. 4. of the Charter, can or must provide more extensive protection than the Convention for the Protection of Human Rights and Fundamental Freedoms?

6) What role does the concept of the 'autonomy of the EU legal order' play in keeping certain distance and points of divergence by the CJEU from the ECtHR case-law in asylum-related matter? Does the CJEU

approach differ from one policy area (or sub-area) to another (e.g., borders acquis, return acquis, asylum acquis etc.)? If so, why?

7) Where is the line to be drawn between having regard to the case law of the ECtHR as part of the "dynamic reference" in Art.52(3) and yet not relying on it "as a source of interpretation with full validity in connection with the application of the Charter" (per AG Trstenjak in N.S. v SSHD)? (By way of background, Irish courts must take judicial notice of decisions of the ECtHR and, must when interpreting and applying the Convention, "take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments" under s.3 of the European Convention on Human Rights Act 2003 but decisions of the CJEU are binding on all courts and tribunals. In common law, either a judgment is binding or not and if not, either it is persuasive (within degrees) or it is not? How do we draw the line between full validity and partial validity? Is there less validity where there is a more extensive protection under EU law than under the Convention?

B. The 'pinch points issue': - Are there divergences or at least 'pinch points' between EU-asylum law and asylum-related ECHR law?

1) How do I reconcile the discussed differences as a national judge? By simply looking for the standard providing the highest level of protection for the individual? What are the criteria of that?

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

1) Which are the criteria of ill treatment?
2) Since the threshold of persecution (QD) is higher than the ill-treatment (ECHR) how can we speak about divergences at the threshold of protection?
3) In how far you see a difference in the determination whether there is a risk of a violation of Art. 3 ECHR or whether subsidiary protection should be granted, other than the question whether there is an actor to which the risk can be attributed?
4) What about the legal aspects of "effective protection" in the case of a protection by private actors? Is it possible to consider that a "social protection" (by a man, by a family) can be sufficient? Do you see any situations where reference to personal or family networks might still be relevant for the assessment of the requirement of "effective protection", notwithstanding the CJEU case-law (C 255-19, January 20, 2021)?
5) Advice for the judicial review perspective - how to assess effectiveness of state protection in practice, if legislation/ official statements confirm that it is in fact in place. Any criteria or instruments to be used?

b) 'Internal protection'/'internal flight alternative' – different thresholds?

1) In Europe, the IPA assessment is based on a 3-prong test: accessibility, safety and reasonableness. Should the reasonableness test be applied even for vulnerable group (e.g. UAM)? If IPA becomes available after the recognition of a form of IP, can this be interpreted as a legitimate reason for revoking refugee status? (see the jurisprudence of the Finish and Norwegian Ministry of Justice).
2) It would be interesting to explore a hypothetical (albeit quite possible in the near future) case of an Afghan asylum applicant (belonging to a vulnerable group, e.g. LGBTQIA+, single woman, *hazara*), whose claim has been rejected at 2nd instance, by the competent authority of the reception country on the basis of IPA, brought before the 2 European Courts, which, as jurisprudence shows, have developed different approaches on several aspects of international protection. How would these organs approach the case?

3) EASO guidance note on Afghanistan states “internal relocation inevitably involves certain hardship. (...), if it could be found that the general living conditions for the applicant in the proposed area of IPA would not be unreasonable or in any way amount to treatment prohibited by article 3 ECHR.” Could it be that the “reasonableness” element in article 8 of the directive 2011/95/EU as strictly implying an article 3 ECHR assessment, would set the threshold too high and too limited?

4) What is the position in the case law of the CJEU/ECtHR regarding the interlink between the assessment of the availability of state protection in the 'home area' of an applicant for international protection impact on the consideration of whether the applicant has an 'internal protection alternative' available to him or her?

5) In light of the CJEU decision in OA, are non-state agents of protection ever relevant in the assessment of internal relocation?

6) On the second pinch point, is it the case that EU law is a less onerous standard - a breach of Art.3 would be covered as rendering an IPA one that a person could not reasonably be expected to live but then goes to issues that are not just Art.3 violations? If that is the case, is this one area where EU law provides more extensive protection than just safeguarding against Art.3 violations? Might this be one way of squaring the circle.

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Session 2 (Judicial test(s) in the field of asylum-related disputes for assessing deficiencies in another Member State affecting the fundamental rights of an individual under the principles of mutual trust (EU law) and presumption of equivalent protection (ECHR)) – *Moderated by Bostjan ZALAR*

Set of questions A

1) I had some Greek cases: applicants were given refugee status or subsidiary protection in Greece, came to Belgium because of living conditions in Greece, applied for IP in Belgium, were refused because of their status in Greece, appealed at the CALL, the refusal to consider their claim was annulled by the CALL, applications for international protection were investigated on their merits vis-a-vis their country of origin & refused, appealed and I rejected the appeals. Quid art 3 - is their situation better in Iraq than in Greece?

2) Effectiveness of international protection, under section 17 of Dublin III Regulation, and protection of nuclear family inner relationships. Applicability of the rule with regards to the protection of the nuclear family itself.

3) Should the risk of indirect refoulement trigger a duty on the Member States authorities (both administrative and judicial ones) to assess asylum claims under Article 17(1) of the Dublin III Regulation? And what kind of evidence should be brought in support of the existence of a risk of indirect refoulement? For example, are informal readmission agreement sufficient evidence?

4) How could we define the relation between the principle of mutual trust under EU law as developed by the Court's jurisprudence and the principle of solidarity amongst EU MS, which the new Pact aims to strengthen?

5) What are the main elements of common ground between member states regarding the principle of mutual trust?

6) Which criteria should a judge take into account when balancing mutual trust among MS with different conditions (e.g., living, economic etc) and protection of a TCN?

7) In the asylum procedure member states administrations and judges have to evaluate whether other member states systematically (!) violate Art. 3 ECHR. Do you see a possibility to have this evaluation at a European level (e.g., new procedure before the ECJ which includes factual evaluation) in order to have a uniform jurisprudence, possibly also to initiate procedures against such members states if systematic violations are determined?

8) In the context of inadmissibility, what is an appellate decision maker to do where the applicant, with international protection in a member state of the Union, raises a prima facie concern of 'extreme material poverty' if returned to that state, but the first instance decision maker does not consider this evidence, and does not seek to contravene the concern, or obtain reassurance from the member state in question?

9) What are the recognized criteria to appreciate the effective protection/deficiency of protection of a refugee in another EU country? Recent trend in jurisprudence?

10) It may be a bit off-topic, but there is certain connection to the issues of mutual trust and equivalent protection: what do you think is the role of Aznar protocol, under which, as a principle with four exceptions, Member States are regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters? Doesn't that contravene Art. 3 of the Refugee Convention?

11) How can we as Judges increase mutual trust?

12) Can the principle of mutual trust play a role in the mutual recognition by MS of a refugee status?

13) Is it possible to formulate common criteria to evaluate the recognition of any kind of international protection?

14) How does the principle of mutual trust (under EU law) in the field of asylum must be weighed with other principles to provide the best protection of human rights, namely, with the principles of subsidiarity, efficiency, and solidarity between States?

15) How are European judges supposed to take into account protection given by UNHCR?

16) Interesting to know if any advice and common criteria may be extended to the European non-EU countries (such as Ukraine) which is trying to follow best EU practices and is a member of CoE and ECHR. And how such advice can be shared/ formally communicated with such countries?

17) Is there serious mutual trust between Member States or is it just a legal concept to transfer cases to other Member States?

18) Focus on international protection and Covid-19 pandemic. Right to health and migration.

19) Does the principle of mutual trust in EU Law automatically apply among all Member States or could a decision by a Supreme Court of a Member State according to which Article 4(3) TEU and/or Article 19 (1) TEU do no longer apply lead to a situation where there is no basis for mutual trust anymore?

20) Mutual trust and discretionary clause.

Set of questions B

1) If the principle of MT is based on the fact that all MS are bound by the Refugee Convention, the ECHR and the Charter, why should national courts when dealing with Dublin transfers, ignore pushbacks and systematic illegal detention carried out by the responsible MS and focus only on art. 4 of the Charter? Does this imply that mutual trust is to be “divided” in guaranteeing art 4 and guaranteeing all other fundamental rights? (see request for preliminary ruling of Oct 4, ’21 District Court Den Bosch, NL).

2) How can or should the practice of NPMs (under optional protocol of UN convention against torture (OPCAT)) be effectively integrated in the analysis of conditions of the place of detention? It is useful (ground) source, however can the information be trusted?

3) Should the CJEU & ECtHR jurisprudence on access to information of the file in national security related immigration cases be better aligned, also in view of recent developments in the case law of the Strasbourg Court (see Muhammad & Muhammad v. Romania?

4) In light of Art.6(3) TEU, is the right to leave (Art.2(2) of Protocol No. 4 to ECHR) part of the EU legal order as a general principle of EU law? If so, what does it entail in the context of externalised EU migration management policies?

Set of questions C

1) The Austrian Constitutional Court follows the two-steps approach when highlighting the necessity to examine not only the situation in the country to which the applicant shall be transferred, but also on the question, how the situation effects the individual concerned (i.a., 25.6.2021, E 599/2021-12). The decisions show, that the focus on the prevailing principle of mutual trust may lead to neglection of the 2nd step by the lower courts.
2) Is the theory of « adjudicated facts of common knowledge » used in the judicial test for assessing deficiencies in another Members State affecting the Fundamental rights of a protected person (conventional and subsidiary protection alike)? If not, could it be used to that purpose and how? Can the facts assessed within the jurisprudence of the ECHR or of the CJEU with regards Members States' systemic deficiencies amount to "adjudicated facts of common knowledge"?
3) In the context of the Dublin Procedure, an asylum seeker may be transferred to another Member States. Referring to the NS or CK judgement of the CJEU, national courts may have to examine the reception conditions of asylum seekers in this State and may have to ask guarantees. What are the values of such guarantees? How deep should we examine the validity of these guarantees?
4) What are the obligations of MSs' first instance decision makers/asylum authorities in relation to their assessment of the situation of beneficiaries of international protection in another MS when deciding on the (in-)admissibility of an application? For example, must assurances be sought in relation to the availability of safe and appropriate accommodation for a single mother with children under two who is a traumatised victim of sexual violence and entirely dependent on state supports?
5) How can we be aware of actual deficiencies in another MS (rather than "hearsay" and rumours)?
6) Whether common criteria for assessing deficiencies in another Member State affecting the fundamental rights of an individual can be identified?
7) If an EU State fails to give an assurance to a requesting EU State regarding the support available for a vulnerable Applicant on return, is there a presumption that the Applicant will be subjected to inhuman and degrading treatment on return? This might occur in an inadmissible case, for example

Set of questions D

1) Does the right to effective judicial remedies against the transfer decision (art. 18, § 1, b), c) and d) of Regulation (EU) 604/2013) include an effective review on the correct application of the criteria set out in Chapter III Reg.?
2) Does the principle of mutual trust include, at least until proven otherwise, a presumption of availability of effective judicial remedies in the requested Member State on the correct application of the criteria set out in Chapter III of Regulation (EU) 604/2013?

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