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Section 2.6. Jurisprudence of the Court of Justice of the EU

As the guardian of EU law, the CJEU ensures that “in the interpretation and application of the Treaties, the law is observed” (Treaty on the European Union, Article 19(1)). As part of its mission, the CJEU ensures the correct interpretation and application of primary and secondary EU laws; reviews the legality of acts of EU institutions; and decides whether Member States have fulfilled their obligations under primary and secondary laws. The CJEU also provides interpretations of EU law when requested by national judges. The court, thus, constitutes the judicial authority of the EU and, in cooperation with the courts and tribunals of Member States, ensures the uniform application and interpretation of EU law.170

In 2023, the CJEU issued more than 20 judgments and orders interpreting various provisions of CEAS, including political opinion as a ground for refugee protection, derived international protection to family members and the concept of a subsequent application.

Effective access to the asylum procedure

In *European Commission v Hungary* (C-823/21), the CJEU decided in an infringement procedure on the right to effective access to the asylum procedure. The court held that Hungary failed to fulfil its obligations under Article 6 of the recast Asylum Procedures Directive (APD). The CJEU ruled that Act LVIII, which requires third-country nationals to travel to an embassy outside of Hungary to express their wish to apply for asylum, was contrary to the recast APD’s objective of ensuring effective, easy and rapid access to the asylum procedure. Furthermore, the CJEU ruled that Hungary could not justify the restriction with the objective to fight the spread of COVID-19, because the restrictions in place were not appropriate and proportionate with that objective.

Dublin procedure

In 2023, the CJEU examined six cases on the interpretation of the Dublin III Regulation. Clarifying procedural aspects, the CJEU decided that the obligation to provide information through the common leaflet and the obligation to hold an interview applied both in the context of a first application for international protection and a take charge procedure pursuant to Articles 20(1)

and 21(1) of the Dublin III Regulation, as well as in the context of a subsequent application for international protection and a situation capable of giving rise to take back procedures as provided under Articles 17(1), 23(1) and 24(1) of the Dublin III Regulation. The CJEU held that the absence of an interview usually resulted in the annulment of the transfer decision, unless the interview was possible at the judicial stage, whereas the absence of the common leaflet only led to an annulment of the transfer decision if the provision of a leaflet would have led to a different outcome of the procedure. The CJEU reasoned that Article 17(1) was discretionary and therefore did not require a court to declare the Member State responsible on the ground that it disagrees with the assessment of the requested Member State about the risk of *refoulement*. Excluding a situation of systemic flaws in the asylum procedure and reception conditions, the court is not allowed to examine whether there is a risk of infringement of the principle of *non-refoulement* in the requested Member State.

In *State Secretary for Justice and Security (Staatssecretaris van Justitie en Veiligheid) v B., F. and K.* (Joined Cases C-323/21, C-324/21 and C-325/21), the CJEU decided on the interpretation of Articles 27(1) and 29(2) of the Dublin III Regulation in cases in which third-country nationals lodged an application for international protection successively in three Member States. The CJEU ruled that, after the expiry of the 6-month time limit for a Dublin transfer, the responsibility for examining the application is transferred to the second Member State, even if in the meantime the applicant lodged a new asylum application in a third Member State. This is not the case if the responsibility was transferred to the third Member State due to the expiry of the time limit for lodging a take back request. According to the CJEU, the third Member State could file a timely take back request to the second Member State but had to grant access to an effective remedy, enabling the person to rely on the transfer of responsibility to the second Member State if the time limit pursuant to Article 29(1) and (2) expired.

L.G. v State Secretary for Justice and Security (Staatssecretaris van Justitie en Veiligheid) (C-745/21) concerned the Dublin transfer of a pregnant applicant whose spouse had a residence permit in the Netherlands. The CJEU ruled that the dependency link provided in Article 16(1) of the Dublin III Regulation did not cover the relationship between an applicant for international protection and the spouse, nor the relationship between the applicant’s unborn child and the spouse who was also the parent of the child. However, the CJEU held that Article 17(1) did not prevent a Member State from adopting legislation that requires the authorities to consider the best interests of the child in cases of a pregnancy, even if another Member State was responsible according to the Dublin III Regulation.

In *E.N., S.S., J.Y. v State Secretary for Justice and Security (Staatssecretaris van Justitie en Veiligheid)* (C-556/21), the CJEU decided on whether Articles 27(3) and 29 of the Dublin III Regulation allowed national legislation to grant an interim measure which suspends the transfer time limit of a Dublin decision at the request of the competent authority and in a second instance proceeding. The CJEU ruled that, in the absence of relevant EU law, a Member State could introduce such an interim measure until the second instance appeal has been concluded. However, to avoid an abusive delay of the transfer deadline, the CJEU held that that this was only possible if the transfer time limit was already suspended during the first instance appeal.

In *S.S., N.Z., S.S., v State Secretary for Justice and Security (Staatssecretaris van Justitie en Veiligheid)* (C 338/21), the CJEU stated that it was compatible with the Dublin III Regulation for a Member State to exercise discretion and give a suspensive effect to an appeal against a rejection of a residence permit for victims of human trafficking, in order to prevent a Dublin transfer. However, such an appeal, which was not directed against the transfer decision itself, could not be regarded as an appeal within the meaning of Article 27(3) or (4) of the Dublin III Regulation and therefore could not suspend the transfer deadline pursuant to Article 29(1).

Lastly, in *State Secretary for Justice and Security (Staatssecretaris van Justitie en Veiligheid) v E., S.* (C-568/21), the CJEU confirmed that a diplomatic card issued under the Vienna Convention on Diplomatic Relations was a 'residence document' within the meaning of Article 2(1) of the Dublin III Regulation, because the issuance of such a card reflected the Member State's acceptance for the holder to stay in its territory. Following the opinion of the Advocate General, the CJEU held that the Dublin III Regulation would be undermined if it did not apply to those with privileges and immunities under the Vienna Convention.

Duty to cooperate, burden of proof, length of procedure and credibility

The CJEU assessed the duty to cooperate, the burden of proof, the length of the procedure and credibility in asylum procedures. On the duty to cooperate, the CJEU ruled that Article 4(1) of the recast Qualification Directive (QD) included the obligation of the examining authority to obtain up-to-date country of origin information (COI) and a medico-legal report on the applicant's mental health if there was evidence of mental health problems and if such a report was necessary for the assessment of international protection. A breach of such a duty to cooperate could lead to an annulment of the decision, if the applicant proves that the decision may have been different without the breach.

The court held that Articles 23(2) and 39(4) of the recast APD had to be interpreted as meaning that an extended time between the asylum application and the decision could not be justified by national legislative amendments made during this period. However, the excessive duration of the administrative or judicial proceedings did not justify the annulment of the negative decision, since the applicant had to prove that the extension affected the outcome of the decision.

In the same proceedings, the CJEU further decided that, in light of Article 4(5e) of the recast QD, the general credibility of an applicant was not to be rejected alone for a false statement during the initial asylum application, which was explained and withdrawn by the applicant at the first available opportunity.

Political opinion as ground for refugee protection

Following a referral of the Supreme Administrative Court of Lithuania (C-280/21), the CJEU decided that, following Article 10(1e) of the recast QD in connection with the relevant UNHCR Handbook, Article 11 of the EU Charter and case law of the European Court of Human Rights (ECtHR) on Article 10 of the European Charter of Human Rights (ECHR), the concept of political opinion had to be interpreted broadly to include attempts by an applicant to legally defend personal interests against illegally-acting, non-state actors, where those actors may exploit,

through corruption, the criminal justice system of the country of origin.

The CJEU further clarified the content of political opinion as a ground for refugee protection under Article 10(1e) and (2) of the recast QD. According to the CJEU, a fear of persecution due to political opinion is well-founded if the applicant could have attracted or may attract the negative attention of the actors of potential persecution in the country of origin. However, the CJEU decided that opinions did not have to be so deeply rooted that the applicant could not refrain from manifesting them upon a return.

Derived international protection to family members

The CJEU ruled in two cases (C-614/22 and C-374/22) concerning appeals brought by two Guinean nationals against the Belgian Commissioner General for Refugees and Stateless Persons (CGRS) against negative decisions on international protection on the ground that they had one or more children in Belgium with refugee status. The CJEU ruled that, regardless of whether Article 23 of the recast QD was correctly implemented and whether the family existed before or after arrival in Belgium, the recast QD did not provide for a derived right to international protection to family members who themselves did not meet the conditions for this status.

Assessment of subsidiary protection

In *X, Y and their six children v Staatssecretaris van Justitie en Veiligheid* (C-125/22), the CJEU clarified the rules when assessing whether an applicant is entitled to subsidiary protection. The CJEU held that under Article 15 of the recast QD, all relevant factors, relating both to the individual position and personal circumstances of the applicant as well as the general situation in the country of origin, had to be examined before identifying the type of serious harm that the factors may potentially substantiate. A failure to conduct all relevant examinations leads to a breach of obligations under the recast QD.

Secondly, the CJEU specified that, when assessing the requirement of a real risk of suffering a type of serious harm pursuant to Article 15(c) of the recast QD, the national authority had to consider factors relating to the individual position and personal circumstances of the applicant other than the mere fact of coming from an area of a given country where, according to the ECtHR judgment in *NA. v the United Kingdom* (No 25904/07), “the most extreme cases of general violence” occur.

Thirdly, the CJEU stated that Article 15(b) of the recast QD had to be interpreted as meaning that the intensity of the indiscriminate violence occurring in the applicant’s country of origin is not capable of weakening the requirement of individualisation of serious harm.

Assessment of protection provided by UNRWA

The CJEU ruled on a preliminary question on the interpretation of Article 12(1a) of the recast QD, which excludes a third-country national or a stateless person from refugee protection if they receive protection from a UN agency other than UNHCR. The CJEU stated that protection or

assistance from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) must be considered to have ceased when UNRWA failed to provide access to medical care and treatment to a stateless person of Palestinian origin who falls within the protection of UNRWA if the person runs a real risk of imminent death or a serious, rapid and irreversible decline of health or a significant reduction in life expectancy without such care.

The concept of a subsequent application

Following a referral by the German Administrative Court of Minden, the CJEU held in *J.B., S.B., F.B. v Bundesrepublik Deutschland (Federal Republic of Germany)* (C-364/22) that Article 33(2d) of the recast APD allowed the rejection of a subsequent application as inadmissible when the applicant had returned to the country of origin after the asylum application was refused, irrespective of whether that return was voluntary or forced, and when the decision on the previous application did not concern the granting of subsidiary protection. This was the case if the examination of grounds prohibiting removal was comparable to the examination carried out with a view to granting subsidiary protection.

Effective remedy in accelerated procedures

The CJEU decided in *Y.N. v Slovenian Republic* (C-58/23) on the interpretation of Article 46(4) of the recast APD concerning a rejection of an application for international protection as manifestly unfounded as part of an accelerated procedure, for which a time limit of 3 days was given to appeal. The applicant had been notified of this decision the day before a weekend containing a public holiday. The CJEU ruled that Article 46(4) of the recast APD, read in conjunction with Article 47 of the ECHR, precluded such national legislation if the period restricts the effective exercise of the rights guaranteed in Articles 12(1b), 12(2), 22 and 23 of the recast APD.

Family reunification

The CJEU ruled in *X,Y, A, B v Belgian State* (C-1/23 PPU) on the interpretation of Article 5(1) of the Family Reunification Directive in conjunction with Articles 7 and 24(2) and (3) of the EU Charter and concluded that EU law precluded national legislation which requires that family members, in particular those of a recognised refugee, must appear in person at the competent diplomatic or consular post of a Member State for the purpose of family reunification, especially if this was impossible or excessively difficult. However, the CJEU held that the Member State could ask family members to appear in person at a later stage of the application procedure.

Refusal or revocation of international protection for committing a serious non-political crime

In three cases (C-402/22, C-8/22 and C-663/21), the CJEU interpreted Article 14(4b) of the recast QD and clarified the conditions for a refusal or revocation of international protection for third-country nationals convicted of a crime. The CJEU held that a crime was ‘particularly serious’ if it undermined the legal order of the community, considering all circumstances such as the nature of the crime, the penalty provided and imposed for the crime, any aggravating or mitigating circumstances, the intentionality, the harm caused and the nature of the procedure.

The CJEU further determined that Article 14(4b) required two conditions: the third-country national was convicted by a final judgment of a particularly serious crime and it was established that the third-country national constitutes a danger to the community.

Finally, the CJEU ruled that the competent authority should determine, taking into account all the circumstances of the case, whether the third-country national represented a genuine, present and sufficiently serious threat to the fundamental interests of the society and whether the revocation or withdrawal of refugee status was proportionate considering the danger posed by the person to the fundamental interest of society. The court highlighted that the proportionality test did not have to consider the extent and nature of the measures to which the person would be exposed if returned to the country of origin.

Return

In 2023, the CJEU further developed its case law on the interpretation of the Returns Directive (RD) in relation to international protection. In *Federal Republic of Germany v G.S.* (C-484/22), the CJEU ruled that Article 5(a) and (b) of the RD required that the best interests of the child and family life had to be protected in proceedings leading to the adoption of a return decision in respect of a minor, and it was not sufficient for the minor to rely on these two protected interests in subsequent proceedings relating to the enforcement of the return decision. It further added that Member States must carry out an in-depth assessment of the situation of the minor.

In *A.L. v Swedish Migration Agency (Migrationsverket)* (C-629/22), the CJEU interpreted Article 6(2) of the RD and clarified the steps of return proceedings in cases in which a third-country national was staying illegally in a Member State despite holding a residence permit or permission to stay in another Member State. In these cases, before adopting a return decision, Member States are required to request the third-country national to leave voluntarily, irrespectively of whether the authorities considered it likely or not that the national will comply with the request. The CJEU noted that Article 6(2) had a direct effect. If the national authority failed to fulfil the obligations set out in Article 6(2), the competent national authorities and courts were required to take all necessary measures to remedy the failure.

In *Association Avocats pour la défense des droits des étrangers (ADDE) and others v Ministry of the Interior (France)* (C-143/22), the CJEU decided on whether a Member State which reintroduced internal border controls may adopt a decision to refuse entry at the border solely on the basis of the Schengen Borders Code, without complying with the RD. The CJEU held that a decision to refuse entry could be adopted based on the Schengen Borders Code, but the removal of the person had to be in compliance with the RD. The CJEU clarified that the RD could apply even before crossing a border, provided that the border-crossing point was on the territory of the Member State.

In *CD v Ministry of the Interior of the Czech Republic, Asylum and Migration Policy Service (Ministerstvo vnitra České republiky, Odbor azylové a migrační politiky)* (C-257/22), the CJEU held that Article 9(1) of the recast APD, read in light of Recital 9 of the RD, provided that from submission of the application until adoption of a first instance decision a third-country national's stay could not be regarded as 'illegal' and therefore a return decision pursuant to Article 6(1) of the RD could not be adopted, irrespective of the period of residence to which that return

decision referred.

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