TABLE OF CONTENTS

E. ECHR JURISPRUDENCE (ordered chronologically and edited)

F. ACADEMIC MATERIALS

Although the rules prevent competitors from citing authorities other than those in this bundle, should further background information be sought to prepare the case the following websites may be useful:
http://curia.europa.eu
http://www.amicuria.org

A. PRELIMINARIA

MOOT QUESTION 2012

ABDUL

Abdul was born in Syria, where as a politically active teenager he frequently took part in anti-government demonstrations and protest marches.

In January 2009, Abdul was obliged to leave Syria when his political activity started to raise the threat of reprisals due to his being targeted by the Syrian regime and went to live in Mulysa (an EU Member State located in the middle of the Mediterranean). There his family persuaded him to enter into an arranged married with Fadiyah, who is also of Syrian descent but with Mulysan nationality. Although Abdul was initially reluctant to marry in this way, both he and Fadiyah did not wish to go against their families' custom and wishes; and they duly married. In December 2009 Fadiyah gave birth to Zarif, their son, and for a while their home life seemed stable. Abdul began working in a factory on the same street as where they live and after work he spent as much time as possible with Zarif.

Abdul, however, becomes increasingly frustrated with Fadiyah's "western" political outlook and her indifference to the plight of those who live in Syria. He also remains critical of the Syrian government and continues to be actively involved in protests and demonstrations against the Syrian government. When the Arab Spring erupts and the Syrian government cracks down on political dissidents, Abdul's frustration at events in his homeland, combined with his anger at Fadiyah's political apathy, leads him to violence against her which culminates in police intervention followed by a domestic violence complaint and an order requiring Abdul to vacate the matrimonial home. At the same time Abdul is charged and convicted of the crime of assault, in respect of which he receives a fine.

Fadiyah simultaneously commences divorce proceedings against Abdul seeking sole custody of Zarif which, although bitterly contested by Abdul, she is eventually granted. Abdul is awarded weekly access rights but in view of the domestic violence concerns and Abdul's status as a foreign national, the court requires these access visits to take place under the supervision of the local social services. The social worker assigned to the case reports his satisfaction with the access visits, commenting on the very close ties that clearly exist between Abdul and his son. Abdul remains the sole provider for the family, paying child maintenance to support Fadiyah and Zarif.

In the interim, Abdul has become more actively involved as a member of the "Free Syria" group (the "FSG"), a Mulysa-based political group of ethnic Syrians who seek to encourage the overthrow of the existing Syrian government. The FSG has staged numerous protests outside the Syrian embassy in Mulysa. Abdul also acts as a spokesman for the group, participating in a number of televised interviews during which he not only calls upon the international community to support the rebel forces in Syria and to assist them in overthrowing the Syrian government but also calls upon all Mulysa-based Syrians to join the struggle for a free Syria, stating that this should be *"...by all means necessary, including armed force if required."* This last statement is particularly controversial, since it was made shortly after an FSG-organised protest which erupted into violence and multiple arrests. Abdul was not present at that protest.

The greater frequency of FSG-organised demonstrations and the regularity of Abdul's television appearances as an FSG spokesman increase his notoriety and he becomes a particularly detested opponent of the Syria government. This makes life very dangerous for his remaining family in Syria who, following encouragement from Abdul, decide to flee across the border into Turkey in January 2011. On their arrival in Turkey they are accommodated in a camp set up by a temporary UN agency (the UN Syrian Migration Unit – 'UNSMU') specifically set up to provide care for those who fled Syria during or after the Arab Spring. They then immediately contact Abdul who implores them to leave the UNSMU camp and persuades them to seek to join him in Mulysa (they duly do so – see below).

Six months later however, Abdul receives a notice from the Minister for the Mulysan Home Office (Border Agency) informing him that he is no longer eligible to remain in Mulysa and that, unless he leaves voluntarily, he will be deported within 60 days to Turkey under the terms of an agreement between Mulysa and Turkey (both being states signatory to the ECHR) that Turkey will accept, receive and assist refugees seeking asylum from the Syrian regime. Turkey has been recognised as a safe third country pursuant to Article 27 of Directive 2005/85 (minimum standards on procedures in Member States for granting and withdrawing refugee status – the 'Refugee Procedures Directive').

The reasons given by the Minister for the deportation decision are as follows:

(i) 'Following the dissolution of your marriage, you no longer have any right to stay in Mulysa. Moreover, you cannot claim any right to stay based upon Directive 2004/38 (the Citizens Rights Directive) as you are not the husband of a European citizen who has exercised her right of free movement;

(ii) 'Further or alternatively, I have concluded that you represent a genuine, present and sufficiently serious threat to Mulysa's public policy and public security. For that reason and regardless of any right to residence which he might otherwise enjoy, I am entitled to make an order for your deportation and have decided that it would be in the public interest to do so.'

The notice further informs Abdul that he has the right to appeal this decision before the Special Immigration Appeals Commission (SIAC) and that a State-funded lawyer will be provided to him for these purposes. At Abdul's suggestion, Fadiyah also consults the lawyer on behalf of Zarif and herself: she is concerned that Abdul's deportation would not only remove the family's only financial support but would also be detrimental for Zafir in that it would deprive Zarif of his father at a vital stage in his upbringing. The lawyer accordingly both a) appeals the deportation order and b) applies for an interim order to suspend enforcement of the Minister's decision, arguing that:

(i) The decision is discriminatory and contrary to the provisions of Articles 18 and/or 20 TFEU and Articles 9 and 10 of the *Charter of Fundamental Rights of the European Union* as it fails to take due account of Zarif's right to family life pursuant to Article 8 ECHR and the supporting jurisprudence of the European Court of Human Rights (in particular the case of *Berrehab v. The Netherlands (1988)*)

(ii) The deportation of Abdul would deprive two EU citizens (Faddiyah and Zarif) of the genuine enjoyment of the substance of their EU citizenship rights, and so is contrary to Article 20 and / or Article 21 TFEU.

On his lawyer's advice, as an alternative route Abdul simultaneously lodges an application with the Mulysan Border Agency to be granted refugee status pursuant to *Directive 2004/83/EC* (minimum standards for the qualification and status of third country nationals or stateless persons as refugees (etc): the 'Refugees Directive'), on the basis that he is a Syrian national who, owing to a well-founded fear of being persecuted for reasons of political opinion or membership of a particular social group, is outside Syria and is unable or, owing to such fear, is unwilling to avail himself of the protection of Syria.

The Border Agency refuses his request for refugee status, stating that Abdul falls within the scope of *Article 12(1)(b)* of *Directive 2004/83/EC (*having been recognised as a spouse of an Mulysan national). Because he has been 'recognised by the competent authorities as having rights which are equivalent to those which are attached to the possession of [Mulysan] nationality', he is excluded from the status of refugee.

On the same day, Abdul is also advised that SIAC has upheld the deportation decision against him and has likewise upheld the order to deport him within 60 days.

Abdul now appeals to the Mulysan Court of Appeal on the grounds cited before – additionally, he argues that his case raises complex issues of EU law and that these should be referred to the Court of Justice of the European Union ('CJEU') for guidance as to their correct interpretation. The Court of Appeal decides to suspend the appeal proceedings and refer a number of questions to the CJEU under the preliminary ruling procedure contained in Article 267 TFEU.

The Mulysan government, knowing how politically sensitive these particular immigration issues are in Mulysa, is appalled at the Court of Appeal's decision. Moreover, it believes that the preliminary reference proceedings will force it to disclose detailed and confidential internal documents containing information about government policies and actions towards this particular category of migrants in order to argue its case competently before the CJEU. It knows that Abdul, as a party to the case, would have full access to its submissions and supporting material; and the government fears that these could be leaked to the media or made use of by FSG. It therefore seeks an injunction preventing Abdul from disclosing or making use of any materials to which he may be given access in the course of the Article 267 TFEU proceedings, in particular preventing his communicating or sharing any information received with the FSG or making use of it himself in his capacity as an FSG spokesman and activist.

The Court of Appeal agrees to exercise the discretion granted to it under the national Rules of Procedure and duly grants the requested injunction, basing its decision on public policy grounds, despite the energetic protest of both Abdul and his lawyer who argue that such an order is outside the powers of the national court. The Court of Appeal refuses to lift the injunction but does decide to add this issue as a further question to be referred to the CJEU.

PRELIMINARY REFERENCE: QUESTIONS RAISED BY COURT

Citizenship of the Union

1. *Is Article 20 and / or Article 21 TFEU to be interpreted as precluding a Member State from refusing to grant to a third country national – whose divorced spouse and minor children are Union citizens who have not as yet exercised rights of free movement within the European Union – residence in the Member State of residence of his divorced spouse and child, who are nationals of that Member State, where*
    a) *both the former spouse and child are financially dependent upon that third country national; and/ or*
    b) *the minor child would thereby be deprived of all contact and rights of weekly access with his father?*

2. *If either question 1 a) or b) is answered in the affirmative and a right of residence exists by virtue of European Union law, are the rights that follow subject to the principle of non-discrimination and so equated to the detailed rights set out in Directive 2004/38 (the Citizens' Rights Directive) thereby either*

   a) precluding a Member State from refusing equivalent status and rights to those available to a third country national divorced spouse of an EU citizen who has exercised rights of free movement as set out in Directive 2004/38, in particular rights of residence and continued access to his minor child (Article 13 thereof); and/ or

   b) precluding a Member State from removing that right of residence from a third country national divorced spouse save on grounds similar to those set out in Article 27 of the Citizens' Right Directive?

The Confidentiality injunction

3. *Is the national court of a Member State (which makes a preliminary reference to the Court of Justice of the European Union pursuant to Article 267 TFEU), precluded from making an order affecting the access to or use of documents disclosed to any party during the course of the reference proceedings?*

The Refugees Directive

4. *Was, or is, a person in the position of Abdul a person "recognised by the competent authorities of the country in which he or she has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country; or rights and obligations equivalent to those", so that he is excluded from refugee status by virtue of Article 12(1)(b) of Directive 2004/83 (the Refugees Directive)?*

ABDUL'S FAMILY (General)

As already indicated, Abdul's high media profile in Mulysa and his vocal criticism of the Syrian governmental regime caused his family to fear repression and to flee to Turkey where they stayed for one month under the protection of UNSMU. They found the conditions in the camp unsanitary (due to the overwhelming numbers of fleeing immigrants) and also did not feel safe so, at Abdul's suggestion, they left the camp on 10 January 2011 and applied for and were granted refugee status in Mulysa in February 2011.

At that time Mulysan domestic law (the *Refugee Act 2011*), was more generous in its definition of "refugee" than the minimum standards set by *Directive 2004/83* (or indeed by the Geneva Convention of 28 July1951 Relating to the Status of Refugees: 'the 1951 Convention'), inasmuch as it did not exclude from from its scope 'persons who are at present receiving protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees' as permitted by *Article 12(1)(a)* of Directive 2004/83 and Article 1D of the 1951 Convention.

However, the Refugee Act 2011 contained no specific provisions concerning the granting of "subsidiary forms of protection" as mentioned in Article 2 (e) and (f) of Directive 2004/83.

Mulysa's initial response to the crisis in Syria was to grant refugee status to 100 Syrians, including Abdul's family ('the Syrian Immigrants Group'), and to issue them all with a 1-year residence permit. However, shortly afterwards, the FSG's campaign to draw the world's attention to the plight of Syria led to increased violence and arrests in Mulysa. As a result, Mulysan citizens ceased to sympathise with Syria refugees and started reacting negatively to the unrest created and the protests involving the resident Syrian population. This situation is not helped by a number of stories in the 'popular' national press which portray the newest Syrian refugees, and those Syrians previously resident in Mulysa, as a drain on the State budget; comparing them to rabbits reproducing courtesy of state benefits; itself a comment on the contrasting situation for native-born Mulysans whose birth rate is declining. The main opposition party in Mulysa begins to focus on the "overly favourable treatment of Syrian citizens at a time of economic crisis when charity should begin at home!"

With a general election looming, the "Syrian question" looks increasingly likely to have an important influence on Mulysan voters' political preferences. The Mulysan Prime Minister dismisses the Minister for Foreign Affairs, replacing him with a more ruthless colleague who promises to reverse the "softly-softly" approach of his predecessor. The government then amends the Refugee Act. The effect of that amendment is twofold: (i) the definition of those excluded from refugee status is aligned precisely with the various exclusions contained in Article 12 of the Refugees Directive (including, in particular, Article 12(1)(a)) and (ii) the earlier, more generous, definition of refugee is abolished retroactively with effect from 1 January 2011.

In June 2011 Mulysa not only applies this new, narrower, definition of refugee to new applicants but also informs the 100 persons who were earlier granted refugee status (i.e., the Syrian Immigrants Group) that their previous status is being revoked. All, including Abdul's family, are held to have voluntarily given up the protection offered by UNSMU by moving from Turkey to Mulysa and are

served with notices of deportation returning them to Turkey, which will become effective in 30 days.

The Syrian Immigrants Group appeal the decision allegedly revoking their status, arguing that

(i) Mulysa's attempt to apply a new definition of refugee retroactively is contrary to the spirit of the Geneva Convention, the Refugees Directive and general principles of EU law (such as, in particular, legitimate expectations);

(ii) some of the persons affected, including Abdul's father, have found employment during their short time in Mulysa and therefore raise no public policy concerns as to whether they are self-sufficient and able to support their dependents;

(iii) Some of the persons affected, including Abdul's father, did not (on a true interpretation of the facts) leave UNSMU protection 'voluntarily', and they should now therefore be afforded automatic refugee status in accordance with Article 12(1)(a) of the Refugees Directive;

(iv) a block deportation of this nature is contrary to the provisions of Articles 1, 4 and 18 of the *Charter of Fundamental Rights of the European Union*, as well as Article 19(1) thereof, which specifically prohibits collective expulsions.

They further argue that even if Mulysa is entitled to exclude them from the category of refugee pursuant to Article 12 (1) (a) of the Refugees Directive, they still fall within the definition of persons 'eligible for subsidiary protection' contained in Article 2(e) and (f) of that Directive; and (i) the original terms of the Refugee Act 2011 combined with (ii) the original decision by the Mulysan authorities to admit then and grant them both refugee status and a one year residence permit are express recognitions of that fact.

The Syrian Immigrants Group's case is referred to the Musylan Immigration Tribunal which, in an expedited hearing, upholds the original deportation decision. They appeal to the Mulysan Court of Appeal, which expedites the appeal and joins it to Abdul's appeal. Following legal advice and with the permission of the court, the Syrian Immigrants Group has added a claim for damages against the State to compensate them individually and collectively for the loss and distress caused.

The Mulysan Court of Appeal decides to add the following questions to those already being referred to the CJEU in Abdul's appeal:

5. Where a Member State has implemented a minimum standards directive (such as Directive 2004/83) in such a manner as to give a wider definition to the meaning of "refugee" (i.e. the Refugee Act 2011), is it precluded from amending that legislation shortly afterwards in such a manner as would narrow the scope of protection offered to the beneficiaries of such legislation albeit that, even following such amendment, the new definition of "refugee" is not more restrictive than that contained in the Directive?

6.a) If a Member State is not precluded from amending its legislation in the manner described in question 5, is it nevertheless precluded from revoking the status of refugee in respect of a person to whom that status has already been granted and to whom it has also granted a one year residence permit?
b) if the answer to question 6 is in the affirmative, is this restriction
(i) limited to the duration of the one year resident permit granted?
(ii) capable of retrospective application so as to benefit a person granted refugee status prior to the enactment of the amending legislation?
(iii) affected by the fact that the person concerned has, in the meantime, taken up employment under the terms of the resident permit granted?

7. Since the relevant Mulysan law makes no explicit reference to "subsidiary forms of protection", should the more generous definition of refugee (contained in the Refugee Act 2011 prior to amendment) be considered to encompass Mulysa's implementation of the definition of "persons eligible for subsidiary protection" contained in Articles 2(e) and (f) of Directive 2004/83; and, if so, was Mulysa's decision to grant refugee status to the applicants be treated as a recognition by the competent authorities of the Member State that such persons qualify for subsidiary protection and should not be returned to their home country if they would face a real risk of suffering serious harm as defined in Article 15 of Directive 2004/83?

8. If any/all of questions 5-7 are answered in the affirmative, does such wrongful implementation of Directive 2004/83 manifestly and gravely exceed the limits of the Member State's lawful discretion, such that it constitutes a "sufficiently serious breach" which would permit the applicants to succeed in a claim for damages against the State of Mulysa?

PRELIMINARY INFORMATION ON THE CJEU

The following is a short introductory guide to the role of the Court of Justice to the European Union (formerly – and still commonly – known as the European Court of Justice or ECJ) and its relationship with the national courts of the Member States.

- The CJEU's function is to rule upon the interpretation and application of the Treaties and on the interpretation, application and validity of secondary EU law. It is the supreme court on such issues, with no appeal to any higher judicial body.

- Cases may be brought directly before the CJEU on behalf of an EU institution (i.e. Commission, Council, European Parliament), by a Member State or by a national of a Member State.

- The Commission's power to bring actions against a Member State it suspects to be in breach of Community law stems from Article 258. The power of one Member State to bring an action against another Member State comes from Article 259 but such cases are rare. Institutions or Member States may also challenge secondary legislation adopted by institutions of the TFEU on the basis that it exceeds the competences granted under the treaties or fails to comply with procedural requirements thereof.

- Where an individual wishes the CJEU to rule upon a certain issue of European Union law, it is most common for such a case to begin in that person's national courts and for the national court to make an Article 267 reference to the CJEU asking for guidance on the interpretation, application or validity of an EU measure.

- The CJEU is assisted by Advocate-Generals, who produce reasoned opinions on a case before the CJEU rules on it. These opinions will discuss the applicable law and will recommend how the court should decide the case. Often these opinions are more detailed than the eventual judgment of the court. They are not binding on the CJEU but they are very influential and are often followed in practice.

- The CJEU is not bound by its own jurisprudence (case-law) and may depart from an earlier decision if it wishes. Although any court attempts to follow its earlier jurisprudence wherever possible, the CJEU has already been seen to have reversed its own jurisprudence on a number of occasions.

- National courts are bound to follow the CJEU's rulings on Union law but it is for the national court to apply that Union law to the facts of the case in front of it.

B. EU LEGISLATIVE MATERIALS
(Chronologically ordered and edited)

EXTRACTED ARTICLES FROM THE CONSOLIDATED VERSION OF THE TREATY ON EUROPEAN UNION (TEU)

TITLE I : COMMON PROVISIONS

Article 1 (ex Article 1 TEU)

By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called 'the Union', on which the Member States confer competences to attain objectives they have in common.

This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community.

Article 2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3 (ex Article 2 TEU)

1. The Union's aim is to promote peace, its values and the well-being of its peoples.

2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4. The Union shall establish an economic and monetary union whose currency is the euro.

5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.

Article 4

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Article 5 (ex Article 5 TEC)

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

Article 6

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law. [...]

TITLE II : PROVISIONS ON DEMOCRATIC PRINCIPLES

Article 9

In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

Article 10

1. The functioning of the Union shall be founded on representative democracy.

2. Citizens are directly represented at Union level in the European Parliament.

Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.

3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.

4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.

Article 11

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.

2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union. [...]

Article 19

1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

2. The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General.

The General Court shall include at least one judge per Member State.

The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 253 and 254 of the Treaty on the Functioning of the European Union. They shall be appointed by common accord of the governments of the Member States for six years. Retiring Judges and Advocates-General may be reappointed.

3. The Court of Justice of the European Union shall, in accordance with the Treaties:

(a) rule on actions brought by a Member State, an institution or a natural or legal person;

(b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;

(c) rule in other cases provided for in the Treaties.

TITLE V : GENERAL PROVISIONS ON THE UNION'S EXTERNAL ACTION AND SPECIFIC PROVISIONS ON THE COMMON FOREIGN AND SECURITY POLICY

CHAPTER 1 : GENERAL PROVISIONS ON THE UNION'S EXTERNAL ACTION

Article 21

1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.

2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

(a) safeguard its values, fundamental interests, security, independence and integrity;

(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;

(c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;

(d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;

(e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;

(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;

(g) assist populations, countries and regions confronting natural or man-made disasters; and

(h) promote an international system based on stronger multilateral cooperation and good global governance.

3. The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.

The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.

EXTRACTED ARTICLES FROM THE CONSOLIDATED VERSION OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU)

PREAMBLE

HIS MAJESTY THE KING OF THE BELGIANS, THE PRESIDENT OF THE FEDERAL REPUBLIC OF GERMANY, THE PRESIDENT OF THE FRENCH REPUBLIC, THE PRESIDENT OF THE ITALIAN REPUBLIC, HER ROYAL HIGHNESS THE GRAND DUCHESS OF LUXEMBOURG, HER MAJESTY THE QUEEN OF THE NETHERLANDS (1),

DETERMINED to lay the foundations of an ever closer union among the peoples of Europe,

RESOLVED to ensure the economic and social progress of their States by common action to eliminate the barriers which divide Europe,

AFFIRMING as the essential objective of their efforts the constant improvements of the living and working conditions of their peoples,

RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition,

ANXIOUS to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions,

DESIRING to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade,

INTENDING to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations,

RESOLVED by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts,

DETERMINED to promote the development of the highest possible level of knowledge for their peoples through a wide access to education and through its continuous updating,

and to this end HAVE DESIGNATED as their Plenipotentiaries:

WHO, having exchanged their full powers, found in good and due form, have agreed as follows.

TITLE I : CATEGORIES AND AREAS OF UNION COMPETENCE

Article 2

1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

3. The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide.

4. The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.

5. In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas. Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations.

6. The scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area.

Article 3

1. The Union shall have exclusive competence in the following areas:

(a) customs union;

(b) the establishing of the competition rules necessary for the functioning of the internal market;

(c) monetary policy for the Member States whose currency is the euro;

(d) the conservation of marine biological resources under the common fisheries policy;

(e) common commercial policy.

2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

Article 4

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.

2. Shared competence between the Union and the Member States applies in the following principal areas:

(a) internal market;

(b) social policy, for the aspects defined in this Treaty;

(c) economic, social and territorial cohesion;

(d) agriculture and fisheries, excluding the conservation of marine biological resources;

(e) environment;

(f) consumer protection;

(g) transport;

(h) trans-European networks;

(i) energy;

(j) area of freedom, security and justice;

(k) common safety concerns in public health matters, for the aspects defined in this Treaty.

3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

Article 5

1. The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies.

Specific provisions shall apply to those Member States whose currency is the euro.

2. The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies.

3. The Union may take initiatives to ensure coordination of Member States' social policies.

TITLE II: PROVISIONS HAVING GENERAL APPLICATION

Article 7

The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.

Article 8

In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.

Article 9

In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

Article 10

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 15

1. In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.

2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.

3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.

General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.

Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph.

The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks.

The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the regulations referred to in the second subparagraph.

Article 16

1. Everyone has the right to the protection of personal data concerning them.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.

The rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 39 of the Treaty on European Union.

PART TWO : NON-DISCRIMINATION AND CITIZENSHIP OF THE UNION

Article 18 (ex Article 12 TEC)

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

Article 19 (ex Article 13 TEC)

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

Article 20 : (ex Article 17 TEC)

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) the right to move and reside freely within the territory of the Member States;

(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

(c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

Article 21 (ex Article 18 TEC)

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.

Article 22 (ex Article 19 TEC)

1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

2. Without prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

Article 23 (ex Article 20 TEC)

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection.

The Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection.

Article 24 (ex Article 21 TEC)

The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the provisions for the procedures and conditions required for a citizens' initiative within the meaning of Article 11 of the Treaty on European Union, including the minimum number of Member States from which such citizens must come.

Every citizen of the Union shall have the right to petition the European Parliament in accordance with Article 227.

Every citizen of the Union may apply to the Ombudsman established in accordance with Article 228.

Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 13 of the Treaty on European Union in one of the languages mentioned in Article 55(1) of the Treaty on European Union and have an answer in the same language.

Article 25 (ex Article 22 TEC)

The Commission shall report to the European Parliament, to the Council and to the Economic and Social Committee every three years on the application of the provisions of this Part. This report shall take account of the development of the Union.

On this basis, and without prejudice to the other provisions of the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may adopt provisions to strengthen or to add to the rights listed in Article 20(2). These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements.

TITLE IV : FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL

CHAPTER 1: WORKERS

Article 45 (ex Article 39 TEC)

1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service.

Article 46 (ex Article 40 TEC)

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in Article 45, in particular:

(a) by ensuring close cooperation between national employment services;

(b) by abolishing those administrative procedures and practices and those qualifying periods in respect of eligibility for available employment, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to liberalisation of the movement of workers;

(c) by abolishing all such qualifying periods and other restrictions provided for either under national legislation or under agreements previously concluded between Member States as imposed on workers of other Member States conditions regarding the free choice of employment other than those imposed on workers of the State concerned;

(d) by setting up appropriate machinery to bring offers of employment into touch with applications for employment and to facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries.

TITLE V : AREA OF FREEDOM, SECURITY AND JUSTICE

CHAPTER 1: GENERAL PROVISIONS

Article 67 (ex Article 61 TEC and ex Article 29 TEU)

1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.

3. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

Article 68

The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice.

Article 69

National Parliaments ensure that the proposals and legislative initiatives submitted under Chapters 4 and 5 comply with the principle of subsidiarity, in accordance with the arrangements laid down by the Protocol on the application of the principles of subsidiarity and proportionality.

Article 70

Without prejudice to Articles 258, 259 and 260, the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation.

Article 71

A standing committee shall be set up within the Council in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union. Without prejudice to Article 240, it shall facilitate coordination of the action of Member States' competent authorities. Representatives of the Union bodies, offices and agencies concerned may be involved in the proceedings of this committee. The European Parliament and national Parliaments shall be kept informed of the proceedings.

Article 72

This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

Article 73

It shall be open to Member States to organise between themselves and under their responsibility such forms of cooperation and coordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security.

Article 74

The Council shall adopt measures to ensure administrative cooperation between the relevant departments of the Member States in the areas covered by this Title, as well as between those departments and the Commission. It shall act on a Commission proposal, subject to Article 76, and after consulting the European Parliament.

Article 75

Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.

The Council, on a proposal from the Commission, shall adopt measures to implement the framework referred to in the first paragraph.

The acts referred to in this Article shall include necessary provisions on legal safeguards.

Article 76

The acts referred to in Chapters 4 and 5, together with the measures referred to in Article 74 which ensure administrative cooperation in the areas covered by these Chapters, shall be adopted:

(a) on a proposal from the Commission, or

(b) on the initiative of a quarter of the Member States.

CHAPTER 2 : POLICIES ON BORDER CHECKS, ASYLUM AND IMMIGRATION

Article 77

1. The Union shall develop a policy with a view to:

(a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders;

(b) carrying out checks on persons and efficient monitoring of the crossing of external borders;

(c) the gradual introduction of an integrated management system for external borders.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning:

(a) the common policy on visas and other short-stay residence permits;

(b) the checks to which persons crossing external borders are subject;

(c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period;

(d) any measure necessary for the gradual establishment of an integrated management system for external borders;

(e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.

3. If action by the Union should prove necessary to facilitate the exercise of the right referred to in Article 20(2)(a), and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure,

may adopt provisions concerning passports, identity cards, residence permits or any other such document. The Council shall act unanimously after consulting the European Parliament.

4. This Article shall not affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law.

Article 78

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

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:

(a) a uniform status of asylum for nationals of third countries, valid throughout the Union;

(b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;

(c) a common system of temporary protection for displaced persons in the event of a massive inflow;

(d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;

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

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

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

3. In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

Article 79

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

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:

(a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;

(b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;

(c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;

(d) combating trafficking in persons, in particular women and children.

3. The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.

4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States.

5. This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.

Article 80

The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

TITLE VI : THE UNION'S RELATIONS WITH INTERNATIONAL ORGANISATIONS AND THIRD COUNTRIES AND UNION DELEGATIONS

Article 220

1. The Union shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies, the Council of Europe, the Organisation for Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development.

The Union shall also maintain such relations as are appropriate with other international organisations.

2. The High Representative of the Union for Foreign Affairs and Security Policy and the Commission shall implement this Article.

PART SIX: INSTITUTIONAL AND FINANCIAL PROVISIONS

TITLE I: INSTITUTIONAL PROVISIONS

CHAPTER 1: THE INSTITUTIONS

SECTION 5

THE COURT OF JUSTICE OF THE EUROPEAN UNION

Article 251 (ex Article 221 TEC)

The Court of Justice shall sit in chambers or in a Grand Chamber, in accordance with the rules laid down for that purpose in the Statute of the Court of Justice of the European Union. When provided for in the Statute, the Court of Justice may also sit as a full Court.

Article 252 (ex Article 222 TEC)

The Court of Justice shall be assisted by eight Advocates-General. Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement.

Article 253 (ex Article 223 TEC)

The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence; they shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255.

Every three years there shall be a partial replacement of the Judges and Advocates-General, in accordance with the conditions laid down in the Statute of the Court of Justice of the European Union.

The Judges shall elect the President of the Court of Justice from among their number for a term of three years. He may be re-elected.

Retiring Judges and Advocates-General may be reappointed.

The Court of Justice shall appoint its Registrar and lay down the rules governing his service.

The Court of Justice shall establish its Rules of Procedure. Those Rules shall require the approval of the Council.

Article 258 (ex Article 226 TEC)

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

Article 259 (ex Article 227 TEC)

A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.

Article 260 (ex Article 228 TEC)

1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.

2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 259.

3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

Article 263 (ex Article 230 TEC)

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning

actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

Article 264 (ex Article 231 TEC)

If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void.

However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.

Article 265 (ex Article 232 TEC)

Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act.

The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.

Article 266 (ex Article 233 TEC)

The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.

This obligation shall not affect any obligation which may result from the application of the second paragraph of Article 340.

Article 267 (ex Article 234 TEC)

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Article 268 (ex Article 235 TEC)

The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340.

Article 269

The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article.

Such a request must be made within one month from the date of such determination. The Court shall rule within one month from the date of the request.

Article 281 (ex Article 245 TEC)

The Statute of the Court of Justice of the European Union shall be laid down in a separate Protocol.

CHAPTER 2: LEGAL ACTS OF THE UNION, ADOPTION PROCEDURES AND OTHER PROVISIONS

SECTION 1: THE LEGAL ACTS OF THE UNION

Article 288 (ex Article 249 TEC)

To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.

PART SEVEN GENERAL AND FINAL PROVISIONS

*Article 339 (*ex Article 287 TEC)

The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

Article 346 (ex Article 296 TEC)

1. The provisions of the Treaties shall not preclude the application of the following rules:

(a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;

(b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.

2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.

PROTOCOL (No 8)

RELATING TO ARTICLE 6(2) OF THE TREATY ON EUROPEAN UNION ON THE ACCESSION OF THE UNION TO THE EUROPEAN CONVENTION ON THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

THE HIGH CONTRACTING PARTIES,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

Article 1

The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the 'European Convention') provided for in Article 6(2) of the Treaty on European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to:

(a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention;

(b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.

Article 2

The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof.

Article 3

Nothing in the agreement referred to in Article 1 shall affect Article 344 of the Treaty on the Functioning of the European Union.

DECLARATIONS ANNEXED TO THE FINAL ACT OF THE INTERGOVERNMENTAL CONFERENCE WHICH ADOPTED THE TREATY OF LISBON,

signed on 13 December 2007

A. DECLARATIONS CONCERNING PROVISIONS OF THE TREATIES

1. Declaration concerning the Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union, which has legally binding force, confirms the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States.

The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties.

2. Declaration on Article 6(2) of the Treaty on European Union

The Conference agrees that the Union's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms should be arranged in such a way as to preserve the specific features of Union law. In this connection, the Conference notes the existence of a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights; such dialogue could be reinforced when the Union accedes to that Convention.

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION [Extracts]

(2010/C 83/02)

The European Parliament, the Council and the Commission solemnly proclaim the following text as the Charter of Fundamental Rights of the European Union.

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION
Preamble

The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment.

To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.

This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.

Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.

The Union therefore recognises the rights, freedoms and principles set out hereafter.

TITLE I: DIGNITY

Article 1: Human dignity

Human dignity is inviolable. It must be respected and protected.

Article 2: Right to life

1. Everyone has the right to life.

2. No one shall be condemned to the death penalty, or executed.

Article 3: Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.

2. In the fields of medicine and biology, the following must be respected in particular:

(a) the free and informed consent of the person concerned, according to the procedures laid down by law;

(b) the prohibition of eugenic practices, in particular those aiming at the selection of persons;

(c) the prohibition on making the human body and its parts as such a source of financial gain;

(d) the prohibition of the reproductive cloning of human beings.

Article 4: 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 5: Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. Trafficking in human beings is prohibited.

TITLE II: FREEDOMS

Article 6: Right to liberty and security

Everyone has the right to liberty and security of person.

Article 7: Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8: Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

Article 9: Right to marry and right to found a family

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

Article 10: Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

Article 11: Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

Article 12: Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.
2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

Article 13: Freedom of the arts and sciences

The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

Article 14: Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.

2. This right includes the possibility to receive free compulsory education.

3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

Article 15: Freedom to choose an occupation and right to engage in work

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.

2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.

3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Article 16: Freedom to conduct a business

The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.

Article 17: Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

2. Intellectual property shall be protected.

Article 18: 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 19: Protection in the event of removal, expulsion or extradition

1. Collective expulsions are prohibited.

2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

TITLE III: EQUALITY

Article 20: Equality before the law

Everyone is equal before the law.

Article 21: Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

Article 22: Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

Article 23: Equality between women and men

Equality between women and men must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Article 24: The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

TITLE V: CITIZENS' RIGHTS

Article 41: Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

(c) the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Article 42: Right of access to documents

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.

TITLE VII: GENERAL PROVISIONS GOVERNING THE INTERPRETATION AND APPLICATION OF THE CHARTER

Article 51: Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

Article 52: Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

3. 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.

4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

6. Full account shall be taken of national laws and practices as specified in this Charter.

7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

Article 53: Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

The European Convention of Human Rights and Fundamental Freedoms (ECHR) 1950 [Extracts]

Article 3 – Prohibition of torture

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

Article 8 – Right to respect for private and family life

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9 – Freedom of thought, conscience and religion

1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10 – Freedom of expression

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11 – Freedom of assembly and association

1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State. [...]

Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Statute of the Court of Justice of the European Union [Extracts]

THE HIGH CONTRACTING PARTIES,

DESIRING to lay down the Statute of the Court of Justice of the European Union provided for in Article 281 of the Treaty on the Functioning of the European Union,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community:

Article 1

The Court of Justice of the European Union shall be constituted and shall function in accordance with the provisions of the Treaties, of the Treaty establishing the European Atomic Energy Community (EAEC Treaty) and of this Statute.

TITLE I

JUDGES AND ADVOCATES-GENERAL

Article 2

Before taking up his duties each Judge shall, before the Court of Justice sitting in open court, take an oath to perform his duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court.

Article 3

The Judges shall be immune from legal proceedings. After they have ceased to hold office, they shall continue to enjoy immunity in respect of acts performed by them in their official capacity, including words spoken or written.

The Court of Justice, sitting as a full Court, may waive the immunity. If the decision concerns a member of the General Court or of a specialised court, the Court shall decide after consulting the court concerned.

Where immunity has been waived and criminal proceedings are instituted against a Judge, he shall be tried, in any of the Member States, only by the court competent to judge the members of the highest national judiciary.

Articles 11 to 14 and Article 17 of the Protocol on the privileges and immunities of the European Union shall apply to the Judges, Advocates-General, Registrar and Assistant Rapporteurs of the Court of Justice of the European Union, without prejudice to the provisions relating to immunity from legal proceedings of Judges which are set out in the preceding paragraphs.

Article 4

The Judges may not hold any political or administrative office.

They may not engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the Council, acting by a simple majority.

When taking up their duties, they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom, in particular the duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits.

Any doubt on this point shall be settled by decision of the Court of Justice. If the decision concerns a member of the General Court or of a specialised court, the Court shall decide after consulting the court concerned.

Article 5

Apart from normal replacement, or death, the duties of a Judge shall end when he resigns.

Where a Judge resigns, his letter of resignation shall be addressed to the President of the Court of Justice for transmission to the President of the Council. Upon this notification a vacancy shall arise on the bench.

Save where Article 6 applies, a Judge shall continue to hold office until his successor takes up his duties.

Article 6

A Judge may be deprived of his office or of his right to a pension or other benefits in its stead only if, in the unanimous opinion of the Judges and Advocates-General of the Court of Justice, he no longer fulfils the requisite conditions or meets

the obligations arising from his office. The Judge concerned shall not take part in any such deliberations. If the person concerned is a member of the General Court or of a specialised court, the Court shall decide after consulting the court concerned.

The Registrar of the Court shall communicate the decision of the Court to the President of the European Parliament and to the President of the Commission and shall notify it to the President of the Council.

In the case of a decision depriving a Judge of his office, a vacancy shall arise on the bench upon this latter notification.

Article 7

A Judge who is to replace a member of the Court whose term of office has not expired shall be appointed for the remainder of his predecessor's term.

Article 8

The provisions of Articles 2 to 7 shall apply to the Advocates-General.

TITLE II

ORGANISATION OF THE COURT OF JUSTICE

Article 9

When, every three years, the Judges are partially replaced, 14 and 13 Judges shall be replaced alternately.

When, every three years, the Advocates-General are partially replaced, four Advocates-General shall be replaced on each occasion.

Article 10

The Registrar shall take an oath before the Court of Justice to perform his duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court of Justice. [...]

Article 16

The Court of Justice shall form chambers consisting of three and five Judges. The Judges shall elect the Presidents of the chambers from among their number. The Presidents of the chambers of five Judges shall be elected for three years. They may be re-elected once.

The Grand Chamber shall consist of 13 Judges. It shall be presided over by the President of the Court. The Presidents of the chambers of five Judges and other Judges appointed in accordance with the conditions laid down in the Rules of Procedure shall also form part of the Grand Chamber.

The Court shall sit in a Grand Chamber when a Member State or an institution of the Union that is party to the proceedings so requests.

The Court shall sit as a full Court where cases are brought before it pursuant to Article 228(2), Article 245(2), Article 247 or Article 286(6) of the Treaty on the Functioning of the European Union.

Moreover, where it considers that a case before it is of exceptional importance, the Court may decide, after hearing the Advocate-General, to refer the case to the full Court.

Article 18

No Judge or Advocate-General may take part in the disposal of any case in which he has previously taken part as agent or adviser or has acted for one of the parties, or in which he has been called upon to pronounce as a member of a court or tribunal, of a commission of inquiry or in any other capacity.

If, for some special reason, any Judge or Advocate-General considers that he should not take part in the judgment or examination of a particular case, he shall so inform the President. If, for some special reason, the President considers that any Judge or Advocate-General should not sit or make submissions in a particular case, he shall notify him accordingly.

Any difficulty arising as to the application of this Article shall be settled by decision of the Court of Justice.

A party may not apply for a change in the composition of the Court or of one of its chambers on the grounds of either the nationality of a Judge or the absence from the Court or from the chamber of a Judge of the nationality of that party.

TITLE III

PROCEDURE BEFORE THE COURT OF JUSTICE

Article 19

The Member States and the institutions of the Union shall be represented before the Court of Justice by an agent appointed for each case; the agent may be assisted by an adviser or by a lawyer.

The States, other than the Member States, which are parties to the Agreement on the European Economic Area and also the EFTA Surveillance Authority referred to in that Agreement shall be represented in same manner.

Other parties must be represented by a lawyer.

Only a lawyer authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area may represent or assist a party before the Court.

Such agents, advisers and lawyers shall, when they appear before the Court, enjoy the rights and immunities necessary to the independent exercise of their duties, under conditions laid down in the Rules of Procedure.

As regards such advisers and lawyers who appear before it, the Court shall have the powers normally accorded to courts of law, under conditions laid down in the Rules of Procedure.

University teachers being nationals of a Member State whose law accords them a right of audience shall have the same rights before the Court as are accorded by this Article to lawyers.

Article 20

The procedure before the Court of Justice shall consist of two parts: written and oral.

The written procedure shall consist of the communication to the parties and to the institutions of the Union whose decisions are in dispute, of applications, statements of case, defences and observations, and of replies, if any, as well as of all papers and documents in support or of certified copies of them.

Communications shall be made by the Registrar in the order and within the time laid down in the Rules of Procedure.

The oral procedure shall consist of the reading of the report presented by a Judge acting as Rapporteur, the hearing by the Court of agents, advisers and lawyers and of the submissions of the Advocate-General, as well as the hearing, if any, of witnesses and experts.

Where it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate-General, that the case shall be determined without a submission from the Advocate-General.

Article 23

In the cases governed by Article 267 of the Treaty on the Functioning of the European Union, the decision of the court or tribunal of a Member State which suspends its proceedings and refers a case to the Court of Justice shall be notified to the Court by the court or tribunal concerned. The decision shall then be notified by the Registrar of the Court to the parties, to the Member States and to the Commission, and to the institution, body, office or agency of the Union which adopted the act the validity or interpretation of which is in dispute.

Within two months of this notification, the parties, the Member States, the Commission and, where appropriate, the institution, body, office or agency which adopted the act the validity or interpretation of which is in dispute, shall be entitled to submit statements of case or written observations to the Court.

In the cases governed by Article 267 of the Treaty on the Functioning of the European Union, the decision of the national court or tribunal shall, moreover, be notified by the Registrar of the Court to the States, other than the Member States, which are parties to the Agreement on the European Economic Area and also to the EFTA Surveillance Authority referred to in that Agreement which may, within two months of notification, where one of the fields of application of that Agreement is concerned, submit statements of case or written observations to the Court.

Where an agreement relating to a specific subject matter, concluded by the Council and one or more non-member States, provides that those States are to be entitled to submit statements of case or written observations where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of the agreement, the

decision of the national court or tribunal containing that question shall also be notified to the non-member States concerned. Within two months from such notification, those States may lodge at the Court statements of case or written observations.

Article 23a [*]

The Rules of Procedure may provide for an expedited or accelerated procedure and, for references for a preliminary ruling relating to the area of freedom, security and justice, an urgent procedure.

Those procedures may provide, in respect of the submission of statements of case or written observations, for a shorter period than that provided for by Article 23, and, in derogation from the fourth paragraph of Article 20, for the case to be determined without a submission from the Advocate General.

In addition, the urgent procedure may provide for restriction of the parties and other interested persons mentioned in Article 23, authorised to submit statements of case or written observations and, in cases of extreme urgency, for the written stage of the procedure to be omitted.

Article 24

The Court of Justice may require the parties to produce all documents and to supply all information which the Court considers desirable. Formal note shall be taken of any refusal.

The Court may also require the Member States and institutions, bodies, offices and agencies not being parties to the case to supply all information which the Court considers necessary for the proceedings.

Article 25

The Court of Justice may at any time entrust any individual, body, authority, committee or other organisation it chooses with the task of giving an expert opinion.

Article 26

Witnesses may be heard under conditions laid down in the Rules of Procedure.

Article 27

With respect to defaulting witnesses the Court of Justice shall have the powers generally granted to courts and tribunals and may impose pecuniary penalties under conditions laid down in the Rules of Procedure.

Article 28

Witnesses and experts may be heard on oath taken in the form laid down in the Rules of Procedure or in the manner laid down by the law of the country of the witness or expert.

Article 29

The Court of Justice may order that a witness or expert be heard by the judicial authority of his place of permanent residence.

The order shall be sent for implementation to the competent judicial authority under conditions laid down in the Rules of Procedure. The documents drawn up in compliance with the letters rogatory shall be returned to the Court under the same conditions.

The Court shall defray the expenses, without prejudice to the right to charge them, where appropriate, to the parties.

Article 30

A Member State shall treat any violation of an oath by a witness or expert in the same manner as if the offence had been committed before one of its courts with jurisdiction in civil proceedings. At the instance of the Court of Justice, the Member State concerned shall prosecute the offender before its competent court.

Article 31

The hearing in court shall be public, unless the Court of Justice, of its own motion or on application by the parties, decides otherwise for serious reasons.

Article 32

During the hearings the Court of Justice may examine the experts, the witnesses and the parties themselves. The latter, however, may address the Court of Justice only through their representatives.

Article 33

Minutes shall be made of each hearing and signed by the President and the Registrar.

Article 34

The case list shall be established by the President.

Article 35

The deliberations of the Court of Justice shall be and shall remain secret.

Article 36

Judgments shall state the reasons on which they are based. They shall contain the names of the Judges who took part in the deliberations.

Article 37

Judgments shall be signed by the President and the Registrar. They shall be read in open court.

Article 38

The Court of Justice shall adjudicate upon costs.

Article 39

The President of the Court of Justice may, by way of summary procedure, which may, in so far as necessary, differ from some of the rules contained in this Statute and which shall be laid down in the Rules of Procedure, adjudicate upon applications to suspend execution, as provided for in Article 278 of the Treaty on the Functioning of the European Union and Article 157 of the EAEC Treaty, or to prescribe interim measures pursuant to Article 279 of the Treaty on the Functioning of the European Union, or to suspend enforcement in accordance with the fourth paragraph of Article 299 of the Treaty on the Functioning of the European Union or the third paragraph of Article 164 of the EAEC Treaty.

Should the President be prevented from attending, his place shall be taken by another Judge under conditions laid down in the Rules of Procedure.

The ruling of the President or of the Judge replacing him shall be provisional and shall in no way prejudice the decision of the Court on the substance of the case.

Article 40

Member States and institutions of the Union may intervene in cases before the Court of Justice.

The same right shall be open to the bodies, offices and agencies of the Union and to any other person which can establish an interest in the result of a case submitted to the Court. Natural or legal persons shall not intervene in cases between Member States, between institutions of the Union or between Member States and institutions of the Union.

Without prejudice to the second paragraph, the States, other than the Member States, which are parties to the Agreement on the European Economic Area, and also the EFTA Surveillance Authority referred to in that Agreement, may intervene in cases before the Court where one of the fields of application of that Agreement is concerned.

An application to intervene shall be limited to supporting the form of order sought by one of the parties.

Article 41

Where the defending party, after having been duly summoned, fails to file written submissions in defence, judgment shall be given against that party by default. An objection may be lodged against the judgment within one month of it being notified. The objection shall not have the effect of staying enforcement of the judgment by default unless the Court of Justice decides otherwise.

Article 42

Member States, institutions, bodies, offices and agencies of the Union and any other natural or legal persons may, in cases and under conditions to be determined by the Rules of Procedure, institute third-party proceedings to contest a judgment rendered without their being heard, where the judgment is prejudicial to their rights.

Article 43

If the meaning or scope of a judgment is in doubt, the Court of Justice shall construe it on application by any party or any institution of the Union establishing an interest therein.

Article 44

An application for revision of a judgment may be made to the Court of Justice only on discovery of a fact which is of such a nature as to be a decisive factor, and which, when the judgment was given, was unknown to the Court and to the party claiming the revision.

The revision shall be opened by a judgment of the Court expressly recording the existence of a new fact, recognising that it is of such a character as to lay the case open to revision and declaring the application admissible on this ground.

No application for revision may be made after the lapse of 10 years from the date of the judgment.

Article 45

Periods of grace based on considerations of distance shall be determined by the Rules of Procedure.

No right shall be prejudiced in consequence of the expiry of a time limit if the party concerned proves the existence of unforeseeable circumstances or of force majeure.

Article 46

Proceedings against the Union in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto. The period of limitation shall be interrupted if proceedings are instituted before the Court of Justice or if prior to such proceedings an application is made by the aggrieved party to the relevant institution of the Union. In the latter event the proceedings must be instituted within the period of two months provided for in Article 263 of the Treaty on the Functioning of the European Union; the provisions of the second paragraph of Article 265 of the Treaty on the Functioning of the European Union shall apply where appropriate.

This Article shall also apply to proceedings against the European Central Bank regarding non-contractual liability.

Rules of Procedure of the Court of Justice [Extracts]

[...]

C h a p t e r 5: THE WORKING OF THE COURT

Article 27

1. The Court shall deliberate in closed session.

2. Only those Judges who were present at the oral proceedings and the Assistant Rapporteur, if any, entrusted with the consideration of the case may take part in the deliberations.

3. Every Judge taking part in the deliberations shall state his opinion and the reasons for it.

4. Any Judge may require that any questions be formulated in the language of his choice and communicated in writing to the Court before being put to the vote.

5. The conclusions reached by the majority of the Judges after final discussion shall determine the decision of the Court. Votes shall be cast in reverse order to the order of precedence laid down in Article 6 of these Rules.

6. Differences of view on the substance, wording or order of questions or on the interpretation of the voting shall be settled by decision of the Court.

7. Where the deliberations of the Court concern questions of its own administration, the Advocates General shall take part and have a vote. The Registrar shall be present, unless the Court decides to the contrary.

8. Where the Court sits without the Registrar being present it shall, if necessary, instruct the most junior Judge within the meaning of Article 6 of these Rules to draw up minutes. The minutes shall be signed by that Judge and by the President. [...]

C h a p t e r 7: RIGHTS AND OBLIGATIONS OF AGENTS, ADVISERS AND LAWYERS

Article 32

1. Agents, advisers and lawyers appearing before the Court or before any judicial authority to which the Court has addressed letters rogatory, shall enjoy immunity in respect of words spoken or written by them concerning the case or the parties.

2. Agents, advisers and lawyers shall enjoy the following further privileges and facilities:

(a) papers and documents relating to the proceedings shall be exempt from both search and seizure; in the event of a dispute the customs officials or police may seal those papers and documents; they shall then be immediately forwarded to the Court for inspection in the presence of the Registrar and of the person concerned;

(b) agents, advisers and lawyers shall be entitled to such allocation of foreign currency as may be necessary for the performance of their duties;

(c) agents, advisers and lawyers shall be entitled to travel in the course of duty without hindrance. [...]

Article 34

The privileges, immunities and facilities specified in Article 32 of these Rules are granted exclusively in the interests of the proper conduct of proceedings. The Court may waive the immunity where it considers that the proper conduct of proceedings will not be hindered thereby.

Article 35

1. If the Court considers that the conduct of an adviser or lawyer towards the Court, a Judge, an Advocate General or the Registrar is incompatible with the dignity of the Court or with the requirements of the proper administration of justice, or that such adviser or lawyer is using his rights for purposes other than those for which they were granted, it shall inform the person concerned. If the Court informs the competent authorities to whom the person concerned is answerable, a copy of the letter sent to those authorities shall be forwarded to the person concerned.

On the same grounds, the Court may at any time, having heard the person concerned and the Advocate General, exclude the person concerned from the proceedings by order. That order shall have immediate effect.

2. Where an adviser or lawyer is excluded from the proceedings, the proceedings shall be suspended for a period fixed by the President in order to allow the party concerned to appoint another adviser or lawyer.

3. Decisions taken under this Article may be rescinded. [...]

TITLE II: PROCEDURE

C h a p t e r 1: WRITTEN PROCEDURE

Article 37

1. The original of every pleading must be signed by the party's agent or lawyer. The original, accompanied by all annexes referred to therein, shall be lodged together with five copies for the Court and a copy for every other party to the proceedings. Copies shall be certified by the party lodging them.

2. Institutions shall in addition produce, within time-limits laid down by the Court, translations of all pleadings into the other languages provided for by Article 1 of Council Regulation No 1. The second subparagraph of paragraph 1 of this Article shall apply.

3. All pleadings shall bear a date. In the reckoning of time-limits for taking steps in proceedings, only the date of lodgment at the Registry shall be taken into account.

4. To every pleading there shall be annexed a file containing the documents relied on in support of it, together with a schedule listing them.

5. Where in view of the length of a document only extracts from it are annexed to the pleading, the whole document or a full copy of it shall be lodged at the Registry.

6. Without prejudice to the provisions of paragraphs 1 to 5, the date on which a copy of the signed original of a pleading, including the schedule of documents referred to in paragraph 4, is received at the Registry by telefax or other technical means of communication available to the Court shall be deemed to be the date of lodgment for the purposes of compliance with the time-limits for taking steps in proceedings, provided that the signed original of the pleading, accompanied by the annexes and copies referred to in the second subparagraph of paragraph 1 above, is lodged at the Registry no later than 10 days thereafter. Article 81(2) shall not be applicable to this period of 10 days.

7. Without prejudice to the first subparagraph of paragraph 1 or to paragraphs 2 to 5, the Court may by decision determine the criteria for a procedural document sent to the Registry by electronic means to be deemed to be the original of that document. That decision shall be published in the Official Journal of the European Union. [...]

Section 4 − Preparatory Measures

Article 54a

The Judge-Rapporteur and the Advocate General may request the parties to submit within a specified period all such information relating to the facts, and all such documents or other particulars, as they may consider relevant. The information and/or documents provided shall be communicated to the other parties.

ORAL PROCEDURE

Article 55

1. Subject to the priority of decisions provided for in Article 85 of these Rules, the Court shall deal with the cases before it in the order in which the preparatory inquiries in them have been completed. Where the preparatory inquiries in several cases are completed simultaneously, the order in which they are to be dealt with shall be determined by the dates of entry in the register of the applications initiating them respectively.

2. The President may in special circumstances order that a case be given priority over others.

The President may in special circumstances, after hearing the parties and the Advocate General, either on his own initiative or at the request of one of the parties, defer a case to be dealt with at a later date. On a joint application by the parties the President may order that a case be deferred.

Article 56

1. The proceedings shall be opened and directed by the President, who shall be responsible for the proper conduct of the hearing.

2. The oral proceedings in cases heard in camera shall not be published.

C h a p t e r 3 a: EXPEDITED PROCEDURES

Article 62a

1. On application by the applicant or the defendant, the President may exceptionally decide, on the basis of a recommendation by the Judge-Rapporteur and after hearing the other party and the Advocate General, that a case is to be determined pursuant to an expedited procedure derogating from the provisions of these Rules, where the particular urgency of the case requires the Court to give its ruling with the minimum of delay.

An application for a case to be decided under an expedited procedure shall be made by a separate document lodged at the same time as the application initiating the proceedings or the defence, as the case may be.

2. Under the expedited procedure, the originating application and the defence may be supplemented by a reply and a rejoinder only if the President considers this to be necessary. An intervener may lodge a statement in intervention only if the President considers this to be necessary.

3. Once the defence has been lodged or, if the decision to adjudicate under an expedited procedure is not made until after that pleading has been lodged, once that decision has been taken, the President shall fix a date for the hearing, which shall be communicated forthwith to the parties. He may postpone the date of the hearing where the organisation of measures of inquiry or of other preparatory measures so requires. Without prejudice to Article 42, the parties may supplement their arguments and offer further evidence in the course of the oral procedure. They must, however, give reasons for the delay in offering such further evidence.

4. The Court shall give its ruling after hearing the Advocate General.

DIRECTIVE 2004/38/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 12, 18, 40, 44 and 52 thereof,

Having regard to the proposal from the Commission

Having regard to the Opinion of the European Economic and Social Committee

Having regard to the Opinion of the Committee of the Regions

Acting in accordance with the procedure laid down in Article 251 of the Treaty

Whereas:

(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.

(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

(4) With a view to remedying this sector-by-sector, piecemeal approach to the right of free movement and residence and facilitating the exercise of this right, there needs to be a single legislative act to amend Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, and to repeal the following acts:

Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on

movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, Council Directive 90/364/EEC of 28 June 1990 on the right of residence, Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity and Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students.

(5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of "family member" should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.

(6) In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.

(7) The formalities connected with the free movement of Union citizens within the territory of Member States should be clearly defined, without prejudice to the provisions applicable to national border controls.

(8) With a view to facilitating the free movement of family members who are not nationals of a Member State, those who have already obtained a residence card should be exempted from the requirement to obtain an entry visa within the meaning of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries

whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement 1 or, where appropriate, of the applicable national legislation.

(9) Union citizens should have the right of residence in the host Member State for a period not exceeding three months without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favourable treatment applicable to job-seekers as recognised by the case-law of the Court of Justice.

(10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.

(11) The fundamental and personal right of residence in another Member State is conferred directly on Union citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures.

(12) For periods of residence of longer than three months, Member States should have the possibility to require Union citizens to register with the competent authorities in the place of residence, attested by a registration certificate issued to that effect.

(13) The residence card requirement should be restricted to family members of Union citizens who are not nationals of a Member State for periods of residence of longer than three months.

(14) The supporting documents required by the competent authorities for the issuing of a registration certificate or of a residence card should be comprehensively specified in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members.

(15) Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis.

(16) As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security.

(17) Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion measure.

(18) In order to be a genuine vehicle for integration into the society of the host Member State in which the Union citizen resides, the right of permanent residence, once obtained, should not be subject to any conditions.

(19) Certain advantages specific to Union citizens who are workers or self-employed persons and to their family members, which may allow these persons to acquire a right of permanent residence before they have resided five years in the host Member State, should be maintained, as these constitute acquired rights, conferred by Commission Regulation (EEC) No 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State 1 and Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity.

(20) In accordance with the prohibition of discrimination on grounds of nationality, all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy, in that Member State, equal treatment with nationals in areas covered by the Treaty, subject to such specific provisions as are expressly provided for in the Treaty and secondary law.

(21) However, it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of job-seekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance

assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons.

(22) The Treaty allows restrictions to be placed on the right of free movement and residence on grounds of public policy, public security or public health. In order to ensure a tighter definition of the circumstances and procedural safeguards subject to which Union citizens and their family members may be denied leave to enter or may be expelled, this Directive should replace Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals, which are justified on grounds of public policy, public security or public health.

(23) Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin.

(24) Accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child, of 20 November 1989.

(25) Procedural safeguards should also be specified in detail in order to ensure a high level of protection of the rights of Union citizens and their family members in the event of their being denied leave to enter or reside in another Member State, as well as to uphold the principle that any action taken by the authorities must be properly justified.

(26) In all events, judicial redress procedures should be available to Union citizens and their family members who have been refused leave to enter or reside in another Member State.

(27) In line with the case-law of the Court of Justice prohibiting Member States from issuing orders excluding for life persons covered by this Directive from their territory, the right of Union citizens and their family members who have been excluded from the territory of a Member State to submit a fresh application after a reasonable period, and in any event after a three year period from enforcement of the final exclusion order, should be confirmed.

(28) To guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures.

(29) This Directive should not affect more favourable national provisions.

(30) With a view to examining how further to facilitate the exercise of the right of free movement and residence, a report should be prepared by the Commission in order to evaluate the opportunity to present any necessary proposals to this effect, notably on the extension of the period of residence with no conditions.

(31) This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I: General provisions

Article 1: Subject

This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

(b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;

(c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.

Article 2: Definitions

For the purposes of this Directive:

1) "Union citizen" means any person having the nationality of a Member State;

2) "Family member" means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3) "Host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

Article 3: Beneficiaries

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

CHAPTER II: Right of exit and entry

Article 4: Right of exit

1. Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State.

2. No exit visa or equivalent formality may be imposed on the persons to whom paragraph 1 applies.

3. Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality.

4. The passport shall be valid at least for all Member States and for countries through which the holder must pass when travelling between Member States. Where the law of a Member State does not provide for identity cards to be issued, the period of validity of any passport on being issued or renewed shall be not less than five years.

Article 5: Right of entry

1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport. No entry visa or equivalent formality may be imposed on Union citizens.

2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement. Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.

3. The host Member State shall not place an entry or exit stamp in the passport of family members who are not nationals of a Member State provided that they present the residence card provided for in Article 10.

4. Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary

visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence.

5. The Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions.

CHAPTER III: Right of residence

Article 6: Right of residence for up to three months

1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.

Article 7: Right of residence for more than three months

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and

have comprehensive sickness insurance cover in the host Member State; or

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered

partner.

Article 8: Administrative formalities for Union citizens

1. Without prejudice to Article 5(5), for periods of residence longer than three months, the host Member State may require Union citizens to register with the relevant authorities.

2. The deadline for registration may not be less than

three months from the date of arrival. A registration certificate shall be issued immediately, stating the name and address of the person registering and the date of the registration. Failure to comply with the registration requirement may render the person concerned liable to proportionate and non-discriminatory sanctions.

3. For the registration certificate to be issued, Member States may only require that – Union citizens to whom point (a) of Article 7(1) applies present a valid identity card or passport, a confirmation of engagement from the employer or a certificate of employment, or proof that they are self-employed persons;

– Union citizens to whom point (b) of Article 7(1) applies present a valid identity card or passport and provide proof that they satisfy the conditions laid down therein;

– Union citizens to whom point (c) of Article 7(1) applies present a valid identity card or passport, provide proof of enrolment at an accredited establishment and of comprehensive sickness insurance cover and the declaration or equivalent means referred to in point (c) of Article 7(1). Member States may not require this declaration to refer to any specific amount of resources.

4. Member States may not lay down a fixed amount which they regard as "sufficient resources", but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.

5. For the registration certificate to be issued to family members of Union citizens, who are themselves Union citizens, Member States may require the following documents to be presented:

(a) a valid identity card or passport;

(b) a document attesting to the existence of a family relationship or of a registered partnership;

(c) where appropriate, the registration certificate of the Union citizen whom they are accompanying or joining;

(d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;

(e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;

(f) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen.

Article 9: Administrative formalities for family members who are not nationals of a Member State

1. Member States shall issue a residence card to family members of a Union citizen who are not nationals of a Member State, where the planned period of residence is for more than three months.

2. The deadline for submitting the residence card application may not be less than three months from the date of arrival.

3. Failure to comply with the requirement to apply for a residence card may make the person concerned liable to proportionate and non-discriminatory sanctions.

Article 10: Issue of residence cards

1. The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called "Residence card of a family member of a Union citizen" no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.

2. For the residence card to be issued, Member States shall require presentation of the following documents:

(a) a valid passport;

(b) a document attesting to the existence of a family relationship or of a registered partnership;

(c) the registration certificate or, in the absence of a registration system, any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining;

(d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;

(e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;

(f) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen.

Article 11: Validity of the residence card

1. The residence card provided for by Article 10(1) shall be valid for five years from the date of issue or for the envisaged period of residence of the Union citizen, if this period is less than five years.

2. The validity of the residence card shall not be affected by temporary absences not exceeding six months a year, or by absences of a longer duration for compulsory military service or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a

third country.

Article 12: Retention of the right of residence by family members in the event of death or departure of the Union citizen

1. Without prejudice to the second subparagraph, the Union citizen's death or departure from the host Member State shall not affect the right of residence of his/her family members who are nationals of a Member State. Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, the Union citizen's death shall not entail loss of the right of residence of his/her family members who are not nationals of a Member State and who have been residing in the host Member State as family members for at least one year before the Union citizen's death.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on a personal basis.

3. The Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies.

Article 13: Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership

1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:

(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or

(b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or

(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or

(d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4). Such family members shall retain their right of residence exclusively on personal basis.

Article 14: Retention of the right of residence

1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein. In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State. 4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

(a) the Union citizens are workers or self-employed persons, or

(b) the Union citizens entered the territory of the host Member State in order to seek employment.

In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

Article 15: Procedural safeguards

1. The procedures provided for by Articles 30 and 31 shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health.

2. Expiry of the identity card or passport on the basis of which the person concerned entered the host Member State and was issued with a registration certificate or residence card shall not constitute a ground for expulsion from the host Member State.

3. The host Member State may not impose a ban on entry in the context of an expulsion decision to which paragraph 1 applies.

CHAPTER IV: Right of permanent residence

Section I: Eligibility

Article 16: General rule for Union citizens and their family members

1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a

third country.

4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.

Article 17: Exemptions for persons no longer working in the host Member State and their family members

1. By way of derogation from Article 16, the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by:

(a) workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension or workers who cease paid employment to take early retirement, provided that they have been working in that Member State for at least the preceding twelve months and have resided there continuously for more than three years. If the law of the host Member State does not grant the right to an old age pension to certain categories of self-employed persons, the age condition shall be deemed to have been met once the person concerned has reached the age of 60;

(b) workers or self-employed persons who have resided continuously in the host Member State for more than two years and stop working there as a result of permanent incapacity to work.

If such incapacity is the result of an accident at work or an occupational disease entitling the person concerned to a benefit payable in full or in part by an institution in the host Member State, no condition shall be imposed as to length of residence;

(c) workers or self-employed persons who, after three years of continuous employment and residence in the host Member State, work in an employed or self-employed capacity in another Member State, while retaining their place of residence in the host Member State, to which they return, as a rule, each day or at least once a week.

For the purposes of entitlement to the rights referred to in points (a) and (b), periods of employment spent in the Member State in which the person concerned is working shall be regarded as having been spent in the host Member State.

Periods of involuntary unemployment duly recorded by the relevant employment office, periods not worked for reasons not of the person's own making and absences from work or cessation of work due to illness or accident shall be regarded as periods of employment.

2. The conditions as to length of residence and employment laid down in point (a) of paragraph 1 and the condition as to length of residence laid down in point (b) of paragraph 1 shall not apply if the worker's or the self-employed person's spouse or partner as referred to in point 2(b) of Article 2 is a national of the host Member State or has lost the nationality of that Member State by marriage to that worker or self-employed person.

3. Irrespective of nationality, the family members of a worker or a self-employed person who are residing with him in the territory of the host Member State shall have the right of permanent residence in that Member State, if the worker or self-employed person has acquired himself the right of permanent residence in that Member State on the basis of paragraph 1.

4. If, however, the worker or self-employed person dies while still working but before acquiring permanent residence status in the host Member State on the basis of paragraph 1, his family members who are residing with him in the host Member State shall acquire the right of permanent residence there, on condition that:

(a) the worker or self-employed person had, at the time of death, resided continuously on the territory of that Member State for two years; or

(b) the death resulted from an accident at work or an occupational disease; or

(c) the surviving spouse lost the nationality of that Member State following marriage to the worker or self-employed person.

Article 18: Acquisition of the right of permanent residence by certain family members who are not nationals of a Member State

Without prejudice to Article 17, the family members of a Union citizen to whom Articles 12(2) and 13(2) apply, who satisfy the conditions laid down therein, shall acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State.

Section II: Administrative formalities

Article 19: Document certifying permanent residence for Union citizens

1. Upon application Member States shall issue Union citizens entitled to permanent residence, after having verified duration of residence, with a document certifying permanent residence.

2. The document certifying permanent residence shall be issued as soon as possible.

Article 20: Permanent residence card for family members who are not nationals of a Member State

1. Member States shall issue family members who are not nationals of a Member State entitled to permanent residence with a permanent residence card within six months of the submission of the application. The permanent residence card shall be renewable automatically every ten years.

2. The application for a permanent residence card shall be submitted before the residence card expires. Failure to comply with the requirement to apply for a permanent residence card may render the person concerned liable to proportionate and non-discriminatory sanctions.

3. Interruption in residence not exceeding two consecutive years shall not affect the validity of the permanent residence card.

Article 21: Continuity of residence

For the purposes of this Directive, continuity of residence may be attested by any means of proof in use in the host Member State. Continuity of residence is broken by any expulsion decision duly enforced against the person concerned.

CHAPTER V: Provisions common to the right of

residence and the right of permanent residence

Article 22: Territorial scope

The right of residence and the right of permanent residence shall cover the whole territory of the host Member State. Member States may impose territorial restrictions on the right of residence and the right of permanent residence only where the same restrictions apply to their own nationals.

Article 23: Related rights

Irrespective of nationality, the family members of a Union citizen who have the right of residence or the right of permanent residence in a Member State shall be entitled to take up employment or self-employment there.

Article 24: Equal treatment

1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

Article 25: General provisions concerning residence documents

1. Possession of a registration certificate as referred to in Article 8, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof.

2. All documents mentioned in paragraph 1 shall be issued free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents.

Article 26: Checks

Member States may carry out checks on compliance with any requirement deriving from their national legislation for non-nationals always to carry their registration certificate or residence card, provided that the same requirement applies to their own nationals as regards their identity card.

In the event of failure to comply with this requirement, Member States may impose the same sanctions as those imposed on their own nationals for failure to carry their identity card.

CHAPTER VI: Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health

Article 27: General principles

1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be

made as a matter of routine. The Member State consulted shall give its reply within two months.

4. The Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.

Article 28: Protection against expulsion

1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous ten years; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

Article 29: Public health

1. The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.

2. Diseases occurring after a three-month period from the date of arrival shall not constitute grounds for expulsion from the territory.

3. Where there are serious indications that it is necessary, Member States may, within three months of the date of arrival, require persons entitled to the right of residence to undergo, free of charge, a medical examination to certify that they are not suffering from any of the conditions referred to in paragraph 1. Such medical examinations may not be required as a matter of routine.

Article 30: Notification of decisions

1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.

2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.

3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.

Article 31: Procedural safeguards

1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.

2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:

– where the expulsion decision is based on a previous judicial decision; or

– where the persons concerned have had previous access to judicial review; or

– where the expulsion decision is based on imperative grounds of public security under Article 28(3).

3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

4. Member States may exclude the individual concerned from their territory pending the redress procedure, but

they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.

Article 32: Duration of exclusion orders

1. Persons excluded on grounds of public policy or public security may submit an application for lifting of the exclusion order after a reasonable period, depending on the circumstances, and in any event after three years from enforcement of the final exclusion order which has been validly adopted in accordance with Community law, by putting forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering their exclusion.

The Member State concerned shall reach a decision on this application within six months of its submission.

2. The persons referred to in paragraph 1 shall have no right of entry to the territory of the Member State concerned while their application is being considered.

Article 33: Expulsion as a penalty or legal consequence

1. Expulsion orders may not be issued by the host Member State as a penalty or legal consequence of a custodial penalty, unless they conform to the requirements of Articles 27, 28 and 29.

2. If an expulsion order, as provided for in paragraph 1, is enforced more than two years after it was issued, the Member State shall check that the individual concerned is currently and genuinely a threat to public policy or public security and shall assess whether there has been any material change in the circumstances since the expulsion order was issued.

CHAPTER VII: Final provisions

Article 34: Publicity

Member States shall disseminate information concerning the rights and obligations of Union citizens and their family members on the subjects covered by this Directive, particularly by means of awareness-raising campaigns conducted through national and local media and other means of communication.

Article 35: Abuse of rights

Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.

Article 36: Sanctions

Member States shall lay down provisions on the sanctions applicable to breaches of national rules adopted for the implementation of this Directive and shall take the measures required for their application. The sanctions laid down shall be effective and proportionate. Member States shall notify the Commission of these provisions not later than .....* and as promptly as possible in the case of any subsequent changes.

Article 37: More favourable national provisions

The provisions of this Directive shall not affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by this Directive.

Article 38: Repeals

1. Articles 10 and 11 of Regulation (EEC) No 1612/68 shall be repealed with effect from … *.

2. Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC shall be repealed with effect from …. *.

* Two years from the date of entry into force of this Directive.

3. References made to the repealed provisions and Directives shall be construed as being made to this Directive.

Article 39: Report

No later than.....* the Commission shall submit a report on the application of this Directive to the European Parliament and the Council, together with any necessary proposals, notably on the opportunity to extend the period of time during which Union citizens and their family members may reside in the territory of the host Member State without any conditions. The Member States shall provide the Commission with the information needed to produce the report.

Article 40: Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ……**.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

* Four years from the date of entry into force of this Directive

** Two years from the date of entry into force of this Directive.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive together with a table showing how the provisions of this Directive correspond to the national provisions adopted.

Article 41: Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Union.

Article 42: Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 29 April 2004.

For the European Parliament For the Council

The President The President

P. COX M. McDOWELL

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular points 1(c), 2(a) and 3(a) of Article 63 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the European Economic and Social Committee(3),

Having regard to the opinion of the Committee of the Regions(4),

Whereas:

(1) A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.

(2) The European Council at its special meeting in Tampere on 15 and 16 October 1999 agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention relating to the Status of Refugees of 28 July 1951 (Geneva Convention), as supplemented by the New York Protocol of 31 January 1967 (Protocol), thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution.

(3) The Geneva Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees.

(4) The Tampere conclusions provide that a Common European Asylum System should include, in the short term, the approximation of rules on the recognition of refugees and the content of refugee status.

(5) The Tampere conclusions also provide that rules regarding refugee status should be complemented by measures on subsidiary forms of protection, offering an appropriate status to any person in need of such protection.

(6) The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States.

(7) The approximation of rules on the recognition and content of refugee and subsidiary protection status should help to limit the secondary movements of applicants for asylum between Member States, where such movement is purely caused by differences in legal frameworks.

(8) It is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who request international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is either a refugee within the meaning of Article 1(A) of the Geneva Convention, or a person who otherwise needs international protection.

(9) Those third country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive.

(10) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.

(11) With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination.

(12) The «best interests of the child» should be a primary consideration of Member States when implementing this Directive.

(13) This Directive is without prejudice to the Protocol on asylum for nationals of Member States of the European Union as annexed to the Treaty Establishing the European Community.

(14) The recognition of refugee status is a declaratory act.

(15) Consultations with the United Nations High Commissioner for Refugees may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention.

(16) Minimum standards for the definition and content of

refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention.

(17) It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention.

(18) In particular, it is necessary to introduce common concepts of protection needs arising sur place; sources of harm and protection; internal protection; and persecution, including the reasons for persecution.

(19) Protection can be provided not only by the State but also by parties or organisations, including international organisations, meeting the conditions of this Directive, which control a region or a larger area within the territory of the State.

(20) It is necessary, when assessing applications from minors for international protection, that Member States should have regard to child-specific forms of persecution.

(21) It is equally necessary to introduce a common concept of the persecution ground «membership of a particular social group» .

(22) Acts contrary to the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations and are, amongst others, embodied in the United Nations Resolutions relating to measures combating terrorism, which declare that «acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations» and that «knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations» .

(23) As referred to in Article 14, «status» can also include refugee status.

(24) Minimum standards for the definition and content of subsidiary protection status should also be laid down. Subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention.

(25) It is necessary to introduce criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States.

(26) Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.

(27) Family members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status.

(28) The notion of national security and public order also covers cases in which a third country national belongs to an association which supports international terrorism or supports such an association.

(29) While the benefits provided to family members of beneficiaries of subsidiary protection status do not necessarily have to be the same as those provided to the qualifying beneficiary, they need to be fair in comparison to those enjoyed by beneficiaries of subsidiary protection status.

(30) Within the limits set out by international obligations, Member States may lay down that the granting of benefits with regard to access to employment, social welfare, health care and access to integration facilities requires the prior issue of a residence permit.

(31) This Directive does not apply to financial benefits from the Member States which are granted to promote education and training.

(32) The practical difficulties encountered by beneficiaries of refugee or subsidiary protection status concerning the authentication of their foreign diplomas, certificates or other evidence of formal qualification should be taken into account.

(33) Especially to avoid social hardship, it is appropriate, for beneficiaries of refugee or subsidiary protection status, to provide without discrimination in the context of social assistance the adequate social welfare and means of subsistence.

(34) With regard to social assistance and health care, the modalities and detail of the provision of core benefits to beneficiaries of subsidiary protection status should be determined by national law. The possibility of limiting the benefits for beneficiaries of subsidiary protection status to core benefits is to be understood in the sense that this notion covers at least minimum income support, assistance in case of illness, pregnancy and parental assistance, in so far as they are granted to nationals according to the legislation of the Member State concerned.

(35) Access to health care, including both physical and mental health care, should be ensured to beneficiaries of refugee or subsidiary protection status.

(36) The implementation of this Directive should be evaluated at regular intervals, taking into consideration in particular the evolution of the international obligations of Member States regarding non-refoulement, the evolution of the labour markets in the Member States as well as the development of common basic principles for integration.

(37) Since the objectives of the proposed Directive, namely to establish minimum standards for the granting of international protection to third country nationals and

stateless persons by Member States and the content of the protection granted, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the Directive, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(38) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom has notified, by letter of 28 January 2002 , its wish to take part in the adoption and application of this Directive.

(39) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland has notified, by letter of 13 February 2002 , its wish to take part in the adoption and application of this Directive.

(40) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application,

HAS ADOPTED THIS DIRECTIVE,

CHAPTER I

GENERAL PROVISIONS

Article 1: Subject matter and scope

The purpose of this Directive is to lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

Article 2: Definitions

For the purposes of this Directive:

(a) «international protection» means the refugee and subsidiary protection status as defined in (d) and (f);

(b) «Geneva Convention» means the Convention relating to the status of refugees done at Geneva on 28 July 1951, as amended by the New York Protocol of 31 January 1967 ;

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

(d) «refugee status» means the recognition by a Member State of a third country national or a stateless person as a refugee;

(e) «person eligible for subsidiary protection» means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

(f) «subsidiary protection status» means the recognition by a Member State of a third country national or a stateless person as a person eligible for subsidiary protection;

(g) «application for international protection» means a request made by a third country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately;

(h) «family members» means, insofar as the family already existed in the country of origin, the following members of the family of the beneficiary of refugee or subsidiary protection status who are present in the same Member State in relation to the application for international protection:

the spouse of the beneficiary of refugee or subsidiary protection status or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens,

the minor children of the couple referred to in the first indent or of the beneficiary of refugee or subsidiary protection status, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;

(i) «unaccompanied minors» means third-country nationals or stateless persons below the age of 18, who arrive on the territory of the Member States

unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person; it includes minors who are left unaccompanied after they have entered the territory of the Member States;

(j) «residence permit» means any permit or authorisation issued by the authorities of a Member State, in the form provided for under that State's legislation, allowing a third country national or stateless person to reside on its territory;

(k) «country of origin» means the country or countries of nationality or, for stateless persons, of former habitual residence.

Article 3: More favourable standards

Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive.

CHAPTER II: ASSESSMENT OF APPLICATIONS FOR INTERNATIONAL PROTECTION

Article 4: Assessment of facts and circumstances

1. Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.

2. The elements referred to in of paragraph 1 consist of the applicant's statements and all documentation at the applicants disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection.

3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

(d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country;

(e) whether the applicant could reasonably be expected to avail himself of the protection of another country where he could assert citizenship.

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

5. Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation, when the following conditions are met:

(a) the applicant has made a genuine effort to substantiate his application;

(b) all relevant elements, at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;

(c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;

(d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and

(e) the general credibility of the applicant has been established.

Article 5: International protection needs arising sur place

1. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which have taken place since the applicant left the country of origin.

2. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which have been engaged in by the applicant since he left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.

3. Without prejudice to the Geneva Convention, Member States may determine that an applicant who files a subsequent application shall normally not be granted refugee status, if the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving the country of origin.

Article 6: Actors of persecution or serious harm

Actors of persecution or serious harm include:

(a) the State;

(b) parties or organisations controlling the State or a substantial part of the territory of the State;

(c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.

Article 7: Actors of protection

1. Protection can be provided by:

(a) the State; or

(b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State.

2. Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia , by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.

3. When assessing whether an international organisation controls a State or a substantial part of its territory and provides protection as described in paragraph 2, Member States shall take into account any guidance which may be provided in relevant Council acts.

Article 8: Internal protection

1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.

2. In examining whether a part of the country of origin is in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.

3. Paragraph 1 may apply notwithstanding technical obstacles to return to the country of origin.

CHAPTER III: QUALIFICATION FOR BEING A REFUGEE

Article 9: Acts of persecution

1. Acts of persecution within the meaning of article 1 A of the Geneva Convention must:

(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

2. Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of:

(a) acts of physical or mental violence, including acts of sexual violence;

(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;

(c) prosecution or punishment, which is disproportionate or discriminatory;

(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;

(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);

(f) acts of a gender-specific or child-specific nature.

3. In accordance with Article 2(c), there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1.

Article 10: Reasons for persecution

1. Member States shall take the following elements into account when assessing the reasons for persecution:

(a) the concept of race shall in particular include considerations of colour, descent, or membership of a particular ethnic group;

(b) the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or

mandated by any religious belief;

(c) the concept of nationality shall not be confined to citizenship or lack thereof but shall in particular include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;

(d) a group shall be considered to form a particular social group where in particular:

members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;

depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article;

(e) the concept of political opinion shall in particular include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant.

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

Article 11: Cessation

1. A third country national or a stateless person shall cease to be a refugee, if he or she:

(a) has voluntarily re-availed himself or herself of the protection of the country of nationality; or

(b) having lost his or her nationality, has voluntarily re-acquired it; or

(c) has acquired a new nationality, and enjoys the protection of the country of his or her new nationality; or

(d) has voluntarily re-established himself or herself in the country which he or she left or outside which he or she remained owing to fear of persecution; or

(e) can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of nationality;

(f) being a stateless person with no nationality, he or she is able, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, to return to the country of former habitual residence.

2. In considering points (e) and (f) of paragraph 1, Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded.

Article 12: Exclusion

1. A third country national or a stateless person is excluded from being a refugee, if:

(a) he or she falls within the scope of Article 1 D of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Directive;

(b) he or she is recognised by the competent authorities of the country in which he or she has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country; or rights and obligations equivalent to those.

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

(a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

3. Paragraph 2 applies to persons who instigate or

otherwise participate in the commission of the crimes or acts mentioned therein.

CHAPTER IV: REFUGEE STATUS

Article 13: Granting of refugee status

Member States shall grant refugee status to a third country national or a stateless person, who qualifies as a refugee in accordance with Chapters II and III.

Article 14: Revocation of, ending of or refusal to renew refugee status

1. Concerning applications for international protection filed after the entry into force of this Directive, Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if he or she has ceased to be a refugee in accordance with Article 11.

2. Without prejudice to the duty of the refugee in accordance with Article 4(1) to disclose all relevant facts and provide all relevant documentation at his/her disposal, the Member State, which has granted refugee status, shall on an individual basis demonstrate that the person concerned has ceased to be or has never been a refugee in accordance with paragraph 1 of this Article.

3. Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person, if, after he or she has been granted refugee status, it is established by the Member State concerned that:

(a) he or she should have been or is excluded from being a refugee in accordance with Article 12;

(b) his or her misrepresentation or omission of facts, including the use of false documents, were decisive for the granting of refugee status.

4. Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when:

(a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present;

(b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State.

5. In situations described in paragraph 4, Member States may decide not to grant status to a refugee, where such a decision has not yet been taken.

6. Persons to whom paragraphs 4 or 5 apply are entitled to rights set out in or similar to those set out in Articles 3, 4, 16, 22, 31 and 32 and 33 of the Geneva Convention in so far as they are present in the Member State.

CHAPTER V: QUALIFICATION FOR SUBSIDIARY PROTECTION

Article 15: Serious harm

Serious harm consists of:

(a) death penalty or execution; or

(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or

(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Article 16: Cessation

1. A third country national or a stateless person shall cease to be eligible for subsidiary protection when the circumstances which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required.

2. In applying paragraph 1, Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the person eligible for subsidiary protection no longer faces a real risk of serious harm.

Article 17: Exclusion

1. A third country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that:

(a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he or she has committed a serious crime;

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations;

(d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present.

2. Paragraph 1 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.

3. Member States may exclude a third country national or a stateless person from being eligible for subsidiary protection, if he or she prior to his or her admission to the Member State has committed one or more crimes, outside the scope of paragraph 1, which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions

resulting from these crimes.

CHAPTER VI: SUBSIDIARY PROTECTION STATUS

Article 18: Granting of subsidiary protection status

Member States shall grant subsidiary protection status to a third country national or a stateless person eligible for subsidiary protection in accordance with Chapters II and V.

Article 19: Revocation of, ending of or refusal to renew subsidiary protection status

1. Concerning applications for international protection filed after the entry into force of this Directive, Member States shall revoke, end or refuse to renew the subsidiary protection status of a third country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if he or she has ceased to be eligible for subsidiary protection in accordance with Article 16.

2. Member States may revoke, end or refuse to renew the subsidiary protection status of a third country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if after having been granted subsidiary protection status, he or she should have been excluded from being eligible for subsidiary protection in accordance with Article 17(3).

3. Member States shall revoke, end or refuse to renew the subsidiary protection status of a third country national or a stateless person, if:

(a) he or she, after having been granted subsidiary protection status, should have been or is excluded from being eligible for subsidiary protection in accordance with Article 17(1) and (2);

(b) his or her misrepresentation or omission of facts, including the use of false documents, were decisive for the granting of subsidiary protection status.

4. Without prejudice to the duty of the third country national or stateless person in accordance with Article 4(1) to disclose all relevant facts and provide all relevant documentation at his/her disposal, the Member State, which has granted the subsidiary protection status, shall on an individual basis demonstrate that the person concerned has ceased to be or is not eligible for subsidiary protection in accordance with paragraphs 1, 2 and 3 of this Article.

CHAPTER VII: CONTENT OF INTERNATIONAL PROTECTION

Article 20: General rules

1. This Chapter shall be without prejudice to the rights laid down in the Geneva Convention.

2. This Chapter shall apply both to refugees and persons eligible for subsidiary protection unless otherwise indicated.

3. When implementing this Chapter, Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

4. Paragraph 3 shall apply only to persons found to have special needs after an individual evaluation of their situation.

5. The best interest of the child shall be a primary consideration for Member States when implementing the provisions of this Chapter that involve minors.

6. Within the limits set out by the Geneva Convention, Member States may reduce the benefits of this Chapter, granted to a refugee whose refugee status has been obtained on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognised as a refugee.

7. Within the limits set out by international obligations of Member States, Member States may reduce the benefits of this Chapter, granted to a person eligible for subsidiary protection, whose subsidiary protection status has been obtained on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognised as a person eligible for subsidiary protection.

Article 21: Protection from refoulement

1. Member States shall respect the principle of non-refoulement in accordance with their international obligations.

2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognised or not, when:

(a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or

(b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State.

3. Member States may revoke, end or refuse to renew or to grant the residence permit of (or to) a refugee to whom paragraph 2 applies.

Article 22: Information

Member States shall provide persons recognised as being in need of international protection, as soon as possible after the respective protection status has been granted, with access to information, in a language likely to be understood by them, on the rights and obligations relating to that status.

Article 23: Maintaining family unity

1. Member States shall ensure that family unity can be maintained.

2. Member States shall ensure that family members of the beneficiary of refugee or subsidiary protection status, who do not individually qualify for such status, are entitled to claim the benefits referred to in Articles 24 to 34, in accordance with national procedures and as far as it is compatible with the personal legal status of the family member.

In so far as the family members of beneficiaries of subsidiary protection status are concerned, Member States may define the conditions applicable to such benefits.

In these cases, Member States shall ensure that any benefits provided guarantee an adequate standard of living.

3. Paragraphs 1 and 2 are not applicable where the family member is or would be excluded from refugee or subsidiary protection status pursuant to Chapters III and V.

4. Notwithstanding paragraphs 1 and 2, Member States may refuse, reduce or withdraw the benefits referred therein for reasons of national security or public order.

5. Member States may decide that this Article also applies to other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were wholly or mainly dependent on the beneficiary of refugee or subsidiary protection status at that time.

Article 24: Residence permits

1. As soon as possible after their status has been granted, Member States shall issue to beneficiaries of refugee status a residence permit which must be valid for at least three years and renewable unless compelling reasons of national security or public order otherwise require, and without prejudice to Article 21(3).

Without prejudice to Article 23(1), the residence permit to be issued to the family members of the beneficiaries of refugee status may be valid for less than three years and renewable.

2. As soon as possible after the status has been granted, Member States shall issue to beneficiaries of subsidiary protection status a residence permit which must be valid for at least one year and renewable, unless compelling reasons of national security or public order otherwise require.

Article 25: Travel document

1. Member States shall issue to beneficiaries of refugee status travel documents in the form set out in the Schedule to the Geneva Convention, for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require.

2. Member States shall issue to beneficiaries of subsidiary protection status who are unable to obtain a national passport, documents which enable them to travel, at least when serious humanitarian reasons arise that require their presence in another State, unless compelling reasons of national security or public order otherwise require.

Article 26: Access to employment

1. Member States shall authorise beneficiaries of refugee status to engage in employed or self-employed activities subject to rules generally applicable to the profession and to the public service, immediately after the refugee status has been granted.

2. Member States shall ensure that activities such as employment-related education opportunities for adults, vocational training and practical workplace experience are offered to beneficiaries of refugee status, under equivalent conditions as nationals.

3. Member States shall authorise beneficiaries of subsidiary protection status to engage in employed or self-employed activities subject to rules generally applicable to the profession and to the public service immediately after the subsidiary protection status has been granted. The situation of the labour market in the Member States may be taken into account, including for possible prioritisation of access to employment for a limited period of time to be determined in accordance with national law. Member States shall ensure that the beneficiary of subsidiary protection status has access to a post for which the beneficiary has received an offer in accordance with national rules on prioritisation in the labour market.

4. Member States shall ensure that beneficiaries of subsidiary protection status have access to activities such as employment-related education opportunities for adults, vocational training and practical workplace experience, under conditions to be decided by the Member States.

5. The law in force in the Member States applicable to

remuneration, access to social security systems relating to employed or self-employed activities and other conditions of employment shall apply.

Article 27: Access to education

1. Member States shall grant full access to the education system to all minors granted refugee or subsidiary protection status, under the same conditions as nationals.

2. Member States shall allow adults granted refugee or subsidiary protection status access to the general education system, further training or retraining, under the same conditions as third country nationals legally resident.

3. Member States shall ensure equal treatment between beneficiaries of refugee or subsidiary protection status and nationals in the context of the existing recognition procedures for foreign diplomas, certificates and other evidence of formal qualifications.

Article 28: Social welfare

1. Member States shall ensure that beneficiaries of refugee or subsidiary protection status receive, in the Member State that has granted such statuses, the necessary social assistance, as provided to nationals of that Member State.

2. By exception to the general rule laid down in paragraph 1, Member States may limit social assistance granted to beneficiaries of subsidiary protection status to core benefits which will then be provided at the same levels and under the same eligibility conditions as nationals.

Article 29: Health care

1. Member States shall ensure that beneficiaries of refugee or subsidiary protection status have access to health care under the same eligibility conditions as nationals of the Member State that has granted such statuses.

2. By exception to the general rule laid down in paragraph 1, Member States may limit health care granted to beneficiaries of subsidiary protection to core benefits which will then be provided at the same levels and under the same eligibility conditions as nationals.

3. Member States shall provide, under the same eligibility conditions as nationals of the Member State that has granted the status, adequate health care to beneficiaries of refugee or subsidiary protection status who have special needs, such as pregnant women, disabled people, persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence or minors who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or who have suffered from armed conflict.

Article 30: Unaccompanied minors

1. As soon as possible after the granting of refugee or subsidiary protection status Member States shall take the necessary measures, to ensure the representation of unaccompanied minors by legal guardianship or, where necessary, by an organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or Court order.

2. Member States shall ensure that the minor's needs are duly met in the implementation of this Directive by the appointed guardian or representative. The appropriate authorities shall make regular assessments.

3. Member States shall ensure that unaccompanied minors are placed either:

(a) with adult relatives; or

(b) with a foster family; or

(c) in centres specialised in accommodation for minors; or

(d) in other accommodation suitable for minors.

In In this context, the views of the child shall be taken into account in accordance with his or her age and degree of maturity.

4. As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.

5. Member States, protecting the unaccompanied minor's best interests, shall endeavour to trace the members of the minor's family as soon as possible. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis.

6. Those working with unaccompanied minors shall have had or receive appropriate training concerning their needs.

Article 31: Access to accommodation

The Member States shall ensure that beneficiaries of refugee or subsidiary protection status have access to accommodation under equivalent conditions as other third country nationals legally resident in their territories.

Article 32: Freedom of movement within the Member State

Member States shall allow freedom of movement within their territory to beneficiaries of refugee or subsidiary protection status, under the same conditions and restrictions as those provided for other third country nationals legally resident in their territories.

Article 33: Access to integration facilities

1. In order to facilitate the integration of refugees into society, Member States shall make provision for integration programmes which they consider to be appropriate or create pre-conditions which guarantee access to such programmes.

2. Where it is considered appropriate by Member States, beneficiaries of subsidiary protection status shall be granted access to integration programmes.

Article 34: Repatriation

Member States may provide assistance to beneficiaries of refugee or subsidiary protection status who wish to repatriate.

CHAPTER VIII: ADMINISTRATIVE COOPERATION

Article 35: Cooperation

Member States shall each appoint a national contact point, whose address they shall communicate to the Commission, which shall communicate it to the other Member States.

Member States shall, in liaison with the Commission, take all appropriate measures to establish direct cooperation and an exchange of information between the competent authorities.

Article 36: Staff

Member States shall ensure that authorities and other organisations implementing this Directive have received the necessary training and shall be bound by the confidentiality principle, as defined in the national law, in relation to any information they obtain in the course of their work.

CHAPTER IX: FINAL PROVISIONS

Article 37: Reports

1. By 10 April 2008 , the Commission shall report to the European Parliament and the Council on the application of this Directive and shall propose any amendments that are necessary. These proposals for amendments shall be made by way of priority in relation to Articles 15, 26 and 33. Member States shall send the Commission all the information that is appropriate for drawing up that report by 10 October 2007 .

2. After presenting the report, the Commission shall report to the European Parliament and the Council on the application of this Directive at least every five years.

Article 38: Transposition

1. The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 10 October 2006 . They shall forthwith inform the Commission thereof.

When the Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

Article 39: Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 40: Addressees

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at Luxembourg, 29 April 2004 .

For the Council

The President

COUNCIL DIRECTIVE 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status

SECTION II

Article 25: Inadmissible applications

1. In addition to cases in which an application is not examined in accordance with Regulation (EC) No 343/2003, Member States are not required to examine whether the applicant qualifies as a refugee in accordance with Directive 2004/83/EC where an application is considered inadmissible

pursuant to this Article.

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

(a) another Member State has granted refugee status;

(b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 26;

(c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 27;

(d) the applicant is allowed to remain in the Member State concerned on some other grounds and as result of this he/she has been granted a status equivalent to the rights and benefits of the refugee status by virtue of Directive 2004/83/EC;

(e) the applicant is allowed to remain in the territory of the Member State concerned on some other grounds which protect him/her against refoulement pending the outcome of a procedure for the determination of status pursuant to point (d);

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

(g) a dependant of the applicant lodges an application, after he/she has in accordance with Article 6(3) consented to have his/her case be part of an application made on his/her behalf, and there are no facts relating to the dependant's situation, which justify a separate application.

Article 26: The concept of first country of asylum

A country can be considered to be a first country of asylum for a particular applicant for asylum if:

(a) he/she has been recognised in that country as a refugee and he/she can still avail himself/herself of that protection; or

(b) he/she otherwise enjoys sufficient protection in that country, including benefiting from the principle of nonrefoulement; provided that he/she will be re-admitted to that country.

In applying the concept of first country of asylum to the particular circumstances of an applicant for asylum Member States may take into account Article 27(1).

Article 27: The safe third country concept

1. Member States may apply the safe third country concept

only where the competent authorities are satisfied that a person seeking asylum will be treated in accordance with the following principles in the third country concerned:

(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;

(b) the principle of non-refoulement in accordance with the Geneva Convention is respected;

(c) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and

(d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

2. The application of the safe third country concept shall be subject to rules laid down in national legislation, including:

(a) rules requiring a connection between the person seeking asylum and the third country concerned on the basis of which it would be reasonable for that person to go to that country;

(b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe;

(c) rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the

grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.

3. When implementing a decision solely based on this Article, Member States shall:

(a) inform the applicant accordingly; and

(b) provide him/her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.

4. Where the third country does not permit the applicant for asylum to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II.

5. Member States shall inform the Commission periodically of the countries to which this concept is applied in accordance with the provisions of this Article.

C. NON-EU LEGISLATIVE MATERIALS

(Geneva) 1951 Convention relating to the Status of Refugees

Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950

Entry into force: 22 April 1954, in accordance with article 43

Preamble

The High Contracting Parties ,

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms,

Considering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement,

Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,

Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States,

Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner,

Have agreed as follows :

Chapter I

GENERAL PROVISIONS

Article 1. - Definition of the term "refugee"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

B. (1) For the purposes of this Convention, the words "events occurring before 1 January 1951" in article 1, section A, shall be understood to mean either (a) "events occurring in Europe before 1 January 1951"; or (b) "events occurring in Europe or elsewhere before 1 January 1951"; and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this

Convention.

(2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations.

C. This Convention shall cease to apply to any person falling under the terms of section A if:

(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or

(2) Having lost his nationality, he has voluntarily reacquired it; or

(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

Article 2. - General obligations

Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

Article 3. - Non-discrimination

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

Article 4. - Religion

The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children.

Article 5. - Rights granted apart from this Convention

Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.

Article 6. - The term "in the same circumstances"

For the purposes of this Convention, the term "in the same circumstances" implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling.

Article 7. - Exemption from reciprocity

1. Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.

2. After a period of three years' residence, all refugees shall enjoy exemption from legislative reciprocity in the territory of the Contracting States.

3. Each Contracting State shall continue to accord to refugees the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State.

4. The Contracting States shall consider favourably the possibility of according to refugees, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to paragraphs 2 and 3, and to extending exemption from reciprocity to refugees who do not fulfil the conditions provided for in paragraphs 2 and 3.

5. The provisions of paragraphs 2 and 3 apply both to the rights and benefits referred to in articles 13, 18, 19, 21 and 22 of this Convention and to rights and benefits for which this Convention does not provide.

Article 8. - Exemption from exceptional measures

With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article, shall, in appropriate cases, grant exemptions in favour of such refugees.

Article 9. - Provisional measures

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

Article 10. - Continuity of residence

1. Where a refugee has been forcibly displaced during the Second World War and removed to the territory of a Contracting State, and is resident there, the period of such enforced sojourn shall be considered to have been lawful residence within that territory.

2. Where a refugee has been forcibly displaced during the Second World War from the territory of a Contracting State and has, prior to the date of entry into force of this Convention, returned there for the purpose of taking up residence, the period of residence before and after such enforced displacement shall be regarded as one uninterrupted period for any purposes for which uninterrupted residence is required.

Article 11. - Refugee seamen

In the case of refugees regularly serving as crew members on board a ship flying the flag of a Contracting State, that State shall give sympathetic consideration to their establishment on its territory and the issue of travel documents to them or their temporary admission to its territory particularly with a view to facilitating their establishment in another country.

Chapter II

JURIDICAL STATUS

Article 12. - Personal status

1. The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by

the law of the country of his residence.

2. Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee.

Article 13. - Movable and immovable property

The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.

Article 14. - Artistic rights and industrial property

In respect of the protection of industrial property, such as inventions, designs or models, trade marks, trade names, and of rights in literary, artistic and scientific works, a refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other Contracting States, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence.

Article 15. - Right of association

As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.

Article 16. - Access to courts

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from cautio judicatum solvi .

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

Chapter III

GAINFUL EMPLOYMENT

Article 17. - Wage-earning employment

1. The Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.

2. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfils one of the following conditions:

(a) He has completed three years' residence in the country;

(b) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefit of this provision if he has abandoned his spouse;

(c) He has one or more children possessing the nationality of the country of residence.

3. The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.

Article 18. - Self-employment

The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial

companies.

Article 19. - Liberal professions

1. Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

2. The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible.

Chapter IV

WELFARE

Article 20. - Rationing

Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals.

Article 21. - Housing

As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

Article 22. - Public education

1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

2. The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

Article 23. - Public relief

The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

Article 24. - Labour legislation and social security

1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters;

(a) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;

(b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:

(i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

(ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.

2. The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.

3. The Contracting States shall extend to refugees the benefits of agreements concluded between them, or which may be

concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

4. The Contracting States will give sympathetic consideration to extending to refugees so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non-contracting States.

Chapter V

ADMINISTRATIVE MEASURES

Article 25. - Administrative assistance

1. When the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority.

2. The authority or authorities mentioned in paragraph 1 shall deliver or cause to be delivered under their supervision to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities.

3. Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities, and shall be given credence in the absence of proof to the contrary.

4. Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.

5. The provisions of this article shall be without prejudice to articles 27 and 28.

Article 26. - Freedom of movement

Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.

Article 27. - Identity papers

The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.

Article 28. - Travel documents

1. The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

2. Travel documents issued to refugees under previous international agreements by Parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article.

Article 29. - Fiscal charges

1. The Contracting States shall not impose upon refugees duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.

2. Nothing in the above paragraph shall prevent the application to refugees of the laws and regulations concerning charges in respect of the issue to aliens of administrative documents including identity papers.

Article 30. - Transfer of assets

1. A Contracting State shall, in conformity with its laws and regulations, permit refugees to transfer assets which they have brought into its territory, to another country where they have been admitted for the purposes of resettlement.

2. A Contracting State shall give sympathetic consideration to the application of refugees for permission to transfer assets wherever they may be and which are necessary for their resettlement in another country to which they have been admitted.

Article 31. - Refugees unlawfully in the country of refuge

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Article 32. - Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33. - Prohibition of expulsion or return ("refoulement")

1. No Contracting State shall expel or return (" refouler ") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Article 34. - Naturalization

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

Chapter VI

EXECUTORY AND TRANSITORY PROVISIONS

Article 35. - Co-operation of the national authorities with the United Nations

1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:

(a) The condition of refugees,

(b) The implementation of this Convention, and

(c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Article 36. - Information on national legislation

The Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention.

Article 37. - Relation to previous conventions

Without prejudice to article 28, paragraph 2, of this Convention, this Convention replaces, as between Parties to it, the Arrangements of 5 July 1922, 31 May 1924, 12 May 1926, 30 June 1928 and 30 July 1935, the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 and the Agreement of 15 October 1946.

Chapter VII

FINAL CLAUSES

Article 38. - Settlement of disputes

Any dispute between Parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

Article 39. - Signature, ratification and accession

1. This Convention shall be opened for signature at Geneva on 28 July 1951 and shall thereafter be deposited with the Secretary-General of the United Nations. It shall be open for signature at the European Office of the United Nations from 28 July to 31 August 1951 and shall be re-opened for signature at the Headquarters of the United Nations from 17 September 1951 to 31 December 1952.

2. This Convention shall be open for signature on behalf of all States Members of the United Nations, and also on behalf of any other State invited to attend the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons or to which an invitation to sign will have been addressed by the General Assembly. It shall be ratified and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. This Convention shall be open from 28 July 1951 for accession by the States referred to in paragraph 2 of this article. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 40. - Territorial application clause

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article 41. - Federal clause

In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of parties which are not Federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the Federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(c) A Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention showing the extent to which effect has been given to that provision by legislative or other action.

Article 42. - Reservations

1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1), 33, 36-46 inclusive.

2. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

Article 43. - Entry into force

1. This Convention shall come into force on the ninetieth day following the day of deposit of the sixth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the sixth instrument of ratification or accession, the Convention shall enter into force on the ninetieth day following the date of deposit by such State of its instrument of ratification or accession.

Article 44. - Denunciation

1. Any Contracting State may denounce this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. Such denunciation shall take effect for the Contracting State concerned one year from the date upon which it is received by the Secretary-General of the United Nations.

3. Any State which has made a declaration or notification under article 40 may, at any time thereafter, by a notification to the Secretary-General of the United Nations, declare that the Convention shall cease to extend to such territory one year after the date of receipt of the notification by the Secretary-General.

Article 45. - Revision

1. Any Contracting State may request revision of this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall recommend the steps, if any, to be taken in respect of such request.

Article 46. - Notifications by the Secretary-General of the United Nations

The Secretary-General of the United Nations shall inform all Members of the United Nations and non-member States referred to in article 39:

(a) Of declarations and notifications in accordance with section B of article 1;

(b) Of signatures, ratifications and accessions in accordance with article 39;

(c) Of declarations and notifications in accordance with article 40;

(d) Of reservations and withdrawals in accordance with article 42;

(e) Of the date on which this Convention will come into force in accordance with article 43;

(f) Of denunciations and notifications in accordance with article 44;

(g) Of requests for revision in accordance with article 45.

In faith whereof the undersigned, duly authorized, have signed this Convention on behalf of their respective Governments.

Done at Geneva, this twenty-eighth day of July, one thousand nine hundred and fifty-one, in a single copy, of which the English and French texts are equally authentic and which shall remain deposited in the archives of the United Nations, and certified true copies of which shall be delivered to all Members of the United Nations and to the non-member States referred to in article 39.

D. ECJ JURISPRUDENCE
(Chronologically ordered and edited)

JUDGMENT OF THE COURT (Grand Chamber)

21 September 2010

Table of contents

(Appeals – Right of access to documents of the institutions – Regulation (EC) No 1049/2001 – Second and third indents of Article 4(2) – Pleadings lodged by the Commission in proceedings before the Court of Justice and the General Court – Decision of the Commission refusing access)

In Joined Cases C-514/07 P, C-528/07 P and C-532/07 P,

THREE APPEALS under Article 56 of the Statute of the Court of Justice, lodged on 20 November 2007 (C-514/07 P) and on 27 November 2007 (C-528/07 P and C-532/07 P),

Kingdom of Sweden (C-514/07 P), represented by S. Johannesson, A. Falk, K. Wistrand and K. Petkovska, acting as Agents,

appellant,

supported by:

Kingdom of Denmark, represented by B. Weis Fogh, acting as Agent,

Republic of Finland, represented by J. Heliskoski, acting as Agent,

interveners in the appeal,

the other parties to the proceedings being:

Association de la presse internationale ASBL (API), established in Brussels (Belgium), represented by S. Völcker and J. Heithecker, Rechtsanwälte, F. Louis, avocat, and C. O'Daly, Solicitor,

applicant at first instance,

European Commission, represented by C. Docksey, V. Kreuschitz and P. Aalto, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

and

Association de la presse internationale ASBL (API) (C-528/07 P), established in Brussels (Belgium), represented by S. Völcker, Rechtsanwalt, F. Louis, avocat, and C. O'Daly, Solicitor,

appellant,

the other party to the proceedings being:

European Commission, represented by C. Docksey, V. Kreuschitz and P. Aalto, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

supported by:

United Kingdom of Great Britain and Northern Ireland, represented by E. Jenkinson and S. Behzadi-Spencer, acting as Agents, and by J. Coppel, Barrister,

intervener in the appeal,

and

European Commission (C-532/07 P), represented by C. Docksey, V. Kreuschitz and P. Aalto, acting as Agents, with an address for service in Luxembourg,

appellant

supported by:

United Kingdom of Great Britain and Northern Ireland, represented by E. Jenkinson and S. Behzadi-Spencer, acting as Agents, and by J. Coppel, Barrister,

intervener in the appeal,

the other party to the proceedings being:

Association de la presse internationale ASBL (API), established in Brussels (Belgium), represented by S. Völcker, Rechtsanwalt, F. Louis, avocat, and C. O'Daly, Solicitor,

applicant at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano (Rapporteur), J.N. Cunha Rodrigues, K. Lenaerts, R. Silva de Lapuerta and C. Toader, Presidents of Chambers, A. Rosas, K. Schiemann, E. Juhász, T. von Danwitz and A. Arabadjiev, Judges,

Advocate General: M. Poiares Maduro,

Registrars: H. von Holstein, Assistant Registrar, and B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 16 June 2009,

after hearing the Opinion of the Advocate General at the sitting on 1 October 2009,

gives the following

Judgment

1 By their appeals, the Kingdom of Sweden, the Association de la presse internationale ASBL ('API') and the Commission of the European Communities seek the setting aside of the judgment in Case T-36/04 *API* v *Commission* [2007] ECR II-3201 ('the judgment under appeal'), by which the Court of First Instance of the European Communities (now 'the General Court') annulled in part the decision of the Commission of 20 November 2003 ('the contested decision') refusing an application by API for access to pleadings lodged by the Commission before the Court of Justice and the General Court in certain court proceedings.

I – Legal context

2 Recitals 1, 2, 4 and 11 in the preamble to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) state as follows:

'(1) The second subparagraph of Article 1 of the Treaty on European Union enshrines the concept of openness, stating that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

(2) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.

…

(4) The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty.

…

(11) In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks. In assessing the exceptions, the institutions should take account of the principles in Community legislation concerning the protection of personal data, in all areas of Union activities.'

3 Article 1(a) of that regulation provides:

'The purpose of this Regulation is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as "the institutions") documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents'.

4 Under paragraphs 1 and 3 of Article 2 of that regulation:

'1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.

…

3. This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.'

5 Paragraphs 2, 4 and 6 of Article 4 of Regulation No 1049/2001, concerning exceptions to the right of access, provide:

'2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

…

– court proceedings and legal advice,

– the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

…

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

…

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.'

6 Under Article 7(2) of Regulation No 1049/2001, '[i]n the event of a total or partial refusal [of his request for access], the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position'.

7 Article 8(1) of that regulation provides:

'A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. …'

8 Article 12(2) of Regulation No 1049/2001 provides:

'In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible.'

II – Background to the dispute

9 By letter of 1 August 2003, API – a non-profit-making organisation of foreign journalists based in Belgium – applied to the Commission, in accordance with Article 6 of Regulation No 1049/2001, for access to the written pleadings lodged by the Commission before the General Court or the Court of Justice in the proceedings relating to the following cases:

– *Honeywell* v *Commission* (T-209/01) and *General Electric* v *Commission* (T-210/01);

– *MyTravel* v *Commission* (T-212/03);

– *Airtours* v *Commission* (T-342/99);

– *Commission* v *Austria* (C-203/03);

– *Commission* v *United Kingdom* (C-466/98); *Commission* v *Denmark* (C-467/98); *Commission* v *Sweden* (C-468/98); *Commission* v *Finland* (C-469/98); *Commission* v *Belgium* (C-471/98); *Commission* v *Luxembourg* (C-472/98); *Commission* v *Austria* (C-475/98); and *Commission* v *Germany* (C-476/98) (collectively, 'the *Open Skies* cases');

– *Köbler* (C-224/01); and

– *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00).

10 By letter of 17 September 2003, the Commission granted that application only in respect of the pleadings lodged in *Köbler* (C-224/01) and *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00), which concerned references for a preliminary ruling under Article 234 EC.

11 As regards the remainder, the Commission refused API's application and that refusal was confirmed, under Article 8(1) of Regulation No 1049/2001, by the contested decision.

12 The Commission, first of all, refused access to the pleadings lodged in *Honeywell* v *Commission* (T-209/01) and *General Electric* v *Commission* (T-210/01), essentially because those cases were pending at the time when the contested decision was adopted and, accordingly, the exception relating to the protection of court proceedings, provided for under the second indent of Article 4(2) of Regulation No 1049/2001, applied.

13 Next, on the basis of the same exception, the Commission refused access to the pleadings lodged in *Airtours* v *Commission* (T-342/99) because, whilst that case was closed, it was none the less closely connected with *MyTravel* v *Commission* (T-212/03), a case which was still pending when the contested decision was adopted. As regards the application for access to the pleadings lodged in the latter case, the Commission decided that it was premature, and API did not challenge that finding in its action.

14 In addition, the Commission refused API's application in respect of the *Open Skies* cases, finding that, although those cases were closed when the contested decision was adopted, they all concerned actions under Article 226 EC for failure to fulfil Treaty obligations ('infringement proceedings'), which meant that the exception relating to protection of the purpose of inspections, investigations and audits, provided for under the third indent of Article 4(2) of Regulation No 1049/2001, applied.

15 Lastly, the Commission refused API's application in respect of the documents lodged in *Commission* v *Austria* (C-203/03). It found that the exception relating to the protection of court proceedings applied to those documents, just as it did to those lodged in *Honeywell* v *Commission* (T-209/01) and *General Electric* v *Commission* (T-210/01). Even so, the Commission added that that application had also to be refused on the basis of the third indent of Article 4(2) of Regulation No 1049/2001, in so far as that provision excludes access to any document concerning infringement proceedings where its disclosure would undermine the protection of the purpose of the investigations, that purpose being to reach an amicable settlement of the dispute between the Commission and the Member State concerned.

16 As regards the application of the last line of Article 4(2) of Regulation No 1049/2001, the Commission found that there was no overriding public interest in disclosure, for the purposes of that provision, to justify allowing access to the documents applied for.

III – The judgment under appeal

17 API brought an action, which was upheld only in part by the General Court, for annulment of the contested decision.

18 In paragraphs 51 to 57 of the judgment under appeal, after recalling that the purpose of Regulation No 1049/2001 is to give the fullest possible effect to the right of public access to documents held by the institutions, the General Court stated that that right is none the less subject to certain limitations. In that regard, the regulation provides for exceptions which, as such, must be interpreted strictly and the application of which requires, as a rule, a specific case-by-case assessment of the content of the documents covered by the application for access, and the risk that the interest protected by each of those exceptions might be undermined cannot be purely hypothetical.

19 Nevertheless, the General Court added, in paragraph 58 of that judgment, that such an examination is not required in all circumstances. It may not be necessary where, owing to the particular circumstances of the individual case, it is obvious that access must be granted or that it must be refused. Such a situation could arise, for example, if certain documents are manifestly covered in their entirety by one of the exceptions provided for under that regulation.

20 In application of those principles, the General Court first examined the part of the contested decision concerning the pleadings lodged in *Honeywell* v *Commission* (T-209/01), *General Electric* v *Commission* (T-210/01) and *Commission* v *Austria* (C-203/03), all of which were pending cases.

21 According to the General Court, such documents are manifestly covered in their entirety by the exception relating to the protection of court proceedings and that remains the position until the proceedings in question have reached the hearing stage.

22 The reason for this is that, as was stated in paragraphs 78 to 81 of the judgment under appeal, it is vital to prevent disclosure of those documents before the hearing, in order to prevent the Commission's agents from being subjected to outside pressure, particularly from members of the public. Prevention of disclosure also makes it possible to prevent the criticism and objections which could be levelled against the arguments set out in those pleadings – by specialists and by the press and public opinion in general – from having the effect, in breach of the principle of equality of arms, of imposing an additional task on the Commission. The Commission might consider itself obliged to take account of them in the defence of its position before the court, whereas the parties to the proceedings – which are under no obligation to disclose their pleadings – can defend their interests free from all external influences.

23 Thus, according to the judgment under appeal, it is not until after the hearing that the Commission is required to undertake a specific examination, on a case-by-case basis, of any pleadings to which it has been asked to give access.

24 In that regard, the General Court added, first, in paragraphs 84 and 85 of the judgment under appeal, that that conclusion cannot be called into question by the fact that disclosure of procedural documents is possible in a number of Member States and that it is also provided for, as regards documents lodged with the European Court of Human Rights, in the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, since the Rules of Procedure of the European Union ('EU') Courts do not provide for a third-party right of access to procedural documents lodged at their registries by the parties.

25 Next, in paragraphs 86 to 89 of that judgment, the General Court held that the Commission cannot rely on the Rules of Procedure of the EU Courts, under which the pleadings of the parties are in principle confidential, in order to refuse access to those pleadings after the hearing as well. The Court of Justice has made it clear that those rules do not prevent the parties from disclosing their own written submissions.

26 Lastly, in paragraphs 90 and 91 of the judgment under appeal, the General Court added that non-disclosure of those pleadings before the hearing is justified, moreover, by the need to protect the '*effet utile*' (practical effect) of any decision by the Court hearing the matter to hold the hearing *in camera*.

27 The General Court accordingly held, in paragraph 92 of the judgment under appeal, that the Commission had in no way erred in law by not carrying out a concrete assessment of the pleadings relating to *Honeywell* v *Commission* (T-209/01), *General Electric* v *Commission* (T-210/01) or *Commission* v *Austria* (C-203/03), and that it had not made an error of assessment in finding that there was a public interest in the protection of those pleadings.

28 Lastly, the General Court held, in paragraph 100 of the judgment under appeal, that API had also failed to raise overriding public interests capable of justifying, under Article 4(2) of Regulation No 1049/2001, disclosure of the documents in question.

29 Secondly, as regards the application for access to the pleadings relating to *Airtours* v *Commission* (T-342/99), the General Court held, in paragraphs 105 to 107 of the judgment under appeal, that the Commission's refusal – on the basis of the close connection between that case and *MyTravel* v *Commission* (T-212/03), a case which was pending – was not justified. Case T-342/99 had already been closed by the judgment of the General Court of 6 June 2002 (ECR II-2585), which meant that the content of the pleadings had already been made public, not only at the hearing, but also in the very text of the judgment. Moreover, the nature of the risk of an adverse effect on the proceedings which are still pending in no way emerges from the mere fact that arguments already submitted before the Court in a closed case are likely also to be debated in a similar case.

30 Thirdly and lastly, the General Court held, in paragraphs 135 to 140 of the judgment under appeal, that the Commission's refusal of API's application for access to the pleadings lodged in the *Open Skies* cases could not be justified on the basis of the exception provided for under the third indent of Article 4(2) of Regulation No 1049/2001 concerning the protection of inspections, investigations and audits. The *Open Skies* cases had already been closed by a judgment, so that no investigation to prove the existence of the infringements in question could be jeopardised by disclosure of the documents requested.

31 Consequently, the General Court annulled the contested decision in so far as it refused access to the pleadings submitted by the Commission before the Court of Justice in the *Open Skies* cases and before the General Court in *Airtours* v *Commission* (T-342/99). Under paragraph 2 of the operative part of the judgment under appeal, the remainder of the action brought by API was dismissed.

IV – Procedure before the Court

32 By orders of the President of the Court of 23 April 2008 and 19 May 2008 respectively, the Kingdom of Denmark and the Republic of Finland were granted leave to intervene in Case C-514/07 P in support of the form of order sought by the Kingdom of Sweden.

33 By order of the President of the Court of 23 April 2008, the United Kingdom of Great Britain and Northern Ireland was granted leave to intervene in Cases C-528/07 P and C-532/07 P in support of the forms of order sought by the Commission.

34 Lastly, by order of 7 January 2009, the President of the Court decided to join Cases C-514/07 P, C-528/07 P and C-532/07 P for the purposes of the oral procedure and of the judgment.

V – Forms of order sought

A – *In* Sweden and API *v* Commission *(C-514/07 P)*

35 The Kingdom of Sweden claims that the Court should set aside paragraph 2 of the operative part of the judgment under appeal; annul the contested decision in its entirety; and order the Commission to pay the costs.

36 API claims that the Court should:

– set aside the judgment under appeal in so far as the General Court confirmed that the Commission has a right not to disclose its pleadings in cases in which a hearing has yet to be held;

– annul the parts of the contested decision which were not previously annulled by the judgment under appeal or, in the alternative, refer the case back to the General Court for adjudication in the light of the judgment of the Court of Justice; and

– order the Commission to pay the costs incurred by API in responding to the appeal.

37 The Kingdom of Denmark claims that the Court should set aside paragraph 2 of the operative part of the judgment under appeal and annul the contested decision, in so far as 'the General Court erred in law by failing to impose an unconditional requirement that a specific examination be carried out of each document in respect of which access is requested in order to determine whether the exception provided for under Article 4(2) [of Regulation No 1049/2001] is applicable'.

38 The Republic of Finland requested the Court, at the hearing, to set aside paragraph 2 of the operative part of the judgment under appeal.

39 The Commission contends that the Court should:

– confirm the judgment under appeal in part in so far as it upheld the contested decision refusing access to the documents requested by API;

– order API to pay the costs incurred by the Commission both at first instance and in the appeal proceedings; and

– order the Kingdom of Sweden to pay the costs incurred by the Commission in the appeal proceedings.

B – *In* API *v* Commission *(C-528/07 P)*

40 API claims that the Court should:

– set aside the judgment under appeal in so far as the General Court confirmed that the Commission has a right not to disclose its pleadings in cases in which a hearing has yet to be held;

– annul the parts of the contested decision which were not previously annulled by the judgment under appeal or, in the alternative, refer the case back to the General Court for adjudication in the light of the judgment of the Court of Justice; and

– order the Commission to pay the costs.

41 The Commission contends that the Court should:

– confirm the judgment under appeal in part in so far as it upholds the contested decision refusing access to the documents requested by API;

– order API to pay the costs incurred by the Commission both at first instance and in the appeal proceedings; and

– order the Kingdom of Sweden to pay the costs incurred by the Commission in the appeal proceedings.

42 The United Kingdom contends that the Court should dismiss the appeal.

C – *In* Commission *v* API *(C-532/07 P)*

43 The Commission claims that the Court should:

– set aside the judgment under appeal in part in so far as it annulled the contested decision refusing access to documents requested by API as from the date of the hearing, concerning all actions save infringement proceedings;

– give final judgment in the matters that are the subject of this appeal; and

– order API to pay the costs incurred by the Commission in relation to Case T-36/04 and to the present appeal.

44 API contends that the Court should:

– declare part of the Commission's first plea inadmissible in so far as it does not indicate precisely the contested elements of the judgment under appeal which the Commission seeks to have set aside;

– declare the Commission's second plea inadmissible;

– in the alternative, dismiss the appeal in its entirety; and

– order the Commission to pay the costs incurred by API in responding to the appeal.

45 The United Kingdom claims that the Court should:

– state that the General Court erred in law in so far as it held, in paragraph 82 of the judgment under appeal, that, after the hearing has been held, the Commission is under an obligation to carry out a case-by-case assessment of each pleading in order to determine whether the exception relating to court proceedings, as provided for under the second indent of Article 4(2) of Regulation No 1049/2001, applies; and

– set aside the judgment under appeal to the extent that the General Court annulled the contested decision in so far as it refused API's application for access to the pleadings lodged by the Commission before the Court in the *Open Skies* cases.

VI – The appeals

46 It is appropriate first to consider the appeal in Case C-532/07 P and then to consider together the appeals in Cases C-514/07 P and C-528/07 P.

A – *The appeal brought by the Commission (Case C-532/07 P)*

47 In support of its appeal, the Commission puts forward three pleas in law, alleging infringements of the second and third indents of Article 4(2) of Regulation No 1049/2001.

1. The first plea in law

48 By its first plea, the Commission submits that the General Court erred in law by interpreting the exception relating to the protection of court proceedings as meaning that the institutions must examine on a case-by-case basis applications for access to pleadings lodged in proceedings other than infringement proceedings, and that they must do so as from the date of the hearing.

a) Arguments of the parties

49 In support of that plea, the Commission submits, first, that such an interpretation reveals a contradiction in the judgment under appeal. After recognising the existence of a general exception to the right of access, the General Court restricts the application of that exception to the period preceding the hearing, wrongly attributing a decisive importance to that stage in the procedure. In reality, the interests of the proper course of justice, as well as the need to avoid, as regards representatives of the Commission, any external influence – that is to say, the two considerations on which the General Court based its finding that the exception in question applies until the hearing – justify that exception being applicable throughout the proceedings, hence until delivery of the judgment.

50 Secondly, according to the Commission, the General Court did not take into account the interests of the sound administration of justice or the interests of the persons mentioned in the procedure other than the principal parties or interveners. In particular, it failed to take account of the practice developed by the Community Courts, according to which they may, of their own motion, omit the names of a party or of other persons who appear in the procedure, or other information relating to the case which would normally have to be published.

51 Thirdly, in the view of the Commission, the General Court failed, in particular, to have regard not only to Article 255 EC, which does not refer to the Court of Justice, but also to the relevant provisions of the Rules of Procedure of the Community Courts, from which it is apparent that the public does not have access to the documents in the case-file.

52 Fourthly, the General Court did not take into account the interests of parties to the procedure other than the Commission. Given the fact that, particularly in direct actions, the pleadings of one party necessarily refer to the content of the pleadings of the other parties, to which they are a response, if the Commission were under an obligation to disclose the content of its written submissions, that would inevitably have an impact on the right of the

other party to control the access, thus opened, to its own pleadings and arguments.

53 Fifthly, it is apparent from the *travaux préparatoires* for Regulation No 1049/2001 that the Community legislature did not wish totally to exclude from the scope of that regulation documents generated and held by the institutions solely for the purposes of court proceedings.

54 Sixthly and lastly, the Commission maintains that the approach ultimately adopted by the General Court runs counter to the case-law of the Court of Justice and, in particular, to Joined Cases C-174/98 P and C-189/98 P *Netherlands and van der Wal* v *Commission* [2000] ECR I-1, in which the Court held that, where the Commission has received an application for access to documents, it may find it necessary to consult the national court prior to any disclosure of those documents, since the above approach would mean that an institution must take a decision alone as to the disclosure of all documents relating to a pending case which are submitted to the Community Courts or generated by them. That would be incompatible with the institution's obligation to respect the rights of the other parties to defend their interests before the Community Courts, while at the same time complying with the Rules of Procedure of those Courts.

55 In support of the Commission's submissions, the United Kingdom adds, first of all, that the General Court ruled *ultra petita* when it held, in paragraph 82 of the judgment under appeal, that, 'after the hearing has been held, the Commission is under an obligation to carry out a concrete assessment of each document requested in order to ascertain, having regard to the specific content of that document, whether it may be disclosed or whether its disclosure would undermine the court proceedings to which it relates'. It is apparent from paragraph 75 of that judgment that, by its action for annulment, API did not raise, for assessment by the General Court, the question of applications for access to pleadings submitted between the date of the hearing and the delivery of the judgment, given that, in each of the three cases in question – that is to say, *Honeywell* v *Commission* (T-209/01), *General Electric* v *Commission* (T-210/01) and *Commission* v *Austria* (C-203/03) – the hearing had not yet been held when API requested access to the Commission's pleadings.

56 The United Kingdom maintains, next, that the institutions must be able to rely on general presumptions applying to categories of documents and that the disclosure of pleadings is inherently different from the disclosure of an internal administrative document. Moreover, the truth of this is borne out by the provision made by the Community legislature with regard to documents relating to court proceedings, the special nature of which is reflected in the exception provided for under the second indent of Article 4(2) of Regulation No 1049/2001. Lastly, according to the United Kingdom, it is inappropriate and contrary to the sound administration of justice for court proceedings to be subject to external influences.

57 API responds to each of the arguments raised by the Commission in support of the first plea.

58 First, API maintains that any external influence on the representatives of the Commission is merely a consequence of the public nature of court proceedings and cannot provide justification for the approach adopted by the General Court. In any event, according to API, the argument based on that risk is incompatible with the need to interpret restrictively the exceptions to the right of access to documents and the approach adopted by the General Court is contrary to the principle of the widest possible access to documents of the institutions, in view of the fact that, given their incomplete nature, neither the Report for the Hearing nor the hearing itself is sufficient to ensure transparency.

59 Secondly, API maintains that neither the practice of the Court of Justice of omitting the names of applicants, or other persons mentioned in the procedure, nor the formal expression of that practice in Article 44(4) of the Rules of Procedure of the Civil Service Tribunal can justify a derogation from the obligations under Regulation No 1049/2001 since, in terms of the authority of its rules, the regulation is of a higher rank.

60 Thirdly, the documents to which API wishes to have access clearly fall within the scope of Article 255 EC, since they are documents held by the Commission and of which it is the author. In other words, API does not seek access to documents held by the Court of Justice, to which Article 255 EC does not refer anyway. In any event, the Commission's argument in that regard is, according to API, inadmissible, since it does not identify the elements of the judgment under appeal which the Commission is seeking to have set aside.

61 Fourthly, not only has the Commission failed to identify the third-party interests which could be harmed by the subsequent disclosure of the documents in question, but it does not take into account, in particular, either the possibility of granting partial access to those documents or the procedure expressly laid down in Article 4(4) of Regulation No 1049/2001 for the purposes of safeguarding the interests of third parties.

62 Fifthly, API agrees with the Commission that documents held by the institutions for the sole purpose of court proceedings are not excluded from the scope of Regulation No 1049/2001. In particular, with regard to the principle of equality of arms, API submits that a party to a dispute is not, in reality, placed at a disadvantage by the disclosure of its pleadings and that, to the extent that there is any asymmetry between the parties, this is merely the inevitable and necessary consequence of the very existence of Regulation No 1049/2001. In any event, partial access to the pleadings is always possible, and preferable to the outright refusal of such access.

63 Sixthly and lastly, the judgment in *Netherlands and van der Wal* v *Commission*, to which the Commission refers, is irrelevant in the present case because it is not a *locus classicus* enabling a blanket ban to be imposed on access to a particular category of documents.

b) Findings of the Court

64 It is appropriate to reject, at the outset, the complaint put forward by the United Kingdom to the effect that the General Court ruled *ultra petita* when it held, in paragraph 82 of the judgment under appeal, that, 'after the hearing has been held, the Commission is under an obligation to carry out a concrete assessment of each document requested in order to ascertain, having regard to the specific content of that document, whether it may be disclosed or whether its disclosure would undermine the court proceedings to which it relates'.

65 In that regard, it should be borne in mind that, although the Court must rule only on the heads of claim put forward by the parties, whose role it is to define the framework of the dispute, the Court cannot confine itself to the arguments put forward by the parties in support of their claims, or it might be forced, in some circumstances, to base its decisions on erroneous legal considerations (order of 27 September 2004 in Case C-470/02 P *UER* v *M6 and Others*, paragraph 69).

66 In the case currently under consideration, it was solely on examining the arguments put forward by API in support of its plea at first instance, alleging infringement of the second indent of Article 4(2) of Regulation No 1049/2001, that the General Court arrived at the finding set out in paragraph 82 of the judgment under appeal. It is thus clear that that paragraph does no more than expand upon the reasoning which led the General Court to reject the plea raised before it by API.

67 However, as the Court of Justice has consistently held, such reasoning by extension does not, of itself, support a finding that the General Court went outside the framework of the dispute and ruled *ultra petita* (see, to that effect, Case C-252/96 P *Parliament* v *Gutiérrez de Quijano y Lloréns* [1998] ECR I-7421, paragraph 34, and the order in *UER* v *M6 and Others*, paragraph 74).

68 That said, it should be borne in mind in relation to the arguments raised by the Commission in support of the present plea, that, in accordance with recital 1 in the preamble to Regulation No 1049/2001, that regulation reflects the intention expressed in the second paragraph of Article 1 EU – inserted by the Treaty of Amsterdam – of marking a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. As is stated in recital 2 in the preamble to Regulation No 1049/2001, the right of public access to documents of the institutions is related to the democratic nature of those institutions (Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* [2008] ECR I-4723, paragraph 34).

69 To that end, Regulation No 1049/2001 is intended, as is apparent from recital 4 in its preamble and from Article 1, to give the fullest possible effect to the right of public access to documents of the institutions (see Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 61; Case C-64/05 P *Sweden* v *Commission* [2007] ECR I-11389, paragraph 53; *Sweden and Turco* v *Council*, paragraph 33; and Case C-139/07 P *Commission* v *Technische Glaswerke Ilmenau* [2010] ECR I-0000, paragraph 51).

70 However, that right is none the less subject to certain limitations based on grounds of public or private interest (*Sison* v *Council*, paragraph 62, and *Commission* v *Technische Glaswerke Ilmenau*, paragraph 53).

71 More specifically, and in reflection of recital 11 in the preamble thereto, Article 4 of Regulation No 1049/2001 provides that the institutions are to refuse access to a document where its disclosure would undermine the protection of one of the interests protected by that provision.

72 Thus, if the Commission decides to refuse access to a document which it has been asked to disclose, it must, in principle, explain how disclosure of that document could specifically and effectively undermine the interest protected by the exception – among those provided for in Article 4 of Regulation No 1049/2001 – upon which it is relying (see, to that effect, *Sweden and Turco* v *Council*, paragraph 49, and *Commission* v *Technische Glaswerke Ilmenau*,

paragraph 53).

73 Of course, since they derogate from the principle of the widest possible public access to documents, those exceptions must be interpreted and applied strictly (*Sison* v *Council*, paragraph 63; *Sweden* v *Commission*, paragraph 66; and *Sweden and Turco* v *Council*, paragraph 36).

74 Nevertheless, contrary to the assertions made by API, it is clear from the case-law of the Court of Justice that the institution concerned may base its decisions in that regard on general presumptions which apply to certain categories of document, as considerations of a generally similar kind are likely to apply to applications for disclosure which relate to documents of the same nature (see *Sweden and Turco* v *Council*, paragraph 50, and *Commission* v *Technische Glaswerke Ilmenau*, paragraph 54).

75 As it is, in the present case, none of the parties has disputed the conclusion reached by the General Court in paragraph 75 of the judgment under appeal that the pleadings to which access was requested had been drawn up by the Commission in its capacity as a party in three direct actions which were still pending on the date of adoption of the contested decision and that, for that reason, each of those sets of pleadings could be regarded as falling within the same category of documents.

76 Accordingly, it must be determined whether general considerations supported a finding that the Commission was entitled to base its decision on the presumption that disclosure of those pleadings would undermine the court proceedings and that, in so doing, it was not under an obligation to carry out a specific assessment of the content of each of those documents.

77 First and foremost in that connection, it should be noted that pleadings lodged before the Court of Justice in court proceedings are wholly specific since they are inherently more a part of the judicial activities of the Court than of the administrative activities of the Commission, those latter activities not requiring, moreover, the same breadth of access to documents as the legislative activities of an EU institution (see, to that effect, *Commission* v *Technische Glaswerke Ilmenau*, paragraph 60).

78 Those pleadings are drafted exclusively for the purposes of the court proceedings, in which they play the key role. It is by means of the application initiating proceedings that the applicant defines the parameters of the dispute and it is, in particular, during the written procedure – the oral procedure not being obligatory – that the parties provide the Court with the information on the basis of which it is to adjudicate.

79 It is clear, both from the wording of the relevant provisions of the Treaties and from the broad logic of Regulation No 1049/2001 and the objectives of the relevant EU rules, that judicial activities are as such excluded from the scope, established by those rules, of the right of access to documents.

80 As regards, first, the relevant provisions of the Treaties, it is quite clear from the wording of Article 255 EC that the Court is not subject to the obligations of transparency laid down in that provision.

81 The purpose of that exclusion emerges even more clearly from Article 15 TFEU, which replaced Article 255 EC and which, while extending the scope of the principle of transparency, specifies – in the fourth subparagraph of paragraph 3 thereof – that the Court of Justice is to be subject to paragraph 3 only when exercising its administrative tasks.

82 It follows that the fact that the Court of Justice is not among the institutions which, in accordance with Article 255 EC, are subject to those obligations is justified precisely because of the nature of the judicial responsibilities which it is called upon to discharge under Article 220 EC.

83 For that matter, that interpretation is also borne out by the broad logic of Regulation No 1049/2001, the legal basis for which is Article 255 EC itself. Article 1(a) of Regulation No 1049/2001, which defines the scope of that regulation, makes no reference to the Court and, by dint of that omission, excludes it from the institutions subject to the obligations of transparency which it lays down, while Article 4 of that regulation devotes one of the exceptions to the right of access to the documents of the institutions precisely to the protection of court proceedings.

84 Thus, it follows both from Article 255 EC and from Regulation No 1049/2001 that the limitations placed on the application of the principle of transparency in relation to judicial activities pursue the same objective: that is to say, they seek to ensure that exercise of the right of access to the documents of the institutions does not undermine the protection of court proceedings.

85 In that regard, it should be noted that the protection of court proceedings implies, in particular, that compliance with the principles of equality of arms and the sound administration of justice must be ensured.

86 With regard, first, to equality of arms, it should be noted that – as the General Court pointed out, in substance, in paragraph 78 of the judgment under appeal – if the content of the Commission's pleadings were to be open to public debate, there would be a danger that the criticism levelled against them, whatever its actual legal significance, might influence the position defended by the Commission before the EU Courts.

87 In addition, such a situation could well upset the vital balance between the parties to a dispute before those Courts – the state of balance which is at the basis of the principle of equality of arms – since only the institution concerned by an application for access to its documents, and not all the parties to the proceedings, would be bound by the obligation of disclosure.

88 Furthermore, it should be borne in mind in that regard that the principle of equality of arms – together with, among others, the principle of *audi alteram partem* – is no more than a corollary of the very concept of a fair hearing (see, by analogy, Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 31; Case C-89/08 P *Commission* v *Ireland and Others* [2009] ECR I-0000, paragraph 50; and Case C-197/09 RX-II *Réexamen M* v *EMEA* [2009] ECR I-0000, paragraphs 39 and 40).

89 As the Court has held, the principle of *audi alteram partem* must apply to all parties to proceedings before the EU Courts, whatever their legal status. It follows that the EU institutions may also rely on that principle when they are parties to such proceedings (see, to that effect, *Commission* v *Ireland and Others*, paragraph 53).

90 API is therefore incorrect in arguing that, being a public institution, the Commission cannot rely on a right to equality of arms because that right is available only to individuals.

91 Admittedly, as API contends, it is Regulation No 1049/2001 itself which imposes obligations of transparency only on the institutions which it lists. Nevertheless, the fact that such obligations are imposed only on the institutions concerned cannot, in the context of pending court proceedings, lead the procedural position of those institutions to be undermined vis-à-vis the principle of equality of arms.

92 As regards, secondly, the sound administration of justice, the exclusion of judicial activities from the scope of the right of access to documents, without any distinction being drawn between the various procedural stages, is justified in the light of the need to ensure that, throughout the court proceedings, the exchange of argument by the parties and the deliberations of the Court in the case before it take place in an atmosphere of total serenity.

93 Disclosure of the pleadings in question would have the effect of exposing judicial activities to external pressure, albeit only in the perception of the public, and would disturb the serenity of the proceedings.

94 It is therefore appropriate to allow a general presumption that disclosure of the pleadings lodged by one of the institutions in court proceedings would undermine the protection of those proceedings, for the purposes of the second indent of Article 4(2) of Regulation No 1049/2001, while those proceedings remain pending.

95 Such disclosure would flout the special nature of that category of documents and would be tantamount to making a significant part of the court proceedings subject to the principle of transparency. As a consequence, the effectiveness of the exclusion of the Court of Justice from the institutions to which the principle of transparency applies, in accordance with Article 255 EC, would be largely frustrated.

96 In addition, such a presumption is also justified in the light of the Statute of the Court of Justice of the European Union and the Rules of Procedure of the EU Courts (see, by analogy, *Commission* v *Technische Glaswerke Ilmenau*, paragraph 55).

97 Although the Statute of the Court of Justice provides that the hearing in court is to be public (Article 31), it restricts those entitled to receive communication of procedural documents to the parties and to the institutions whose decisions are in dispute (Article 20, second paragraph).

98 Similarly, the Rules of Procedure of the EU Courts provide for procedural documents to be served only on the parties to the proceedings. In particular, Article 39 of the Rules of Procedure of the Court of Justice, Article 45 of the Rules of Procedure of the General Court and Article 37(1) of the Rules of Procedure of the Civil Service Tribunal provide that the application is to be served only on the defendant.

99 It is clear, therefore, that neither the Statute of the Court of Justice nor the above Rules of Procedure provide for any third-party right of access to pleadings submitted to the Court in court proceedings.

100 Account must be taken of that fact for the purposes of interpreting the exception provided for under the second indent

of Article 4(2) of Regulation No 1049/2001, for if third parties were able, on the basis of Regulation No 1049/2001, to obtain access to those pleadings, the system of procedural rules governing the court proceedings before the EU Courts would be called into question (see, by analogy, *Commission* v *Technische Glaswerke Ilmenau*, paragraph 58).

101 In that regard, it should be noted that API is beside the point in arguing that other national legal systems have adopted different approaches, by providing, inter alia, that courts may permit access to pleadings lodged before them. As the Commission maintains, and as the General Court rightly held in paragraph 85 of the judgment under appeal, the Rules of Procedure of the EU Courts make no provision for a third-party right of access to procedural documents lodged at their registries by the parties.

102 On the contrary, it is precisely the existence of those Rules of Procedure, by which matters concerning the pleadings in question remain governed, and the fact that not only do they make no provision for a third-party right of access to the case-file but, in accordance with Article 31 of the Statute of the Court of Justice, they actually do provide that a hearing may be heard *in camera* or that certain information, such as the names of parties, may be kept confidential, which lend authority to the presumption that disclosure of those pleadings would undermine court proceedings (see, by analogy, *Commission* v *Technische Glaswerke Ilmenau*, paragraphs 56 to 58).

103 It is true that, as the Court has stated, such a general presumption does not exclude the right of an interested party to demonstrate that a given document, disclosure of which has been applied for, is not covered by that presumption (*Commission* v *Technische Glaswerke Ilmenau*, paragraph 62). The fact remains that, in the present case, it does not appear from the judgment under appeal that API availed itself of that right.

104 In the light of all the above considerations, it must be held that the General Court erred in law in holding that, in the absence of any evidence capable of rebutting that presumption, the Commission is under an obligation, after the hearing has taken place, to carry out a concrete assessment of each document requested in order to determine whether, given the specific content of that document, its disclosure would undermine the court proceedings to which it relates.

105 Nevertheless, it should be noted that – as was stated in paragraph 66 above – the considerations set out in paragraph 82 of the judgment under appeal are no more than an extension of the reasoning which led the General Court to reject the plea raised before it by API. However, the operative part of the judgment under appeal is in no way dependent upon that paragraph.

106 It follows that the setting aside of that part of the grounds of the judgment under appeal does not entail the setting aside of the operative part.

2. The second plea in law

107 By its second plea, the Commission, supported by the United Kingdom, submits that the General Court erred in law by holding that the exception relating to protection of the purpose of inspections, investigations and audits, provided for under the third indent of Article 4(2) of Regulation No 1049/2001, did not permit the Commission, after delivery of the judgment in the infringement proceedings under Article 226 EC, to refuse access to the pleadings lodged in those proceedings without first carrying out a specific examination of the content of those documents.

a) Arguments of the parties

108 According to the Commission, the General Court ignored the fact that enforcement procedures may continue after the judgment delivered in infringement proceedings and may lead not only to a further action under Article 228 EC but also to further discussions between the Commission and the Member State found to be in default, with a view to bringing the latter into conformity with EU law.

109 In that regard, the Commission submits that the arguments of the General Court to the effect that an action under Article 228 EC would have a different subject-matter and would depend on future and uncertain events are formalistic and take no account of the reality of the dialogue between the Commission and the Member States.

110 The Commission adds that, when it refused API access to the pleadings in question in the *Open Skies* cases, the Commission was confronted with an intractable question of principle, in relation to which it was obliged to represent the European Community in negotiations which it had to hold simultaneously with the Member States and with non-member States. The Commission explained at the hearing before the General Court that disclosure of its pleadings after delivery of the judgment in those cases would have endangered those negotiations, which concerned the conclusion of a new international agreement on air transport.

111 According to API, however, the appeal explains neither the reasons for which the 'reality of the dialogue' with the Member States would be compromised if the Commission disclosed its pleadings after the Court has given judgment, nor why its 'role as guardian of the Treaties' would be undermined by that disclosure. Unless the Commission can point to particular circumstances which justify the application of one of the exceptions to disclosure, the pleadings should be disclosed. In any event, that argument is inadmissible, since it merely repeats arguments which have already been submitted before the General Court.

b) Findings of the Court

112 By its second plea, which is in two parts, the Commission alleges, in substance, that the General Court erred in holding that documents relating to investigations carried out by the Commission in the context of infringement proceedings under Article 226 EC are no longer covered by the exception provided for under the third indent of Article 4(2) of Regulation No 1049/2001 after the Court of Justice has delivered its judgment closing those proceedings.

113 By the first part of that plea, the Commission submits that the reasons on the basis of which the General Court held, in paragraph 142 of the judgment under appeal, that the Commission had made an error of assessment by refusing access to the documents concerning the *Open Skies* cases are formalistic and take no account of the reality of the dialogue between the Commission and the Member States.

114 In essence, the Commission alleges that the General Court misconstrued the legal relationship between Article 226 EC and Article 228 EC, in that it underestimated the importance of the link between the procedures provided for in those two provisions in the context of two connected cases which follow one upon the other and which relate to the same infringement on the part of the same Member State.

115 Contrary to API's contention, the Commission does not merely repeat the arguments raised at first instance, but seeks to challenge the legal assessment made by the General Court.

116 Where the appellant challenges the interpretation or application of EU law by the General Court, the points of law examined at first instance may be discussed again in the course of an appeal. Indeed, if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose (Case C-234/02 P *Ombudsman* v *Lamberts* [2004] ECR I-2803, paragraph 75).

117 It follows that the first part of the second plea is admissible.

118 With regard to the substance, it should be noted that although, admittedly, the procedures provided for under Articles 226 EC and 228 EC have the same purpose, that is to say, to ensure the effective application of EU law, the fact remains that they constitute two distinct procedures, each with its own subject-matter.

119 The procedure established under Article 226 EC is designed to obtain a declaration that the conduct of a Member State is in breach of EU law and to terminate that conduct (see Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 27, and Case C-456/05 *Commission* v *Germany* [2007] ECR I-10517, paragraph 25), while the procedure provided for under Article 228 EC has a much narrower ambit, being designed only to induce a defaulting Member State to comply with a judgment establishing a breach of obligations (Case C-304/02 *Commission* v *France* [2005] ECR I-6263, paragraph 80).

120 It follows that, once the Court of Justice has held, by a judgment delivered on the basis of Article 226 EC, that a Member State has failed to fulfil its obligations, the continuation of negotiations between that Member State and the Commission is no longer designed to establish the existence of the infringement – which is precisely what the Court of Justice has found – but to determine whether the necessary conditions for the bringing of an action under Article 228 EC are met.

121 In addition, as regards the possibility that the infringement proceedings may lead to an amicable settlement, it is clear that, once the infringement has been found by judgment of the Court of Justice delivered on the basis of Article 226 EC, an amicable settlement is no longer possible in the case of that infringement.

122 Accordingly, it must be held that the General Court did not err in law by holding that it cannot be presumed that disclosure of pleadings lodged in a procedure which ultimately led to the delivery of a judgment on the basis of Article 226 EC undermines investigations which could lead to proceedings being brought under Article 228 EC.

123 In the light of the above, the first part of the second plea must be rejected as unfounded.

124 By the second part of this plea, the Commission submits that disclosure of the documents relating to the *Open Skies*

cases, even after the Court of Justice has given judgment in those cases, would have endangered the negotiations for a new international agreement on air transport which, at the time when the contested decision was adopted, the Commission was conducting in the name of the Community with the Member States and with non-member States.

125 It is sufficient to note in that regard that, even though the Commission submits in its appeal that it had emphasised that fact at the hearing before the General Court, it is in no way apparent from the judgment under appeal – which the Commission has not challenged on that point – that the Commission had raised, either in the contested decision or before the General Court, the need to keep the documents in question confidential so as not to compromise the negotiations in which it was engaged with a view to concluding that agreement.

126 As it is, in accordance with settled case-law, to allow a party to put forward for the first time before the Court of Justice a plea and arguments which it did not raise before the General Court would be to authorise it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court. In an appeal, the jurisdiction of the Court of Justice is thus confined to review of the findings of law on the pleas argued before the General Court (see Case C-266/97 P *VBA* v *VGB and Others* [2000] ECR I-2135, paragraph 79; and Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraph 114; and, to that effect, the order of 21 January 2010 in Case C-150/09 P *Iride and Iride Energia* v *Commission*, paragraphs 73 and 74).

127 Since, accordingly, this part of the plea must be held inadmissible, the second plea must be rejected as, in part, unfounded and, in part, inadmissible.

3. The third plea in law

a) Arguments of the parties

128 By its third plea, the Commission submits that the General Court erred in law by interpreting the exception relating to the protection of court proceedings as meaning that the institutions must examine, on a case-by-case basis, even applications for access to pleadings lodged in closed cases where those cases are connected to proceedings which are still pending. Since the General Court decided that the Commission could refuse disclosure of its pleadings so long as they had not been discussed at the hearing before the Court, it should have applied the same reasoning to applications for the disclosure of documents lodged in cases which were closed, but linked to cases still pending. That is justified a fortiori where the parties to the closed proceedings and those to the connected proceedings, which remain pending, are not the same.

129 In that regard, API contends that total or partial access to pleadings lodged in a closed case does not affect the Commission's ability to defend itself in a later case which is still pending, even if those two cases are connected.

b) Findings of the Court

130 It must be noted from the outset that, although, for the reasons set out in paragraphs 68 to 104 above, the disclosure of pleadings lodged in pending court proceedings is presumed to undermine the protection of those proceedings, because of the fact that the pleadings constitute the basis on which the Court carries out its judicial activities, that is not the case where the proceedings in question have been closed by a decision of the Court.

131 In the latter case, there are no longer grounds for presuming that disclosure of the pleadings would undermine the judicial activities of the Court since those activities come to an end with the closure of the proceedings.

132 Admittedly, the possibility cannot be ruled out that – as the Commission alleges – disclosure of pleadings relating to court proceedings which are closed but connected to other proceedings which remain pending may create a risk that the later proceedings might be undermined, especially where the parties to the pending case are not the same as those to the case which has been closed. In such a situation, if the Commission were to use the same arguments in support of its legal position in both sets of proceedings, disclosure of its arguments in the pending proceedings could give rise to the risk that they might be undermined.

133 Nevertheless, such a risk depends on a number of factors, such as the degree of similarity between the arguments put forward in the two cases. If the Commission's pleadings are repeated only in part, partial disclosure could be sufficient to prevent any risk of undermining the pending proceedings.

134 Accordingly, only a specific examination of the documents to which access is requested, undertaken in accordance with the criteria referred to in paragraph 72 above, can enable the Commission to establish whether their disclosure may be refused on the basis of the second indent of Article 4(2) of Regulation No 1049/2001.

135 It follows that the General Court was fully entitled to hold, in substance, that the risk that a protected interest might be undermined – a condition for the application of that provision – cannot be presumed on the basis of a mere link between the two sets of court proceedings concerned.

136 Accordingly, since the third plea cannot be upheld, the Commission's appeal in Case C-532/07 P must be dismissed in its entirety.

B – *The appeals lodged by the Kingdom of Sweden (Case C-514/07 P) and by API (Case C-528/07 P)*

137 Whereas Case C-532/07 P concerns, on the one hand, access to pleadings lodged in court proceedings in which, at the time of the Commission's decision, a hearing has already been held and, on the other, access to pleadings lodged in closed court proceedings which are either infringement proceedings following which the defendant Member State has not yet complied with EU law, or which are closely connected to other proceedings, which remain pending, Cases C-514/07 P and C-528/07 P concern access to pleadings lodged in court proceedings in which, at the time of the Commission's decision, a hearing has not yet taken place.

138 The Kingdom of Sweden – supported by the Kingdom of Denmark and the Republic of Finland – and API base their respective appeals on the same two pleas in law, alleging infringement of the second indent of Article 4(2) of Regulation No 1049/2001 and infringement of the last line of Article 4(2) of that regulation.

1. The first plea in law

a) Arguments of the parties

139 By this plea, the Kingdom of Sweden and API submit, in substance, that the General Court misinterpreted the second indent of Article 4(2) of Regulation No 1049/2001, providing for the exception relating to the protection of court proceedings, inasmuch as it held that, where an application is made for access to pleadings lodged by the Commission before the EU Courts in court proceedings which have not yet reached the stage of the hearing, the Commission is entitled to base its refusal of disclosure on that exception, without being under an obligation to undertake a specific examination of the content of each document to which access has been requested.

140 In support of that plea, the Kingdom of Sweden and API submit, first of all, that the General Court interpreted broadly an exception which, as such, must always be interpreted narrowly. The Swedish Government adds that such an interpretation is also incompatible with the objective of Regulation No 1049/2001, which is to ensure the widest possible public access to documents held by the EU institutions.

141 The Kingdom of Denmark additionally submits that the above argument put forward by the Swedish Government is especially persuasive in the light of *Sweden and Turco* v *Council*, in which the Court of Justice, setting out the criteria with which the institutions must comply when refusing access to documents on the basis of the exceptions provided for under Article 4 of Regulation No 1049/2001, stated in paragraph 35 that a specific examination of the documents to which access has been requested is always necessary.

142 Next, according to API, the General Court was wrong in holding that access to the Commission's pleadings gives rise to the risk that its agents – and not the representatives of the other parties to the proceedings – might be exposed to external 'criticism and objections'. In any event, the Commission – contrary to the statement made in paragraph 80 of the judgment under appeal – has no right to defend its interests 'independently of any external influence'. Furthermore, the General Court disregarded the importance of the fact that other legal systems permit access, at any stage of the proceedings, to pleadings lodged before their courts. Lastly, the General Court was wrong in referring to the need to protect the *effet utile* (practical effect) of any decision to hold the hearing *in camera*.

143 In response to those arguments, the Commission contends that Regulation No 1049/2001 does not provide for absolute transparency and that, accordingly, it is not contrary to the purpose of that regulation, which is to give the fullest possible effect to the right of public access, to pay due regard to general principles of law such as the protection of the proper conduct of court proceedings and the sound administration of justice.

144 According to the Commission, supported on this point by the United Kingdom, it is also contrary to that principle to require an institution to carry out a concrete and individual examination of each document to which it has been requested to provide access where it is clear that that document falls within the scope of one of the exceptions provided for under Regulation No 1049/2001, by virtue, in particular, of the nature of that document or the particular context in which it has been drawn up.

b) Findings of the Court

145 By this plea, the Kingdom of Sweden and API allege that the General Court erred in law in interpreting the second indent of Article 4(2) of Regulation No 1049/2001 as meaning that the institutions are entitled to refuse, without first undertaking a specific examination of each case, access to pleadings lodged in pending court proceedings which have not yet reached the hearing stage.

146 It is sufficient to note, in that regard, that, for the reasons set out in paragraphs 68 to 104 above, the Commission may base its response on the presumption that disclosure of pleadings lodged in pending court proceedings undermines those proceedings for the purposes of the second indent of Article 4(2) of Regulation No 1049/2001 and that, accordingly, the Commission may, throughout such proceedings, refuse an application for access to such documents, without being under an obligation to undertake a specific examination.

147 It follows that, for the same reasons, the interpretation argued for by the Kingdom of Sweden and API in the context of this plea, to the effect that the above provision does not permit the Commission to issue such a refusal before the date of the hearing, is unfounded.

148 In consequence, the first plea raised in Cases C-514/07 P and C-528/07 P must be rejected as unfounded.

2. The second plea in law

a) Arguments of the parties

149 By this plea, the Kingdom of Sweden and API allege that the General Court infringed the last line of Article 4(2) of Regulation No 1049/2001 in holding that the general public interest in receiving information relating to pending court proceedings cannot constitute an overriding public interest for the purposes of that provision. In addition, API maintains that, in any event, the General Court did not – as it should have done – weigh that interest against the interest in protecting those proceedings. In that regard, the Kingdom of Sweden submits that, contrary to the findings of the General Court in paragraph 99 of the judgment under appeal, such a balancing exercise must always be undertaken by reference to the actual content of the documents disclosure of which has been requested.

150 However, according to the Commission, the General Court ruled in accordance with settled case-law by affirming that the overriding public interest, in consideration of which documents must be disclosed pursuant to that provision, is, in principle, distinct from the general principle of transparency which underlies Regulation No 1049/2001.

151 The United Kingdom adds that the present plea has its origins in an incorrect understanding of the judgment under appeal, given that it is apparent from paragraphs 97 to 99 of that judgment that, in reality, the General Court not only recognised that it was necessary to weigh the interests at stake, but also carried out that balancing exercise itself.

b) Findings of the Court

152 It should be noted, first of all, that, after stating that, in principle, the overriding public interest – as referred to in the last line of Article 4(2) of Regulation No 1049/2001 – must be distinct from the principle of transparency, the General Court went on to find in paragraph 97 of the judgment under appeal that the fact that a party requesting access does not invoke a public interest distinct from the principle of transparency does not automatically imply that it is unnecessary to weigh the interests at stake: according to the General Court, 'the invocation of those same principles may, in the light of the particular circumstances of the case, be so pressing that it overrides the need to protect the documents in question'.

153 Accordingly, the Kingdom of Sweden and API are incorrect in stating that the General Court ruled out the possibility that the interest in transparency could constitute an overriding public interest for the purposes of the above provision.

154 Next, as the Commission and the United Kingdom argue, the General Court – in paragraphs 98 and 99 of the judgment under appeal – weighed the interest in transparency against the interest relating to protection of the aim of preventing all external influences on the proper conduct of court proceedings.

155 Thus, API's argument that the General Court did not undertake that balancing exercise is also unfounded.

156 Lastly, as regards the argument of the Kingdom of Sweden to the effect that the General Court did not carry out that balancing exercise correctly in that it failed to take into account the content of the documents in question, it should be noted that, according to the General Court, it is only where the particular circumstances of the case substantiate a finding that the principle of transparency is especially pressing that that principle can constitute an overriding public interest capable of prevailing over the need for protection of the disputed documents and, accordingly, capable of justifying their disclosure in accordance with the last line of Article 4(2) of Regulation No 1049/2001.

157 As it is, even if it were possible to justify the disclosure of documents on that basis where it is presumed that disclosure will undermine one of the interests protected by the system of exceptions provided for under Article 4(2) of Regulation No 1049/2001, it must be held that it is apparent from paragraph 95 of the judgment under appeal that API merely claimed that the public's right to be informed about important issues of Community law, such as those concerning competition, and about issues which are of great political interest, which is true of the issues raised by infringement proceedings, prevails over the protection of the court proceedings.

158 Nevertheless, such vague considerations cannot provide an appropriate basis for establishing that, in the present case, the principle of transparency was in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the documents in question.

159 In those circumstances, the General Court was fully entitled to find that the interest relied on by API was not such as to justify disclosure of the pleadings in question and that, accordingly, it was unnecessary to carry out a concrete examination of the content of those documents in those circumstances.

160 In the light of all the above, the second plea cannot be upheld either.

161 Accordingly, both the appeal lodged by the Kingdom of Sweden in Case C-514/07 P and the appeal brought by API in Case C-528/07 P must be dismissed in their entirety.

VII – Costs

162 Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is unfounded the Court of Justice is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Under the first subparagraph of Article 69(4), the Member States and the institutions which intervene in the proceedings are to bear their own costs.

163 Since the Kingdom of Sweden was unsuccessful in its appeal in Case C-514/07 P, it must be ordered to pay the costs of that procedure, in accordance with the form of order sought by the Commission.

164 Since API was unsuccessful in its appeal in Case C-528/07 P, it must be ordered to pay the costs of that procedure, in accordance with the form of order sought by the Commission.

165 Since the Commission was unsuccessful in its appeal in Case C-532/07 P, it must be ordered to pay the costs of that procedure, in accordance with the forms of order sought by API.

166 The Member States which intervened in the appeal proceedings must bear their own costs in that connection.

On those grounds, the Court (Grand Chamber) hereby:

1. Dismisses the appeals;

2. Orders the Kingdom of Sweden to bear its own costs and to pay those incurred by the European Commission in connection with the appeal in Case C-514/07 P;

3. Orders the Association de la presse internationale ASBL (API) to bear its own costs and to pay those incurred by the European Commission in connection with the appeal in Case C-528/07 P;

4. Orders the European Commission to bear its own costs and to pay those incurred by the Association de la presse internationale ASBL (API) in connection with the appeal in Case C-532/07 P;

5. Orders the Kingdom of Denmark, the Republic of Finland and the United Kingdom of Great Britain and Northern Ireland to bear their own costs in connection with the appeals.

OPINION OF ADVOCATE GENERAL SHARPSTON

delivered on 4 March 2010 (1)

Case C-31/09

Nawras Bolbol

v

Bevándorlási és Állampolgársági Hivatal

(Reference for a preliminary ruling from the Fővárosi Bíróság (Hungary))

(Minimum conditions to be fulfilled by persons from third countries or stateless persons in order to be able to claim refugee status – Stateless person of Palestinian origin – Conditions under which refugee status is accorded – Article 12(1)(a) of Directive 2004/83/EC)

1. The humanitarian challenge of how to care for persons who have lost home and livelihood as a result of conflict has been with us since men first learnt to make weapons and use them against their neighbours. Individuals and groups of individuals in that situation need and deserve assistance and protection. Unfortunately, particular forms of conflict generate very large numbers of such persons. More prosperous or stable countries to which they make their way to seek asylum cannot necessarily deal easily with the influx, particularly in the immediate aftermath of yet another conflagration, without potentially jeopardising their own prosperity and stability. Preferential treatment of any particular class or group of refugees, for whatever reason, will therefore – if not kept in proportion and balance – come at the expense of appropriate treatment for other persons who, from an objective humanitarian perspective, are equally deserving.

2. The international community has therefore laid down, in the Geneva Convention of 28 July 1951 Relating to the Status of Refugees, (2) binding rules of international humanitarian law that delineate who, in what circumstances, is to be treated as a refugee and how they are to be cared for. All EU Member States are signatories to that Convention. At EU level, their obligations are reflected in Directive 2004/83. (3)

3. The present reference from the Fővárosi Bíróság (Budapest Metropolitan Court) under the former Article 68 EC concerns the circumstances in which, under Directive 2004/83, a Member State can or must accord refugee status to a Palestinian who has sought asylum within that Member State.

International Law - *The 1951 Convention*

4. The preamble to the 1951 Convention recalls that the Charter of the United Nations and the Universal Declaration of Human Rights have affirmed the principle that all human beings are to enjoy fundamental rights and freedoms without discrimination, and notes that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms. At the same time, the preamble notes that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem whose international scope and nature the United Nations had recognised cannot be achieved without international co-operation. The preamble expresses the wish that all States, recognising the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States.

5. Article 1A of the 1951 Convention sets out the detailed criteria for assessing whether an individual should be granted refugee status:

'For the purposes of the present Convention, the term "refugee" shall apply to any person who:

…

(2) Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual

residence, is unable or, owing to such fear, is unwilling to return to it.

…' (4)

6. Article 1C provides for various circumstances in which the Convention ceases to apply to a person who qualified for refugee status under Article 1A – essentially, because he either no longer needs, or should no longer need, its protection.

7. Article 1D (whose interpretation is critical to the present reference) reads as follows:

'This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.'

8. Article 38 provides that, at the request of a Party, the International Court of Justice (5) is to adjudicate on any dispute between Parties to the Convention as to its interpretation or application.

UN General Assembly Resolutions relating to the situation in Palestine (6)

9. In the aftermath of the events of World War II and specifically the Holocaust, the United Nations agreed to the proposals of the United Nations Special Committee on Palestine (7) to partition Palestine (Resolution 181 (II) of 29 November 1947). On 14 May 1948, the State of Israel was proclaimed. There immediately followed what subsequent UN resolutions describe as 'the 1948 conflict'. By Resolution 273 (III) of 11 May 1949, the United Nations admitted the State of Israel to membership of that organisation.

10. As a result of the 1948 conflict, many Palestinians became displaced persons. Resolution 212 (III) of 19 November 1948 set up the United Nations Relief for Palestinian Refugees to provide immediate temporary assistance for such persons. By General Assembly Resolution 302 (IV) of 8 December 1949, the United Nations established the United Nations Relief and Works Agency for Palestine Refugees in the Near East. (8)

11. UNRWA's mandate has been renewed every three years since its creation in 1949. Its current mandate is due to expire in 2011. (9) Its area of operations comprises five 'fields': Lebanon, the Syrian Arab Republic, Jordan, the West Bank (including East Jerusalem) and the Gaza Strip. (10)

The Consolidated Eligibility and Registration Instructions (CERI)

12. The CERI issued by UNRWA define 'persons who meet UNRWA's Palestine Refugee criteria' as 'persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948 and who lost both home and means of livelihood as a result of the 1948 conflict'. (11) Certain other persons, whilst not meeting UNRWA's Palestinian Refugee criteria, are also eligible to receive UNRWA's services. (12) UNRWA groups these two categories together as persons 'who are eligible to receive UNRWA's services upon being registered in the Agency's Registration System and obtaining an UNRWA Registration Card as proof of registration'. (13)

13. There are, moreover, certain other categories of person who are eligible to receive UNRWA services *without* being registered in UNRWA's Registration System. (14) These include 'non-registered persons displaced as a result of the 1967 and subsequent hostilities' (15) and 'non-registered persons who live in refugee camps and communities'. (16)

The Statute of the Office of the UNHCR

14. The Office of the United Nations High Commissioner for Refugees (17) was created on 14 December 1950 by Resolution 428 (V) of the United Nations General Assembly. The UNHCR is a subsidiary organ of the United Nations under Article 22 of the UN Charter. The functions of the Office of the UNHCR are defined in its Statute. (18)

15. Article 6 of the Statute sets out the scope of the UNHCR's competence. Under Article 7(c), however, that competence does not extend to a person who continues to receive from other organs of agencies of the United Nations protection or assistance.

UNHCR statements

16. The UNHCR occasionally makes statements which have persuasive, but not binding, force. (19) His Office has published various statements which relate to the interpretation of Article 1D of the 1951 Convention: a commentary in its Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol, a note published in 2002 (and revised in 2009) and a 2009 statement (also subsequently revised) which relates expressly to Ms Bolbol's case. I intend to treat this last as an unofficial *amicus curiae* brief.

The UNHCR Handbook

17. The Handbook defines Article 1D as a provision whereby persons otherwise having the characteristics of refugees are excluded from refugee status. It states that exclusion under this clause applies to any person who is in receipt of protection or assistance from UNRWA, observing that UNRWA operates only in certain areas of the Middle East, and that it is only there that its protection or assistance are given. (20) Thus, a refugee from Palestine who finds himself outside that area does not enjoy the assistance mentioned and may be considered for determination of his refugee status under the criteria of the 1951 Convention. The Handbook then states that it should normally be sufficient to establish that the circumstances which originally qualified him for protection or assistance from UNRWA still persist and that the cessation and exclusion clauses (21) do not apply to him.

The 2002 note

18. In its 2002 note, (22) the UNHCR approaches the two sentences of Article 1D as alternative rather than cumulative. In its view, Article 1D applies to Palestinian refugees within the meaning of Resolution 194 (III) of 11 December 1948 or displaced persons within the meaning of Resolution 2252 (ES-V) of 4 July 1967. (23) Those living in the UNRWA zone who are either registered, or who are eligible to be registered, with the agency (24) should be considered to be receiving protection and assistance from UNRWA, and thus fall into the first sentence of Article 1D and outside the scope of the 1951 Convention.

19. The UNHCR regards the second sentence of Article 1D as giving automatic entitlement to the benefits of the 1951 Convention to persons who are outside the UNRWA zone, (25) but who are nonetheless Palestinian refugees within the meaning of Resolution 194 (III) of 11 December 1948 or displaced persons within the meaning of Resolution 2252 (ES-V) of 4 July 1967. This includes persons who have never resided in the UNRWA zone and who therefore fall within the competence of the UNHCR. (26) However, such persons can also return (or be returned) to the UNRWA zone. (27) If so, they will come within the first sentence of Article 1D.

The 2009 note

20. The 2009 note similarly takes as its starting point the wording of Resolutions 194 (III) and 2252 (ES-V). The UNHCR regards 'receiving' in the first sentence of Article 1D as including 'being eligible to receive' protection and assistance from UNRWA; and notes that to be in a position to receive such assistance, the persons concerned must be in the UNRWA zone. (28) As regards the second sentence of Article 1D, the UNHCR adds to the arguments in its 2002 note the observation that, in its view, 'ceased for any reason' includes circumstances where a particular person, previously registered with UNRWA, has travelled outside the UNRWA zone. (29)

European Union law

EC Treaty

21. Article 63 EC (30) provides that:

'The Council … shall … adopt:

1. measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties …

…'

Joint Position 96/196/JHA

22. Article 12 of the Joint Position (31) is entitled 'Article 1D of the Geneva Convention'. It reads as follows:

'Any person who deliberately removes himself from the protection and assistance found in Article 1D of the Geneva Convention is no longer automatically covered by that Convention. In such cases, refugee status is in principle to be determined in accordance with Article 1A.'

Directive 2004/83

23. The Tampere Council laid the foundations for the programme of European legislation relating to the area of freedom, security and justice in the EU known as the Hague Programme. Directive 2004/83 is part of that programme. It sets out minimum standards for the qualification and status of third country nationals or stateless persons, either as refugees or as persons entitled to a subsidiary form of protection (such as a non-*refoulement* order).

24. Recital 3 in the preamble to Directive 2004/83 notes that '[t]he Geneva Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees'. Recital 6 states that '[t]he main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States'.

25. Article 2(c) of the Directive mirrors the first paragraph of Article 1A(2) of the 1951 Convention. It defines 'refugee' as a 'third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply'.

26. Chapter III of the Directive deals with qualification for being a refugee. Article 12, found in that Chapter, reflects Article 1D of the 1951 Convention. More particularly, Article 12(1)(a) mirrors Article 1D of the Convention and reads as follows:

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

(a) he or she falls within the scope of Article 1D of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Directive'.

27. Article 13 of the Directive provides that refugee status is to be granted to 'a third country national or a stateless person, who qualifies as a refugee in accordance with Chapters II [assessment of applications for international protection] and III [qualification for being a refugee]'.

28. Chapters V and VI of the Directive deal, respectively, with qualification for, and the status of, subsidiary protection. In particular, Article 18 provides for the grant of subsidiary protection status to a third country national or stateless person eligible for subsidiary protection in accordance with Chapters II and V.

29. Article 38(1) provides that the Directive is to be transposed into national law before 10 October 2006. At the time of the facts giving rise to this reference, Article 12(1)(a) of the Directive had not been transposed into national law in Hungary, although the deadline for transposition has passed. The parties to the national proceedings both take the view that Article 12(1)(a) of the Directive is sufficiently clear, precise and unconditional to be relied on directly by an applicant as against the competent national authority.

Facts, procedure and questions referred

30. On 10 January 2007 Ms Bolbol, a stateless Palestinian, arrived in Hungary together with her spouse on a visa from the Gaza Strip. Upon arrival, she applied for and received a residence permit from the authority responsible for foreign nationals. On 21 June 2007 she applied to the Bevándorlási és Állampolgársági Hivatal (Immigration and Citizenship Office;

'the BAH') for refugee status because, in the event that the authority did not extend her residence permit, she did not want to return to the Gaza Strip, which she stated was unsafe on account of the conflict between Fatah and Hamas.

31. Ms Bolbol's application was made under the second paragraph of Article 1D of the 1951 Convention, on the basis that she is a Palestinian residing outside the UNRWA zone. Only her father remains in the Gaza Strip, where he works as a university lecturer. All her other family members have emigrated.

32. It is common ground that Ms Bolbol did not actually avail herself of UNRWA's protection or assistance whilst in the Gaza Strip. Her claim is based on her entitlement to such protection. She presented in support of her claim an UNRWA registration card issued to the family of her father's first cousin. However, the BAH disputes the existence of a family connection in the absence of any direct documentary evidence. UNRWA has not expressly confirmed whether she would be entitled to be registered. (32)

33. By decision of 14 September 2007 the BAH refused Ms Bolbol's application for refugee status. (33) At the same time it placed Ms Bolbol under the protection of a non-*refoulement* order, (34) on the grounds that the readmission of Palestinians is at the discretion of the Israeli authorities, and that Ms Bolbol would be exposed to the risk of torture or inhuman and degrading treatment in the Gaza Strip on account of the conditions there.

34. Ms Bolbol challenged the BAH's decision rejecting her claim for refugee status before the Fővárosi Bíróság, which stayed the proceedings and referred the following questions to the Court:

'For the purposes of Article 12(1)(a) of Council Directive 2004/83/EC:

1. Must someone be regarded as a person receiving the protection and assistance of a United Nations agency merely by virtue of the fact he is entitled to assistance or protection or is it also necessary for him actually to avail himself of that protection or assistance?

2. Does cessation of the agency's protection or assistance mean residence outside the agency's area of operations, cessation of the agency and cessation of the possibility of receiving the agency's protection or assistance or, possibly, an objective obstacle such that the person entitled thereto is unable to avail himself of that protection or assistance?

3. Do the benefits of this directive mean recognition as a refugee, or either of the two forms of protection covered by the directive (recognition as a refugee and the grant of subsidiary protection), according to the choice made by the Member State, or, possibly, neither automatically but merely inclusion in the scope *ratione personae* of the directive?'

35. Written observations were submitted by Ms Bolbol, the Belgian, German, French, Hungarian and United Kingdom Governments and the Commission. All but the United Kingdom Government attended the hearing and presented oral argument on 20 October 2009.

Analysis

The Directive and the 1951 Convention

36. Although the European Union as such is not a signatory to the Convention, Article 63(1) EC expressly provides that the common policy on asylum must be adopted in accordance with the 1951 Convention and the 1967 Protocol. Directive 2004/83, whose legal base is Article 63(1) EC, describes the 1951 Convention in its preamble as a 'cornerstone' in the protection of refugees. The Directive is plainly intended to give effect, through common Community rules, to the Member States' international obligations. The provisions of the Directive must, therefore, be interpreted in a manner which is consistent with the 1951 Convention. (35)

37. The International Court of Justice has not yet ruled on the interpretation of Article 1D of the 1951 Convention, although the UNHCR has expressed its views on the subject. (36) A (non-exhaustive) examination of pertinent decisions by national courts of Member States shows a striking disparity, both in approach and in result (37) (reflected in the observations presented by the Member States that have intervened in these proceedings). None of these interpretations are, of course, binding on the Court.

38. In order to answer the questions referred by the national court, I find it both logical and helpful first to analyse Article 1D of the Convention, before returning to apply that analysis within EU law. (38)

39. It is also essential to be clear about the ambit of the present case. Both Article 12(1)(a) of Directive 2004/83 and Article 1D of the 1951 Convention refer, in general terms, to 'protection or assistance' from 'organs or agencies' of the UN.

However, Ms Bolbol's claim before the national court is based on her claim to be entitled to receive UNRWA assistance; and the observations of all parties before the Court have addressed the issues exclusively by reference to the role of UNRWA (rather than more generally). I shall therefore follow that approach in this Opinion.

40. I shall therefore look first at the historical background to the drafting of Article 1D of the 1951 Convention (together with the *travaux préparatoires*). (39) Next, I shall set out the guiding considerations that I believe to be applicable, before examining the specific points of interpretation that need to be addressed. Finally, I shall revert to Directive 2004/83 and deal, in sequence, with the questions referred.

The historical background and the travaux préparatoires

41. The drafting of the 1951 Convention took place against the background of recent conflict, devastation and displacement of population. World War II had left large numbers of displaced persons in Europe. A separate but related chain of events had led, with the participation of the international community, to the partition of Palestine, followed by the declaration of the State of Israel. In the regional conflict that both preceded and followed that event, a significant number of persons were displaced.

42. Since Article 1D is formulated in general terms, it is potentially applicable to *any* situation in which other 'organs or agencies' of the UN are providing 'protection or assistance' to persons who would otherwise fall within the scope *ratione personae* of the 1951 Convention. Indeed, the UN had recently started to provide specific assistance in conjunction with the conflict in Korea. (40) That said, the *travaux préparatoires* make it clear that the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (41) had the situation in Palestine uppermost in its mind when drafting Article 1D.

43. The minutes of the Conference of Plenipotentiaries appear to reflect three principal concerns: (42) first, the need to prevent a mass exodus from the geographical area that had been Palestine; (43) second, the desire of certain States to maintain the political visibility of persons displaced by the events of 1948; (44) and third, the need to avoid an overlap of competences between the UNHCR and UNRWA. (45) All those concerns focus (for historical reasons) on the consequences, in terms of displaced persons requiring assistance, of the situation in Palestine. In analysing Article 1D for the purposes of the present proceedings, I shall therefore take that to be the historical starting point.

44. The *travaux préparatoires* also appear to address the displacement of Palestinians as, essentially, an issue affecting a group of persons. (46) However, whilst it is the category of displaced Palestinians that historically formed the subject-matter of Article 1D, the provision itself must be read in a way that renders it intelligible and applicable to an individual. Such an approach reflects the fact that international law as a whole places a high value on the right to self-determination (a collective right for groups of persons), (47) but that, at the same time, international humanitarian law is founded on the principles of respect for the person and for the individuals within a group. (48)

45. The negotiated compromise that became Article 1D is one that singles out, in particular, displaced Palestinians for special consideration and, in some respects, special protection within the overall framework of international refugee law.

46. Although it is a short provision, Article 1D is replete with unanswered questions. At least four broad areas of opacity can be distinguished – two arising from the first sentence and two from the second – that must be resolved in order to answer the questions referred to the Court in the present proceedings. (49)

47. First, what is meant, in a geographical and/or temporal sense, by 'persons who are at present receiving … protection or assistance'? Second, do such persons have to be in actual receipt of protection or assistance, or does it suffice that they would be entitled to receive it? (As a sub-question, relevant specifically to the interpretation of the Directive and the proceedings before the national court: what is the effect of formal registration with UNRWA? Is it substantive, or merely evidentiary?) Third, in what circumstances should one consider that 'such protection or assistance has ceased for any reason'? Fourth, what meaning is to be attributed to the phrase 'these persons shall *ipso facto* be entitled to the benefits of this Convention'?

Guiding considerations

48. As the written and oral submissions to the Court have made clear, the actual text of Article 1D is capable of supporting a wide variety of different meanings. I therefore think it essential to set out, clearly and unambiguously, the principles that guide my thinking.

49. First, all genuine refugees deserve protection and assistance. An interpretation that would lead to a gap in protection for any such person is therefore, *a priori*, to be rejected.

50. Second, the historical intention behind Article 1D was clearly to give some form of *special treatment and consideration* to displaced Palestinians. (50)

51. Third, whatever the initial hopes of the General Assembly (as reflected in 1951 by the draftsmen of the Convention) that UNRWA would need to deal only with temporary provision of assistance, the problems associated with the situation in Palestine have proved intractable over the succeeding decades, as the successive renewals of UNRWA's mandate have demonstrated. The 1967 Protocol likewise reflects the unhappy reality that refugee problems requiring to be addressed under the 1951 Convention are not confined to those caused by events occurring before 1 January 1951. Thus, the original intention of the draftsmen of the Convention must be coloured by the reality of subsequent history.

52. Fourth, the Convention draftsman intended displaced Palestinians who were receiving the special treatment and consideration expressly put in place to care for them (assistance from UNRWA) not to be able to apply for refugee status under the Convention, as overseen by the UNHCR (hence the first sentence of Article 1D). Whilst they are being cared for by UNRWA, such persons are excluded *ratione personae* from the Convention.

53. Fifth, as a corollary to (or possibly by way of compensation for) that exclusion, under certain circumstances, displaced Palestinians falling within the second sentence of Article 1D are *ipso facto* entitled to the *benefits* of the Convention (and not merely to cease to be excluded from its scope on cessation of protection or assistance from UNRWA). The very presence of the second sentence implies a greater consequence than that, when its specific conditions are fulfilled, such persons merely join the queue with every other potential applicant for refugee status under Article 1A.

54. Sixth, the concept of 'cessation of protection or assistance' by a UN organ or agency other than the UNHCR (here, UNRWA) cannot be construed in a way that would result in such persons being, effectively, trapped in the UNRWA zone, unable (even if forcibly separated from UNRWA assistance) to leave and claim refugee status elsewhere until the situation in 'Palestine problem' is entirely resolved and UNRWA wound up. Such an outcome would be wholly unacceptable.

55. Seventh, because *all* genuine refugees should be able to obtain protection or assistance but the capacity of States to absorb refugees is not infinite, Article 1D cannot be interpreted either as entitling every displaced Palestinian, whether or not actually being or having been in receipt of UNRWA assistance, to leave the UNRWA zone voluntarily and claim automatic refugee status elsewhere. Such an interpretation would provide disproportionately favourable treatment for displaced Palestinians at the expense of other genuine applicants for refugee status displaced by other conflicts in the world.

56. Finally, the two sentences that comprise Article 1D are meant together to address the concern to provide special treatment and consideration for persons displaced by the situation in Palestine. Because the first sentence on its own was deemed insufficient, the second sentence was added. It therefore seems reasonable to read the two sentences (and hence their component elements) consecutively, not disjunctively; (51) and to seek a reading for the provision *as a whole* that strikes a reasonable balance between caring for displaced Palestinians (under Article 1D) and caring for other potential refugees (under the 1951 Convention as a whole).

57. I now turn to consider in detail the four points of interpretation (52) which are raised by the questions from the referring court.

(i) The meaning of 'persons who are at present receiving … protection or assistance'

58. The words 'at present receiving' are limitative in two senses. First, the practicalities of receiving protection or assistance from UNRWA suggest a limitation of place. (53) Second, the words 'at present' and the use of the present tense suggest a limitation in time. (54)

Limitation of place

59. In order to receive protection or assistance from a UN organ or agency other than the UNHCR, a person must be in a place where such protection and assistance is physically available. Assistance from UNRWA is obtainable only in the UNRWA zone. Consequently, as the UNHCR has stated, for present purposes a person will only come within the first sentence of Article 1D when he is resident in the UNRWA zone.

60. The Belgian Government suggests that, in consequence, the whole of Article 1D must be limited to persons who are within the UNRWA zone. It seems to me that, however, in law, neither of the two sentences that together comprise Article 1D

is limited geographically in any way. It is merely the practical realities of receiving UNRWA assistance that produce the apparent geographical limitation in the first sentence. It follows that an individual who leaves the UNRWA zone should, in certain circumstances, be able to invoke the specific rights conferred by the second sentence of Article 1D, wherever he may be.

61. I emphasise, furthermore, that the two sentences of Article 1D must be read consecutively. Thus, when an individual seeks to claim rights under the second sentence of Article 1D, it is necessary first to find out whether he was initially within the first sentence of that article. If he was not, he was not previously excluded *ratione personae* from the scope of the Convention. Rather, he – like any other potential refugee – can apply for individual assessment under Article 1A. (55)

Limitation in time

62. The United Kingdom argues that the use of the words 'at present' refers to 1951, when the Convention was drafted. It submits that the drafting parties had in mind only the group of persons identified as already receiving assistance and protection from UNRWA when the Convention came into force.

63. Ms Bolbol's position is to the effect that any person who has ever received (56) assistance from UNRWA falls within the exclusion clause in the first sentence of Article 1D. (57)

64. The Commission and Hungary interpret the words 'presently receiving' as meaning receiving at the time immediately preceding an application for refugee status under Article 1D.

65. In my view, the interpretation proposed by the United Kingdom is more rigid than the text will allow, particularly in the light of the 1967 Protocol and the repeated renewals of UNRWA's mandate.

66. I accept that in 1951 the drafting parties may have been thinking principally of persons who were, at that point, already receiving protection or assistance from other 'organs and agencies' of the United Nations (such as UNRWA). However, since then many additional persons (both the descendants of those originally displaced and new displaced persons) have been assisted and protected by that organisation. Indeed, the amendments to the Convention made by the 1967 Protocol clearly express the international community's recognition that situations giving rise to applications for refugee status did not, unfortunately, cease at a particular moment in history.

67. Applying that same logic here, it follows that the United Kingdom's restrictive reading of the first sentence of Article 1D cannot be correct. A restrictive reading is likewise difficult to reconcile with UNRWA's own guidelines (CERI), which offer assistance not only to persons displaced by the events of 1948, but (for example) to 'non-registered persons displaced as a result of the 1967 and subsequent hostilities'. (58)

68. Furthermore, Article 7 of the UNHCR's Statute excludes from UNHCR competence any 'person … who continues to receive from other organs or agencies of the United Nations protection or assistance …'. On the (not unreasonable) twin assumptions that (a) UNRWA is providing assistance to a greater number of persons now than in 1951 and that (b) many of those who received UNRWA assistance in 1951 have since died, it seems to me that a restrictive reading of the first sentence of Article 1D is likely to give a lower level of special treatment and consideration to displaced Palestinians than the United Nations intended.

69. However, in my own view the broad temporal scope of Ms Bolbol's approach goes too far the other way. Only those who are initially excluded from the scope of the Convention by the first sentence of Article 1D are potential beneficiaries of the special treatment envisaged by the second sentence of that provision. (59) A balanced approach to the interpretation of Article 1D as a whole thus requires one neither artificially to inflate the size of the excluded group defined by the first sentence (beyond those 'at present receiving' non-UNHCR protection or assistance) nor to be over-expansive as to the circumstances in which members of that group will qualify for the benefits conferred by the second sentence.

70. It follows that some limitation in time is necessary. I therefore read 'at present receiving' protection or assistance in the first sentence of Article 1D as meaning, at any particular point in time, 'persons who are currently receiving protection or assistance from UN organs or agencies other than the UNHCR'. Such persons are excluded from the Convention because they do not need its protection.

(ii) Actual or potential receipt?

71. The second point of interpretation is whether the person concerned must actually have benefited from assistance or

protection, or whether it suffices that he is potentially entitled so to benefit.

72. In my view, the first sentence of Article 1D covers only persons who have actually availed themselves of the protection or assistance of an organ or agency other than the UNHCR.

73. First, the wording of the first sentence uses the expression 'receiving' rather than 'is entitled to receive'. (60) Here, I agree with the United Kingdom that to read 'receiving' as 'entitled to receive' is to read in something which is plainly not in the text.

74. Second, the first sentence of Article 1D is a derogation from the general principle that the protection *rationepersonae* given by the Convention is universal, (61) inasmuch as it excludes a particular category of persons from the scope of the Convention. As such, it should presumably be interpreted strictly rather than expansively. (62)

75. Third, a strict reading also chimes in with the idea that such persons (who will subsequently, if necessary, be able to claim the special rights set out in Article 1D, second sentence) are not acting of their own volition, but are being swept along by events over which they have no control, (63) inasmuch as the decision whether to give assistance to any particular individual is dependent, directly or indirectly, on UNRWA. (64)

76. In disagreeing here with the interpretation put forward by the Office of the UNHCR I am guided primarily by the clear text of the provision, which has not been amended in over 50 years. In contrast, it seems to me that the UNHCR's reading has varied over time, (65) reflecting the intractable nature of the Palestine problem. Whilst its reading has the advantage of eliminating most evidentiary problems associated with the first sentence, it does so by excluding a much greater number of potential refugees from the scope of the 1951 Convention.

(iii) 'when such protection or assistance has ceased for any reason'

77. The written observations lodged with the Court suggest, between them, most shades of meaning for this phrase, from a total cessation of UNRWA activity (66) to a cessation of protection in respect of a particular individual. (67) Indeed, Ms Bolbol goes further and suggests that if *either* protection or assistance ceases, that triggers the second sentence of Article 1D. She points out that the United Nations Conciliation Commission for Palestine (68) has ceased effectively to operate (69) and concludes that Article 1D, second sentence, is already necessarily in operation for all those previously excluded from protection by the first sentence.

78. I do not accept that submission. The two sentences of Article 1D are to be read consecutively. The phrase 'protection or assistance' – used in both sentences – should therefore be read as meaning assistance or protection provided by any one of the 'organs or agencies of the United Nations' other than the UNHCR. If a person is 'at present receiving' from *any* such agency 'protection or assistance', he is excluded from the Convention (first sentence). I read 'ceases' as meaning that Article 1D, second sentence, is triggered if that same person is no longer able to benefit from protection or assistance from any such agency.

79. On the other hand, to read 'ceases' as requiring the total cessation of UNRWA's activities throughout the UNRWA zone would mean that, until then, no person who ceased to receive assistance from organs such as UNRWA would be able to derive any benefit from the second sentence of Article 1D or, arguably, from the Convention as a whole. Such a reading also sits oddly with the presence of the words 'for any reason' before the clause referring to the resolution of the underlying problem (displaced Palestinians), since the obvious reason for total cessation of UNRWA's activities would be that 'the position of such persons' had been definitively settled.

80. For that reason, I conclude that what matters is whether the individual concerned has ceased to receive protection or assistance.

81. Finally, I must address the question of whether the reason for the cessation of UNRWA assistance matters. Specifically, is the second sentence of Article 1D triggered if a person voluntarily removes himself from the geographical area in which UNRWA operates, thus making it impossible for him to continue to receive UNRWA's assistance? Or does 'cessation for any reason' mean simply 'whatever the reason why UNRWA has ceased to provide assistance to a particular person'? As I shall explain, I prefer the second reading.

82. In trying to unpick this Gordian knot, I think that one must look both at the consequences of any particular reading and at the underlying rationale behind the provision. My answer is therefore linked to the reading that I give to the final point of interpretation (as to the legal consequences of triggering the second sentence of Article 1D), (70) where my interpretation is more generous than some Member States have proposed. I would distinguish between persons who remove themselves

voluntarily from the UNRWA zone and thereby from UNRWA's assistance and those who find that external events beyond their control have meant that UNRWA ceases to continue to provide assistance to them. (71)

83. Individuals in the first category are no longer excluded from the scope of the Convention *ratione personae*, because they are not 'at present receiving ... protection or assistance', and are at liberty to ask for individual assessment with a view to obtaining refugee status under Article 1A. However, they may not claim to be *ipso facto* entitled to the benefits of the Convention. They have chosen to place themselves in a situation in which UNRWA's assistance is no longer available to them; but there has been no cessation in UNRWA's willingness to provide such assistance.

84. Individuals in the second category find involuntarily that their previous situation (in which, although excluded from the Convention by Article 1D, first sentence, they were being cared for by UNRWA) has been altered. UNRWA has ceased to provide such assistance to them. It seems to me that the special regime set out in Article 1D, second sentence, must – if it is to have any meaning – step in to address the needs of such persons.

(iv) 'Ipso facto ... entitled to the benefits of this convention'

85. The Belgian and United Kingdom Governments argue that entitlement to the benefits of the 1951 Convention means no more than the entitlement to be assessed under the criteria set out in Article 1A. To my mind, however, the wording of the second sentence of Article 1D makes it abundantly clear that someone who was previously excluded from the scope of the Convention by the article's first sentence but whose receipt of non-UNHCR protection or assistance has ceased within the meaning of the first part of the second sentence is then entitled to significantly more, namely automatic recognition as a refugee.

86. First, both the English and the French texts lend themselves to such a reading. Thus, the English has 'shall *ipso facto* be entitled to the benefits of this Convention' and the French 'bénéficieront de plein droit du régime de cette convention'. I find it difficult to see how merely being entitled to apply for assessment under Article 1A can be said to correspond to either formula.

87. Second, Article 1 is not – as such – a 'benefit' of the Convention. Rather, the benefits are contained in the succeeding articles. Article 1 defines who is, and who is not, to have access to those benefits. (72) It follows that *ipso facto* entitlement to benefits implies that one has already passed beyond Article 1.

88. Third, the rationale behind Article 1D is that displaced Palestinians should enjoy special treatment and consideration. I find it difficult to regard merely being allowed to join the queue for individual assessment of entitlement to refugee status as special treatment and consideration. That seems to me more the mere removal of a previous obstacle (being excluded from the Convention's scope).

89. I therefore conclude that *ipso facto* entitlement means the automatic grant of refugee status, without further individual assessment.

The results of this construction of Article 1D

90. The construction that I propose in dealing with each of the four points of interpretation involves reading the two sentences that together comprise Article 1D in a way that will generate the following set of outcomes:

(a) a displaced Palestinian who is not receiving UNRWA protection or assistance is not excluded *ratione personae* from the scope of the Convention: he is therefore to be treated like any other applicant for refugee status and to be assessed under Article 1A (avoidance of overlap between UNRWA and the UNHCR; application of the principle of universal protection);

(b) a displaced Palestinian who is receiving protection or assistance from UNRWA is excluded *ratione personae* from the scope of the Convention whilst he is in receipt of that protection or assistance (avoidance of overlap between UNRWA and the UNHCR);

(c) a displaced Palestinian who was receiving protection or assistance from UNRWA but who, for whatever reason, can no longer obtain protection or assistance from UNRWA ceases to be excluded *ratione personae* from the scope of the Convention (application of the principle of universal protection); however, whether he is then *ipso facto* entitled to the benefits of the Convention or not depends on why he can no longer obtain such protection or assistance;

(d) if such a displaced Palestinian can no longer benefit from UNRWA protection or assistance as a result of external

circumstances over which he had no control, he has an automatic right to refugee status (application of the principle of special treatment and consideration);

(e) if such a displaced Palestinian can no longer benefit from UNRWA protection or assistance as a result of his own actions, he cannot claim automatic refugee status; however, he is (naturally) entitled to have an application for refugee status assessed on its merits under Article 1A (application of the principle of universal protection and fair treatment for all genuine refugees; proportionate interpretation of the extent of special treatment and consideration to be afforded to displaced Palestinians).

Application mutatis mutandis to the Directive

91. Given that the wording of Article 12(1)(a) of the Directive directly reflects that of the 1951 Convention, it is now possible to deal relatively shortly with the actual questions referred. Once the Court has interpreted Article 12(1)(a), that provision is, in my view, capable of direct effect.

The first question

92. Article 12(1)(a) does not set out verbatim the exclusion condition 'at present receiving … protection or assistance'; but contents itself with referring directly back to Article 1D of the 1951 Convention. Nothing suggests that the exclusion condition in the Directive is intended to mean something different from Article 1D. On the contrary: every indication is that it should bear exactly the same meaning.

93. Applying the interpretation of Article 1D of the 1951 Convention that I have set out above, I therefore conclude that a person comes within the scope of the first sentence of Article 12(1)(a) of the Directive only if he has actually availed himself of protection or assistance provided by an organ or agency of the United Nations other than the UNHCR. Mere entitlement to such protection or assistance does not exclude such a person from being a refugee within the meaning of Article 2(c) of the Directive.

94. A subsidiary issue (which arises in the context of applying the Directive) is, what evidence must an applicant produce to demonstrate that he fell within the first sentence of Article 12(1)(a) of the Directive as a precursor to claiming special rights under the second sentence? On the basis of the interpretation that I set out above, it seems to me that an applicant must adduce evidence to show that he was actually receiving protection or assistance.

95. Here, it is essential to acknowledge both the State's legitimate interest in checking whether a particular individual is entitled to what he claims and the very real, practical problems that any displaced person seeking refugee status may face in proving his entitlement. Some applicants will not have a genuine claim to refugee status; and the State is entitled to probe their case. At the same time, the State may not lay down unrealistic standards for the evidence required. (73)

96. The question then arises as to what difference actual registration with UNRWA makes or should make.

97. Registration to my mind is a matter of evidence, not of substance.

98. UNRWA sometimes provides assistance without registering a person. (74) Sometimes, the administrative records may lag behind the event; or may themselves have been destroyed during hostilities. I therefore reject the French Government's submission that only actual proof of UNRWA registration will suffice.

99. That said, I would treat evidence of actual registration with UNRWA as raising an irrebuttable presumption that an applicant had been in actual receipt of assistance.

The second question

100. The second sentence of Article 12(1)(a) of the Directive directly mirrors that of the 1951 Convention and *a fortiori* should be interpreted in the same way.

101. My answer to the second question referred is therefore that 'cessation of the agency's protection or assistance' means that the person concerned has ceased, otherwise than of his own volition, to benefit from the protection or assistance that he enjoyed immediately previously.

102. I do not underestimate the evidentiary issues that will arise in conjunction with determining whether a particular person

left the UNRWA zone voluntarily or involuntarily. The problems range from fragmentary evidence (that bears out part of a narrative but not every single step) to the possibility of fabricated evidence (or genuine evidence obtained by bribing the right official). Here, as with demonstrating actual receipt of assistance, the State is entitled to insist on some evidence, but not on the best evidence that might be produced in an ideal world.

The third question

103. The third question referred cannot be answered by direct transposition of the earlier analysis. Here, the scheme of the Directive needs to be taken into account.

104. Article 2(c) of the Directive defines a refugee as a third country national who fulfils a specific set of criteria (modelled on Article 1A of the Convention) 'and to whom Article 12 does not apply'. Article 12 (entitled 'Exclusion') then excludes certain categories of persons (mirroring parts of Article 1 of the 1951 Convention) (75) 'from being a refugee'.

105. Does that mean that a person who comes within *any part* of Article 12(1)(a) (that is, the first and/or the second sentence) is permanently excluded from being a refugee? In my view it cannot.

106. First, the second sentence of Article 12(1)(a) clearly provides for the *benefits* of the Directive to be extended to persons who fell within the first sentence but who then satisfied the criteria set out in the second sentence. To reconcile that wording with the general definition of 'refugee' given by Article 2(c), it is necessary to construe the second sentence of Article 12(1)(a) as an exception to the disqualification clause contained in the first sentence of that provision, with its own specific consequences.

107. Second, Article 12 forms part of Chapter III of the Directive ('Qualification for being a refugee'). The placement of this article indicates, as Ms Bolbol, the Hungarian Government and the Commission have correctly argued, that this is a separate avenue from the procedure set out in Chapter II ('Assessment of applications for international protection') under which a person may qualify as a refugee and hence be entitled to the grant of refugee status under Article 13. (76)

108. Finally, in delineating who is and is not to be considered as a refugee, Articles 2(c), 11 and 12 reflect not only the wording but also the scheme of Article 1 of the 1951 Convention read as a whole. If the Directive contains a lacuna such that a person who fulfils both parts of Article 12(1)(a) is still excluded from being classified as a refugee, then the Directive fails correctly to transpose Member States' international law obligations under the Convention into European Union law. That must therefore be an erroneous reading of the Directive.

109. Applying the analysis of Article 1D of the Convention that I have set out earlier, I therefore conclude, in answer to the third question referred, that the words 'the benefits of this directive' mean qualification as a refugee and automatic entitlement to refugee status in accordance with Article 13 of the Directive. (77)

110. For the sake of completeness, I add that the availability of subsidiary protection (78) as a further option does not affect the interpretation of Article 12(1)(a). That option is relevant only to persons who are not granted refugee status automatically by virtue of Article 12(1)(a) but who are assessed in accordance with Chapter II and who qualify for subsidiary protection under Chapter V. Under the 1951 Convention, a person must fulfil the criteria in Article 1A in order to qualify for *any* protection. Under the Directive, a person who falls short of meeting the equivalent criteria (set out in Article 2(c) and further elaborated in Chapter II) may still be offered a (lesser) degree of protection.

Conclusion

111. In the light of the above, I suggest that in answer to the questions referred by the Fővárosi Bíróság the Court should rule as follows:

(1) A person comes within the scope of the first sentence of Article 12(1)(a) of Council Directive 2004/83/EC of 29 April 2004 only if he has actually availed himself of the protection or assistance of a United Nations agency other than the UNHCR. Mere entitlement to such protection or assistance does not suffice to trigger that provision.

(2) The words 'cessation of the agency's protection or assistance' mean that the person concerned is no longer in the relevant geographical area and has ceased, otherwise than of his own volition, to benefit from the protection or assistance that he enjoyed immediately before leaving that geographical area.

(3) The words 'the benefits of this directive' mean recognition as a refugee and the automatic grant of refugee status.

1 – Original language: English.

2 – 'The 1951 Convention' or 'the Convention', which consolidated and replaced earlier instruments. It entered into force on 22 April 1954. The version applicable to the present proceedings is that which resulted from the adoption, in 1967, of the New York Protocol of 31 January 1967 Relating to the Status of Refugees ('the 1967 Protocol'). Directive 2004/83 refers to the 1951 Convention as 'the Geneva Convention', a shorthand term more commonly reserved for the four treaties and protocols thereto that together set the standards in international law for humanitarian treatment of the victims of war. For the sake of clarity, I shall therefore, save in direct citation, avoid 'Geneva Convention' in this Opinion.

3 – Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ 2004 L 304, p. 12 ('Directive 2004/83' or 'the Directive').

4 – As amended by the Protocol added in 1967, in recognition of the fact that new refugee situations had arisen since the Convention was adopted and that all refugees should enjoy equal status.

5 – 'The ICJ'.

6 – The question whether resolutions of the UN General Assembly are in fact 'law' *strictu sensu* is one which has not yet been resolved (see, for example, the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons (ICJ Reports, 1996, p. 226) for a discussion of the normative value of resolutions). For the purposes of the present Opinion, however, this point does not require detailed analysis.

7 – 'The UNSCOP'.

8 – 'UNRWA'.

9 – See UN General Assembly Resolution 62/02.

10 – See CERI, point VII.E. For simplicity, I shall refer to UNRWA's area of operations in this Opinion as 'the UNRWA zone'.

11 – UNRWA's website: http://www.un.org/unrwa/overview/qa.html; CERI, point III.A.1. Point VII (glossary and definitions) repeats this definition (at point VII.J). It also contains the detailed definitions of certain other terms used later in this section of the Opinion.

12 – These are 'persons who at the time of original registration did not satisfy all of UNRWA's Palestinian Refugee criteria, but who were determined to have suffered significant loss and/or hardship for reasons related to the 1948 conflict in Palestine; they also include persons who belong to the families of Registered Persons' (CERI, point III.A.2). Such persons, although registered with UNRWA, are not counted as part of the official Registered Refugee population of the Agency. According to UNRWA's website, there are presently around 4.6 million persons registered with UNRWA.

13 – CERI, point III.A. Elsewhere UNRWA states that 'UNRWA's services are available to all those living in its area of operations who meet this definition, who are registered with the Agency and who need assistance' (www.un.org/unrwa/refugees/whois.html).

14 – CERI, point III.B. UNRWA states that its programmes 'keep due records' of such persons. Perhaps understandably, UNRWA does not, however, attempt to ascertain or confirm whether a particular person who is not registered and who has not actually received assistance is nevertheless *potentially* entitled to assistance (see further point 71 below).

15 – UNRWA makes its services available to persons in this category in accordance with established practice and/or host country agreement. In Resolution 2252 (ES-V) of 4 July 1967, the UN General Assembly endorsed UNRWA's efforts 'to provide humanitarian assistance, as far as practicable, on an emergency basis and as a temporary measure, to other persons in the area who are at present displaced and are in serious need of immediate assistance as a result of the recent hostilities'. That the need for such humanitarian assistance is not, alas, 'temporary' is well demonstrated by the fact that the terms of Resolution 2252 (ES-V) have been repeated in numerous General Assembly Resolutions since, most recently in Resolution 64/L.13 of 13 November 2009.

16 – 'These persons benefit from UNRWA services (e.g. sanitation and environmental health services) that are extended to refugee camps and communities as a whole' (CERI, point III.B).

17 – 'The UNHCR'.

18 – Annexed to that resolution.

19 – Recital 15 in the preamble to Directive 2004/83 states that 'consultations with the [UNHCR] may provide valuable guidance to Member States when determining refugee status'. For a further discussion of the value of statements of the UNHCR's office; see Hathaway, *The Right of Refugees under International Law* Cambridge University Press, 2005, pp. 112-118, in particular the distinctions in normative weight he draws between (a) Conclusions of the Executive Committee (the most authoritative), (b) the Handbook and (c) other statements issued for guidance. The UNHCR material referred to in this Opinion falls into categories (b) and (c).

20 – The Handbook notes that, although UNRWA is currently the only organ or agency other than the UNHCR that is providing protection or assistance under Article 1D, there was previously one other such body (the United Nations Korean Reconstruction Agency) and there could, potentially, be other

such bodies in the future.

21 – Articles 1C (cessation) and 1E and 1F (exclusion).

22 – The Office of the UNHCR issued, in 2009, a revised version of this note. I have noted the pertinent changes in the footnotes to this section.

23 – The 2009 revision makes it clearer that this includes their descendants.

24 – The 2009 revision omits this requirement, stating that the person concerned needs only to be inside the UNRWA zone to be deemed to be receiving protection and assistance.

25 – The 2009 revision states that such persons fall within the second sentence because they are 'not at present receiving' (rather than 'no longer receiving') protection or assistance and thus the protection or assistance has 'ceased'.

26 – The 2009 revision deletes 'and fall within the competence of the UNHCR' from this point.

27 – The 2009 revision does not discuss the concept of 'being returned'.

28 – The revised version of this note adopts the analysis of the revised 2002 note and adds that all persons falling within the wording of Resolutions 194 (III) and 2252 (ES-V), and their descendants, who are in the UNRWA zone, are 'at present receiving … protection or assistance' within the sense of Article 1D.

29 – The revised version does not analyse the meaning of 'ceased for any reason' but indicates simply that persons moving from inside to outside the UNRWA zone and then back again will move back and forth between paragraphs 1 and 2 of Article 1D, irrespective of the reasons for leaving or returning.

30 – Following the entry into force of the Lisbon Treaty, Article 63(1) and (2) EC is reproduced (with some alterations) in Article 78(1) and (2) TFEU. Most notably, the TFEU requires the European Parliament and Council to adopt measures for a common European asylum system, comprising, inter alia, a uniform status of asylum and of subsidiary protection for nationals of third countries. Article 63(3)(a) EC is reproduced (with some alterations) in Article 79(2)(a) TFEU.

31 – Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonised application of the definition of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees (OJ 1996 L 63, p. 2).

32 – See footnote 14 above (Ms Bolbol's legal representative had requested such confirmation). Even if Ms Bolbol were not eligible to be registered, she might nevertheless (if she were within the UNRWA zone) be entitled to receive assistance: see points 10 to 12 above.

33 – From the order for reference it appears that this decision was based on Article 3(1) of the Menedékjogról Szóló 1997. Évi CXXXIX. Törvény ('the Met').

34 – From the order for reference it appears that this was based on Article 38(2) of the Met and on Article 51(1) of the Harmadik Országbeli Állampolgárok Beutazásáról és Tartózkodásáról Szóló 2007. Évi II. Törvény.

35 – See the judgment of the Court in Joined Cases C-175, C-176, C-178 and C-179/08 *Salahadin Abdulla et alia* [2010] ECR I-0000, paragraphs 52 and 53.

36 – See the UNHCR Handbook and the two Notes referred to at points 18 and 20 above. The ICJ has exclusive jurisdiction, under Article 38, to give authoritative rulings as to the meaning of the 1951 Convention.

37 – Compare, for example, the approach taken by the UK Court of Appeal in *El-Ali* [2003] 1 WLR 95 with the conclusion reached by Belgium's Conseil du Contentieux des Etrangers in its decisions of 21 April 2009 and 14 May 2009 (Case numbers 26 112 and 27 366 respectively).

38 – That is particularly the case since Article 12(1)(a) is virtually a straight transposition of the concepts and wording that are found in Article 1D of the 1951 Convention. That said, the Court's actual ruling will, evidently, be authoritative only in respect of the Directive.

39 – While international law endeavours to give effect to the natural and ordinary meanings of a Treaty's provisions (under Article 31 of the Vienna Convention on the Law of Treaties ('VCLT')), there is scope in both the VCLT (under Article 32) and in the general principles of international law for referring to the *travaux préparatoires* of a Treaty and the circumstances of its conclusion in determining the meaning of a term when an interpretation based on the ordinary meaning of a provision, in the light of its object and purpose, would leave the meaning of that term ambiguous or obscure. For further discussion, see Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edition, Manchester University Press, 1984, p. 141 et seq.

40 – See footnote 20 above.

41 – 'The Conference of Plenipotentiaries'.

42 – A number of international bodies have at times interpreted the provisions of a Treaty in the light of the contemporaneous common will of the drafting parties (see, for example, the judgment of the ICJ in *Land and Maritime Boundary between Cameroon and Nigeria*, ICJ Reports 2002, p. 303 at

paragraph 59, and the Decision on Delimitation of the Border between Eritrea and Ethiopia, delivered on 13 April 2002 by the Eritrea-Ethiopia Boundary Commission at paragraphs 3.3, 3.4 and 3.13, which refers to the decision of the arbitral tribunal in the *Argentina/Chile Frontier Case* ((1966) 38 ILR 10, p. 89).

43 – See the statements of the Italian and Iraqi representatives at the 19th, and the French representative at the 29th, meeting of the Conference of Plenipotentiaries.

44 – See the statements of the Egyptian representative at the 19th and 29th meeting of the Conference of Plenipotentiaries.

45 – See the statements of the Egyptian representative at the 19th, and the French representative at the 20th, meeting of the Conference of Plenipotentiaries.

46 – See, for example, the statements of the Conference's President at the 19th, the French representative at the 20th, and the US representative at the 21st, meeting of the Conference of Plenipotentiaries.

47 – See, for example, Article 1(2) of the UN Charter. The concept of self-determination evolved in tandem with the process of de-colonisation, and as such tends to have a strong territorial element (Shaw, *International Law*, 5th edition, Cambridge University Press, 2008). It is therefore difficult to apply to groups of refugees or stateless persons. The question of its applicability to displaced Palestinians is the subject of lively debate (see, *inter alia*, the Advisory Opinion of the ICJ on the Legal Consequences on the Construction of a Wall in the Occupied Territory (ICJ Reports 2004, p. 136)).

48 – See the preamble to, and Article 1(3) of, the UN Charter. This analysis is reflected in a central aspect of Article 1A of the Convention under which, in order to obtain refugee status, an individual must show a well-founded fear of persecution to himself as an individual within the parameters of a more general risk posed to a particular group of persons sharing the same characteristic.

49 – It seems from the *travaux préparatoires* that even the Egyptian delegation, at whose initiative the second sentence was added to the draft that became Article 1D, was not entirely clear as to the intended function of the sentence as a whole: see the statements of the Egyptian representative at the 19th and 20th meetings of the Conference of Plenipotentiaries.

50 – The German Government has queried whether this separate and distinct set of arrangement infringes the principle of equal treatment. Answering that question in the negative requires one to acknowledge that Article 1D was drafted so as to take account of the particular problems of a particular group of displaced people, whose situation was – at least in part – attributable to a decision taken by the international community (the partition of Palestine). That objective difference then provides the reason for (a degree of) special treatment. Whether the application of Article 1D to persons receiving protection or assistance from a body other than the UNHCR is a hypothetical situation *not* caused by a decision taken by the international community would violate the principle of equal treatment is a question beyond the scope of this Opinion.

51 – Here, I disagree with the line of interpretation proposed by the Office of the UNHCR, which states (in its 2002 note, and more clearly in the 2009 revision of that note) that all Palestinians (falling within the ambit of Resolution 194 (III) of 11 December 1948 and Resolution 2252 (ES-V) of 4 July 1967) who are outside the UNRWA zone are not at present receiving protection or assistance, and consequently that protection or assistance has ceased. This means assistance could theoretically 'cease' for someone who has never received it, which simply does not fit with the natural meaning of the word 'cease'. The original version of the UNHCR note relating to the present case stated that if someone has left the UNRWA zone, the protection and assistance have 'ceased' *for them* so that they *should* then automatically obtain the benefits of the Convention. I address this reasoning later (at point 81 et seq.).

52 – Summarised at point 47 above.

53 – I accept that a hypothetical future UN organ or agency operating within the meaning of Article 1D might not be so limited.

54 – I consider below, as the second issue of interpretation, whether 'receiving' means 'actually receiving' or 'entitled to receive'.

55 – Assuming, of course, that the individual in question is not excluded under Article 1C, 1E or 1F.

56 – Or who would be entitled to receive assistance: as to that, see point 71 et seq.

57 – She then argues for a correspondingly broad interpretation of the second sentence.

58 – See points 11 to 13 above.

59 – See point 85 et seq. below for the discussion of what that special treatment entails.

60 – The French text of Article 1D (which is the other authentic text, as mentioned in the final paragraph of the Convention) likewise has 'bénéficient actuellement' rather than 'sont éligibles à bénéficier'.

61 – The original temporal limitation ('as a result of events occurring before 1 January 1951') was removed by the 1967 Protocol; and most States have now elected, under Article 1B, to treat the Convention as applying to 'events occurring in Europe or elsewhere'. As of 2009, of the 147 States party to either the Convention or the Protocol, just four States had elected to treat the Convention as applying only to events occurring in Europe.

62 – Whilst the case-law relating to such clauses is less clearly marked than in European Union law (see, for examples, the Opinion of Advocate

General Kokott in Case C-73/07 *Satakunnan Markkinapörssi and Satamedia* [2008] ECR I-9831, point 58 and the case-law cited there), international judicial and arbitrational bodies have, under the VCLT, developed their interpretive practices so as to construe treaties in a way which bears in mind the purpose and objects of those treaties (see, for example, the decision of the ICJ in *Territorial Dispute (Libyun Aruh Jamuhiriyu/Chad)*, ICJ Reports 1994, paragraph 41, and the decision of the arbitral tribunal in the *German External Debts Case*, 19 ILM 1980, p. 1377, paragraphs 28 and 30). These authorities suggest that a strict reading of the derogation may be viewed favourably by other international bodies.

63 – I return to the degree of control a refugee has over his fate later, at point 77 et seq.

64 – See points 11 to 13 above and the detailed footnotes thereto.

-65 – See points 18 and 19 above.

66 – The observations of the Belgian, French, and United Kingdom Governments.

67 – Ms Bolbol's observations and the 2009 note from the UNHCR. The Commission's approach also focuses on individuals. However, the Commission takes the view that persons who have left the UNRWA zone do not fall within Article 1D but instead come under the general rules, as their movements are not akin to a cessation of protection or assistance (which occurs independently of any action on the part of an individual).

68 – 'The UNCCP'.

69 – Ms Bolbol argues that UNRWA was created to assist displaced Palestinians, whilst the UNCCP was to protect them. She bases her argument on the cessation of the UNCCP's activities and the fact that UNRWA did not take over the UNCCP's functions.

70 – See below, point 85 et seq.

71 – This is, moreover, the interpretation earlier taken by the European legislature: see Joint Position 96/196, which states that persons who have deliberately removed themselves from the protection and assistance found in Article 1D of the 1951 Convention are no longer automatically covered by the Convention.

72 – The drafting of Article 1 of the 1967 Protocol supports this reading, inasmuch as it groups together Articles 2 to 34 of the 1951 Convention. The 2009 note from the Office of the UNHCR also states that 'the term "benefits of the 1951 Convention" refers to the standard of treatment that States Parties … are required to accord to refugees under Articles 2 to 34 of that Convention'.

73 – As applied to the Directive (as distinct from the Convention), this means that whilst Member States retain the right to lay down, under national law, the applicable rules of evidence, those rules must not make it impossible or virtually impossible for an applicant to claim rights guaranteed by EU law: see Case C-63/08 *Pontin* [2009] ECR I-0000, paragraph 43 and the case-law cited there.

74 – See point 13 above and footnotes 14 to 16. It seems likely that rather a large number of persons receiving assistance may not formally be registered, although there should usually be some record within UNRWA to show that it is at least likely that they were receiving assistance.

75 – The correlation is as follows (Directive article given before Convention article): Article 12(1)(a) for Article 1D; Article 12(1)(b) for Article 1E; Article 12(2)(a), (b) and (c) for Article 1F. Article 12(3) provides further clarification as to the interpretation of Article 12(2). The terms of Article 1C of the Convention are reflected in a separate provision of the Directive (Article 11: 'Cessation').

76 – 'Member States shall grant refugee status to a third country national or stateless person who qualifies as a refugee in accordance with Chapters II *and III*' (emphasis added). The wording of Article 12 of Joint Position 96/196 also suggests that persons falling within both sentences of Article 1D of the 1951 Convention are automatically entitled to refugee status, and do not need to be assessed under the criteria set out in Article 1A.

77 – The mandatory phrase 'shall grant refugee status' in Article 13 of the Directive (see previous footnote) can mean nothing else.

78 – Under Chapter VI, Articles 18 and 19 of the Directive.

JUDGMENT OF THE COURT (Grand Chamber)

17 June 2010 (*)

(Directive 2004/83/EC – Minimum standards for the qualification and status of third country nationals or stateless persons as refugees – Stateless person of Palestinian origin who has not sought protection or assistance from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) – Application for refugee status – Refusal based on a failure to meet the conditions laid down in Article 1A of the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 – Right of that stateless person to be recognised as a refugee on the basis of the second sentence of Article 12(1)(a) of Directive 2004/83)

In Case C-31/09,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC from the Fővárosi Bíróság (Hungary), made by decision of 15 December 2008, received at the Court on 26 January 2009, in the proceedings

Nawras Bolbol

v

Bevándorlási és Állampolgársági Hivatal,

THE COURT (Grand Chamber),

composed of V. Skouris, President, J.N. Cunha Rodrigues (Rapporteur), K. Lenaerts, J.-C. Bonichot, R. Silva de Lapuerta, Presidents of Chambers, A. Rosas, P. Kūris, J.-J. Kasel and M. Safjan, Judges,

Advocate General: E. Sharpston,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 20 October 2009,

after considering the observations submitted on behalf of:

– Ms Bolbol, by G. Győző, ügyvéd,

– the Hungarian Government, by R. Somssich, M. Fehér and K. Borvölgyi, acting as Agents,

– the Belgian Government, by C. Pochet and T. Materne, acting as Agents,

– the German Government, by M. Lumma and N. Graf Vitzthum, acting as Agents,

– the French Government, by E. Belliard, G. de Bergues and B. Beaupère-Manokha, acting as Agents,

– the United Kingdom Government, by I. Rao, acting as Agent,

– the Commission of the European Communities, by B. Simon and M. Condou-Durande, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 March 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 12(1)(a) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12; 'the Directive').

2 The reference has been made in the course of proceedings between Ms Bolbol, a stateless person of Palestinian origin, and Bevándorlási és Állampolgársági Hivatal (Office for Immigration and Citizenship; 'BAH') concerning the refusal of BAH to grant Ms Bolbol's application for refugee status.

Legal context

International law

Convention relating to the Status of Refugees

3 The Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954)), entered into force on 22 April 1954. It was supplemented by the Protocol relating to the Status of Refugees of 31 January 1967, which entered into force on 4 October 1967 ('the Geneva Convention').

4 The first subparagraph of Article 1A(2) of the Geneva Convention provides that the term 'refugee' is to apply to any person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'.

5 Article 1D of the Geneva Convention provides:

'This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.'

United Nations Conciliation Commission for Palestine

6 The United Nations Conciliation Commission for Palestine (UNCCP) was established by United Nations General Assembly Resolution No 194 (III) of 11 December 1948. Under paragraph 11 of that resolution, the United Nations General Assembly:

'Resolves that the refugees wishing to return to their homes in peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible;

Instructs the [UNCCP] to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation, and to maintain close relations with the Director of the United Nations Relief for Palestine Refugees and, through him, with the appropriate organs and agencies of the United Nations.'

United Nations Relief and Works Agency for Palestine Refugees in the Near East

7 United Nations General Assembly Resolution No 302 (IV) of 8 December 1949 established the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). Its mandate has been regularly renewed, and its current mandate expires on 30 June 2011. UNRWA's area of operation covers the Lebanon, the Syrian Arab Republic, Jordan, the West Bank (including East Jerusalem) and the Gaza Strip.

8 Under paragraph 20 of Resolution No 302 (IV), the United Nations General Assembly:

'*Directs* [UNRWA] to consult with [the UNCCP] in the best interests of their respective tasks, with particular reference to paragraph 11 of General Assembly resolution 194 (III) of 11 December 1948.'

9 In accordance with paragraph 6 of United Nations General Assembly Resolution No 2252 (ES-V) of 4 July 1967, the General Assembly:

'*Endorses* … the efforts of the Commissioner-General of [UNRWA] to provide humanitarian assistance, as far as practicable, on an emergency basis and as a temporary measure, to other persons in the area who are at present displaced and are in serious need of immediate assistance as a result of the recent hostilities.'

10 Under paragraphs 1 to 3 of United Nations General Assembly Resolution No 63/91 of 5 December 2008, the General Assembly:

'1. *Notes with regret* that repatriation or compensation of the refugees, as provided for in paragraph 11 of General Assembly resolution 194 (III), has not yet been effected, and that, therefore, the situation of the Palestine refugees continues to be a matter of grave concern and the Palestine refugees continue to require assistance to meet basic health, education and living needs;

2. *Also notes with regret* that the [UNCCP] has been unable to find a means of achieving progress in the implementation of paragraph 11 of General Assembly resolution 194 (III), and reiterates its request to the [UNCCP] to continue exerting efforts towards the implementation of that paragraph and to report to the Assembly as appropriate, but no later than 1 September 2009;

3. *Affirms* the necessity for the continuation of the work of [UNRWA] and the importance of its unimpeded operation and its provision of services for the well-being and human development of the Palestine refugees and for the stability of the region, pending the just resolution of the question of the Palestine refugees'.

The United Nations High Commissioner for Refugees

11 Under paragraph 7(c) of the annex to United Nations General Assembly Resolution No 428 (V), of 14 December 1950, on the Statute of the Office of the High Commissioner for Refugees (UNHRC), the mandate of the High Commissioner for Refugees, as defined in that statute, '… shall not extend to a person … who continues to receive from other organs or agencies of the United Nations protection or assistance'.

European Union legislation

12 Recitals 2 and 3 in the preamble to the Directive state:

'(2) The European Council at its special meeting in Tampere on 15 and 16 October 1999 agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention …, thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution.

(3) The Geneva Convention … provide[s] the cornerstone of the international legal regime for the protection of refugees.'

13 Recital 6 in the preamble to the Directive states:

'The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States.'

14 Under Recital 10 in the preamble to the Directive:

'This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.'

15 Recitals 16 and 17 of the preamble to the Directive state:

'(16) Minimum standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention.

(17) It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention.'

16 Pursuant to Article 2(c) to (e) of the Directive, for the purposes of that directive:

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

(d) "refugee status" means the recognition by a Member State of a third country national or a stateless person as a refugee;

(e) "person eligible for subsidiary protection" means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country'.

17 Articles 13 and 18 of the Directive provide that the Member States are to grant refugee status or subsidiary protection status to third country nationals who qualify as refugees in accordance with Chapters II and III or Chapters II and V of that

directive respectively.

18 Chapter III of the Directive on qualification for being a refugee includes, under the heading 'Exclusion', Article 12(1)(a) which provides:

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

(a) he or she falls within the scope of Article 1D of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Directive'.

19 Article 13 of the Directive provides:

'Member States shall grant refugee status to a third country national or a stateless person, who qualifies as a refugee in accordance with Chapters II and III.'

20 Chapter VII of the Directive, entitled 'Content of International Protection', includes Article 21(1) which provides:

'Member States shall respect the principle of non-refoulement in accordance with their international obligations.'

21 In accordance with Articles 38 and 39, the Directive entered into force on 20 October 2004 and had to be transposed by 10 October 2006 at the latest.

National legislation

22 Article 3(1) of Law No CXXXIX of 1997 on asylum (*Magyar Közlöny* 1997/112 (XII.15.); 'the Law on Asylum'), provides:

'Subject to the exception provided for in Article 4, the refugee authority shall, upon application, recognise as a refugee a foreigner who proves or provides prima facie evidence that the provisions of the Geneva Convention apply to him under Article 1A and B(1)(b) of the Geneva Convention, and Article 1(2) and (3) of the Protocol.'

23 Pursuant to Article 38(2) of the Law on Asylum, in a decision refusing an application for asylum, the competent authority is to confirm whether there is a prohibition against refoulement and/or expulsion.

24 Article 51(1) of Law No II of 2007 on the Entry and Stay of third country nationals (a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról szóló 2007. évi II. törvény, *Magyar Közlöny* 2007/1 (I.5.)) provides:

'Third country nationals may not be returned or expelled to the territory of a country that fails to satisfy the criterion of safe country of origin or safe third country in respect of the person in question, in particular where the third country national is likely to be persecuted for reasons of race, religion, nationality or membership of a particular social group, nor to the territory or border of a country where there is good reason to believe that the expelled third country national is likely to be subjected to torture or cruel, inhuman or degrading treatment or punishment.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

25 It is clear from the order for reference that Ms Bolbol, after having left the Gaza Strip in the company of her husband, arrived in Hungary with a visa on 10 January 2007. There, she subsequently obtained a residence permit from the immigration authority.

26 On 21 June 2007, in case her residence permit was not extended, she submitted an application for asylum to BAH, citing the unsafe situation in the Gaza Strip caused by the daily clashes between Fatah and Hamas. Ms Bolbol based her application on the second subparagraph of Article 1D of the Geneva Convention, pointing out that she was a Palestinian residing outside UNRWA's area of operations. Of her family members, only her father remained in the Gaza Strip.

27 According to the order for reference, Ms Bolbol has not availed herself of the protection or assistance of UNRWA. She claims however to be entitled to such protection and assistance, relying in support of that claim on a UNRWA registration card issued to the family of her father's cousins. In the absence of any documentary evidence, the defendant in the main proceedings disputes the family connection on which Ms Bolbol relies. In addition, despite the steps taken by Ms Bolbol at UNRWA, it has been unable to confirm her right to be registered on the basis of her family connections.

28 In its decision of 14 September 2007, the defendant in the main proceedings refused Ms Bolbol's application for asylum, but at the same time found that she could not be expelled.

29 The refusal of Ms Bolbol's application for asylum is based on Article 3(1) of the Law on Asylum. According to the grounds for refusal of the application, the second subparagraph of Article 1D of the Geneva Convention does not require unconditional recognition as a refugee but defines the category of persons to whom the provisions of the Geneva Convention apply. It follows that Palestinians must also be given access to the asylum procedure and that it is necessary to examine whether they meet the definition of 'refugee' for the purposes of Article 1A of that convention. According to that decision, it is not possible to grant Ms Bolbol refugee status because Article 1A of the Geneva Convention does not apply to her, since she did not leave her country of origin owing to persecution for reasons of race, religion, nationality or because of political persecution.

30 It is apparent from the order for reference that Ms Bolbol benefits from a prohibition on expulsion on the basis of Article 38 of the Law on Asylum and Article 51(1) of Law No II of 2007 on Entry and Stay, on the grounds that the readmission of Palestinians was at the discretion of the Israeli authorities and Ms Bolbol would be exposed to torture or inhuman and degrading treatment in the Gaza Strip on account of the critical conditions there.

31 Ms Bolbol has requested the referring court to vary BAH's decision and grant her refugee status pursuant to the second subparagraph of Article 1D of the Geneva Convention which, in her view, is a separate basis for recognition as a refugee. Since she meets the conditions laid down in that provision, she is entitled to recognition as a refugee irrespective of whether she qualifies as a refugee under Article 1A. According to Ms Bolbol, the purpose of Article 1D is to make clear that where a person registered or entitled to be registered with UNRWA resides, for any reason, outside UNRWA's area of operations and, for good reason, cannot be expected to return there, the States party to the Geneva Convention must automatically grant him refugee status. In view of the fact that, through her father, she is entitled to be registered with UNRWA, but resides in Hungary and therefore outside its area of operations, she should be recognised as a refugee without further examination.

32 The defendant in the main proceedings contends that the action should be dismissed, maintaining that Ms Bolbol's application for refugee status is unfounded since she did not leave her country for any of the reasons set out in Article 1A of the Geneva Convention, and that Article 1D does not automatically grant a basis for refugee status but is merely a provision concerning the Convention's scope *ratione personae*. Therefore, Palestinians are entitled to refugee status only where they meet the definition of 'refugee' within the meaning of Article 1A of the Geneva Convention, which must be determined on a case-by-case basis.

33 The referring court observes that the point of law raised in the main proceedings must be resolved in the light of Article 12(1)(a) of the Directive. As the originating application in the main proceedings was lodged on 21 June 2007, a date by which that provision had not yet been transposed into Hungarian domestic law, the provisions of European Union law should, in this instance, be applied directly.

34 According to the referring court, Article 1D of the Geneva Convention is open to a number of interpretations. In October 2002, the United Nations High Commissioner for Refugees issued a 'Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees'. However, that note fails to provide sufficiently clear and unequivocal guidance to guarantee consistent application of that provision with regard to Palestinians. As the Directive includes a reference to Article 1D of the Geneva Convention, the Court has jurisdiction to interpret the meaning of that article of the Convention.

35 In those circumstances, the Fővárosi Bíróság (Budapest Municipal Court) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'For the purposes of Article 12(1)(a) of Council Directive 2004/83/EC:

1. Must someone be regarded as a person receiving the protection and assistance of a United Nations agency merely by virtue of the fact that he is entitled to assistance or protection or is it also necessary for him actually to avail himself of that protection or assistance?

2. Does cessation of the agency's protection or assistance mean residence outside the agency's area of operations, cessation of the agency and cessation of the possibility of receiving the agency's protection or assistance or, possibly, an objective obstacle such that the person entitled thereto is unable to avail himself of that protection or assistance?

3. Do the benefits of the directive mean recognition as a refugee, or either of the two forms of protection covered by the directive (recognition as a refugee and the grant of subsidiary protection), according to the choice made by the Member State, or, possibly, [does it mean] neither automatically but merely [lead to] inclusion [of the person concerned within] the scope *ratione personae* of the Directive?'

The questions referred for a preliminary ruling

Preliminary observations

36 The Directive was adopted on the basis of, inter alia, point (1)(c) of the first subparagraph of Article 63 EC which required the Council of the European Union to adopt measures on asylum, in accordance with the Geneva Convention and other relevant treaties, within the area of minimum standards with respect to the qualifications of nationals of third countries as refugees.

37 It is apparent from recitals 3, 16 and 17 in the preamble to the Directive that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria (see Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* [2010] ECR I-0000, paragraph 52).

38 The provisions of the Directive must for that reason be interpreted in the light of its general scheme and purpose, while respecting the Geneva Convention and the other relevant treaties referred to in point (1) of the first subparagraph of Article 63 EC. Those provisions must also, as is apparent from recital 10 in the preamble to the Directive, be interpreted in a manner which respects the fundamental rights and the principles recognised in particular by the Charter of Fundamental Rights of the European Union (*Salahadin Abdulla and Others*, paragraphs 53 and 54).

The first question

39 By its first question, the referring court asks whether, for the purposes of the first sentence of Article 12(1)(a) of the Directive, a person receives protection and assistance from an agency of the United Nations other than UNHCR by virtue of the mere fact that that person is entitled to that protection or assistance, or must that person have availed himself of that protection or assistance.

40 At the outset, it should be borne in mind that, in the context of a reference for a preliminary ruling, it is for the national court to establish the facts.

41 As was stated in paragraph 27 above, Ms Bolbol has not availed herself of the protection or assistance of UNRWA.

42 Chapter III of the Directive, on qualification for being a refugee, includes Article 12(1)(a) which states that a third country national or a stateless person is excluded from being a refugee, if 'he or she falls within the scope of Article 1D of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the [UNHCR]'.

43 Article 1D of the Geneva Convention provides that it does not apply 'to persons who are at present receiving … protection or assistance' from such an organ or agency of the United Nations.

44 It is not in dispute that UNRWA constitutes one of the organs or agencies of the United Nations other than UNHCR which are referred to in Article 12(1)(a) of the Directive and in Article 1D of the Geneva Convention, since it was created in the light of the specific situation of Palestinian refugees receiving protection or assistance from UNRWA, as is apparent in particular from the proposal for a Council Directive presented by the Commission on 12 September 2001 (COM(2001) 510 final).

45 As the Advocate General observes at points 12 and 13 of her Opinion, it is clear from UNRWA's 'Consolidated Eligibility and Registration Instructions' ('CERI') – the currently applicable version of which was adopted during 2009 – that while the term 'Palestine Refugee' applies, for UNRWA's purposes, to 'persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948 and who lost both home and means of livelihood as a result of the 1948 conflict' (Point III.A.1 of CERI), other persons are also eligible to receive protection or assistance from UNRWA. They include 'non-registered persons displaced as a result of the 1967 and subsequent hostilities' (Point III.B of CERI; see also, inter alia, paragraph 6 of the United Nations General Assembly Resolution No 2252 (ES-V) of 4 July 1967).

46 In those circumstances, it cannot be ruled out *a priori* that a person such as Ms Bolbol, who is not registered with UNRWA, could nevertheless be among those persons coming within Article 1D of the Geneva Convention and, therefore, within the first sentence of Article 12(1)(a) of the Directive.

47 Contrary to the line of argument developed by the United Kingdom Government, it cannot be maintained, as an argument against including persons displaced following the 1967 hostilities within the scope of Article 1D of the Geneva Convention, that only those Palestinians who became refugees as a result of the 1948 conflict who were receiving protection

or assistance from UNRWA at the time when the original version of the Geneva Convention was concluded in 1951 are covered by Article 1D of that convention, and therefore, by Article 12(1)(a) of the Directive.

48 The Geneva Convention, in its original 1951 version, was amended by the Protocol on the Status of Refugees of 31 January 1967 specifically to allow the interpretation of that convention to adapt and to allow account to be taken of new categories of refugees, other than those who became refugees as a result of 'events occurring before 1 January 1951'.

49 Therefore, in order to determine whether a person such as Ms Bolbol comes within a situation envisaged by the first sentence of Article 12(1)(a) of the Directive, it must be ascertained, as the referring court asks, whether it suffices that such a person is eligible to receive the assistance provided by UNRWA or whether it must be established that he has availed himself of that assistance.

50 Article 1D of the Geneva Convention, to which Article 12(1)(a) of the Directive refers, merely excludes from the scope of that convention those persons who are 'at present receiving' protection or assistance from an organ or agency of the United Nations other than UNHCR.

51 It follows from the clear wording of Article 1D of the Geneva Convention that only those persons who have actually availed themselves of the assistance provided by UNRWA come within the clause excluding refugee status set out therein, which must, as such, be construed narrowly and cannot therefore also cover persons who are or have been eligible to receive protection or assistance from that agency.

52 While registration with UNRWA is sufficient proof of actually receiving assistance from it, it has been explained in paragraph 45 above that such assistance can be provided even in the absence of such registration, in which case the beneficiary must be permitted to adduce evidence of that assistance by other means.

53 In those circumstances, the answer to the first question referred is that, for the purposes of the first sentence of Article 12(1)(a) of Directive 2004/83, a person receives protection or assistance from an agency of the United Nations other than UNHCR, when that person has actually availed himself of that protection or assistance.

54 It should be added that persons who have not actually availed themselves of protection or assistance from UNRWA, prior to their application for refugee status, may, in any event, have that application examined pursuant to Article 2(c) of the Directive.

The second and third questions

55 As has been pointed out in paragraph 41 above, Ms Bolbol has not availed herself of protection or assistance from UNRWA.

56 In those circumstances, and in the light of the reply to the first question, it is not necessary to reply to the other questions referred.

Costs

57 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

For the purposes of the first sentence of Article 12(1)(a) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, a person receives protection or assistance from an agency of the United Nations other than UNHCR, when that person has actually availed himself of that protection or assistance.

JUDGMENT OF THE COURT (Grand Chamber)
8 March 2011 (*)

(Citizenship of the Union – Article 20 TFEU – Grant of right of residence under European Union law to a minor child on the territory of the Member State of which that child is a national, irrespective of the previous exercise by him of his right of free movement in the territory of the Member States – Grant, in the same circumstances, of a derived right of residence, to an ascendant relative, a third country national, upon whom the minor child is dependent – Consequences of the right of residence of the minor child on the employment law requirements to be fulfilled by the third-country national ascendant relative of that minor)

In Case C-34/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal du travail de Bruxelles (Belgium), made by decision of 19 December 2008, received at the Court on 26 January 2009, in the proceedings

Gerardo Ruiz Zambrano,
v
Office national de l'emploi (ONEm),

THE COURT (Grand Chamber),
composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues (Rapporteur), K. Lenaerts, J.-C. Bonichot, Presidents of Chamber, A. Rosas, M. Ilešič, J. Malenovský, U. Lõhmus, E. Levits, A. Ó Caoimh, L. Bay Larsen and M. Berger, Judges,
Advocate General: E. Sharpston,
Registrar: A. Calot Escobar,
having regard to the written procedure and further to the hearing on 26 January 2010,
after considering the observations submitted on behalf of:
– Mr Ruiz Zambrano, by P. Robert, avocat,
– the Belgian Government, by C. Pochet, acting as Agent, assisted by F. Motulsky and K. de Haes, avocats,
– the Danish Government, by B. Weis Fogh, acting as Agent,
– the German Government, by M. Lumma and N. Graf Vitzthum, acting as Agents,
– Ireland, by D. O'Hagan, acting as Agent, assisted by D. Conlan Smyth, Barrister,
– the Greek Government, by S. Vodina, T. Papadopoulou and M. Michelogiannaki, acting as Agents,
– the Netherlands Government, by C. Wissels, M. de Grave and J. Langer, acting as Agents,
– the Austrian Government, by E. Riedl, acting as Agent,
– the Polish Government, by M. Dowgielewicz, and subsequently by M. Szpunar, acting as Agents,
– the European Commission, by D. Maidani and M. Wilderspin, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 30 September 2010,
gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 12 EC, 17 EC and 18 EC, and also Articles 21, 24 and 34 of the Charter of Fundamental Rights of the European Union ('the Charter of Fundamental Rights').
2 That reference was made in the context of proceedings between Mr Ruiz Zambrano, a Columbian national, and the Office national de l'emploi (National Employment Office) ('ONEm') concerning the refusal by the latter to grant him unemployment benefits under Belgian legislation.

Legal context

European Union law

3 Article 3(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC,

75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34), provides:

‘This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.’

National law

The Belgian Nationality Code

4 Under Article 10(1) of the Belgian Nationality Code (*Moniteur belge*, 12 July 1984, p. 10095), in the version applicable at the time of the facts in the main proceedings (‘the Belgian Nationality Code’):

‘Any child born in Belgium who, at any time before reaching the age of 18 or being declared of full age, would be stateless if he or she did not have Belgian nationality, shall be Belgian.’

The Royal Decree of 25 November 1991

5 Article 30 of the Royal Decree of 25 November 1991 (*Moniteur belge* of 31 December 1991, p. 29888) concerning rules on unemployment provides as follows:

‘In order to be eligible for unemployment benefit, a full-time worker must have completed a qualifying period comprising the following number of working days:

…

2. 468 during the 27 months preceding the claim [for unemployment benefit], if the worker is more than 36 and less than 50 years of age,

…’

6 Article 43(1) of the Royal Decree states:

‘Without prejudice to the previous provisions, a foreign or stateless worker is entitled to unemployment benefit if he or she complies with the legislation relating to aliens and to the employment of foreign workers.

Work undertaken in Belgium is not taken into account unless it complies with the legislation relating to the employment of foreign workers.

…’

7 Under Article 69(1) of the Royal Decree:

‘In order to receive benefits, foreign and stateless unemployed persons must satisfy the legislation concerning aliens and that relating to the employment of foreign labour.’

The Decree-Law of 28 December 1944

8 Article 7(14) of the Decree-Law of 28 December 1944 on social security for workers (*Moniteur belge* of 30 December 1944), inserted by the Framework Law of 2 August 2002 (*Moniteur belge* of 29 August 2002, p. 38408), is worded as follows:

‘Foreign and stateless workers shall be eligible to receive benefits only if, at the time of applying for benefits, they satisfy the legislation concerning residency and that relating to the employment of foreign labour.

Work done in Belgium by a foreign or stateless worker shall be taken into account for the purpose of the qualifying period only if it was carried out in accordance with the legislation on the employment of foreign labour.

…’

The Law of 30 April 1999

9 Article 4(1) of the Law of 30 April 1999 on the employment of foreign workers (*Moniteur belge* of 21 May 1999, p. 17800) provides:

‘An employer wishing to employ a foreign worker must obtain prior employment authorisation from the competent authority.

The employer may use the services of that worker only as provided for in that authorisation.

The King may provide for exceptions to the first paragraph herein, as He deems appropriate.’

10 Under Article 7 of that law:

‘The King may, by a decree debated in the Council of Ministers, exempt such categories of foreign workers as He shall determine from the requirement to obtain a work permit.

Employers of foreign workers referred to in the preceding paragraph shall be exempted from the obligation to obtain a work permit.’

The Royal Decree of 9 June 1999

11 Article 2(2) of the Royal Decree of 9 June 1999 implementing the Law of 30 April 1999 on the employment of foreign workers (*Moniteur belge* of 26 June 1999, p. 24162) provides:

‘The following shall not be required to obtain a work permit:

…

2. the spouse of a Belgian national, provided that s/he comes in order to settle, or does settle, with that national;

(a) descendants under 21 years of age or dependants of the Belgian national or his spouse;

(b) dependent ascendants of the Belgian national or his/her spouse;

(c) the spouse of the persons referred to in (a) or (b);

…’

The Law of 15 December 1980

12 Article 9 of the Law of 15 December 1980 on access to Belgian territory, residence, establishment and expulsion of foreign nationals (*Moniteur belge* du 31 December 1980, p. 14584), in the version thereof applicable to the main proceedings (‘the Law of 15 December 1980’), provides:

‘In order to be able to reside in the Kingdom beyond the term fixed in Article 6, a foreigner who is not covered by one of the cases provided for in Article 10 must be authorised by the Minister or his representative.

Save for exceptions provided for by international treaty, a law or royal decree, the foreigner must request that authorisation from the competent diplomatic mission or Belgian consul in his place of residence or stay abroad.

In exceptional circumstances, the foreigner may request that authorisation from the mayor of the municipality where he is residing, who will forward to the Minister or his representative. It will, in that case, be issued in Belgium.’

13 Article 40 of the same law provides:

‘1. Without prejudice to the provisions in the regulations of the Council [of the European Union] and the Commission of the European Communities and more favourable ones on which an EC foreign national might rely, the following provisions shall apply to him.

2. For the purposes of this Law, “EC foreign national” shall mean any national of a Member State of the European Communities who resides in or travels to the Kingdom and who:

(i) pursues or intends to pursue there an activity as an employed or self-employed person;

(ii) receives or intends to receive services there:

(iii) enjoys or intends to enjoy there a right to remain;

(iv) enjoys or intends to enjoy there a right of residence after ceasing a professional activity or occupation pursued in the Community;

(v) undergoes or intends to undergo there, as a principal pursuit, vocational training in an approved educational establishment; or

(vi) belongs to none of the categories under (i) to (v) above.

3. Subject to any contrary provisions of this Law, the following persons shall, whatever their nationality, be treated in the same way as an EC foreign national covered by paragraph 2(i), (ii) and (iii) above, provided that they come in order to settle, or do settle, with him:

(i) the spouse of that national;

(ii) the national's descendants or those of his spouse who are under 21 years of age and dependent on them;

(iii) the national's ascendants or those of his spouse who are dependent on them;

(iv) the spouse of the persons referred to in (ii) or (iii).

4. Subject to any contrary provisions of this Law, the following persons shall, whatever their nationality, be treated in the same way as an EC foreign national covered by paragraph 2(iv) and (vi) above, provided that they come in order to settle, or do settle, with him:

(i) the spouse of that national;

(ii) the national's descendants or those of his spouse who are dependent on them;

(iii) the national's ascendants or those of his spouse who are dependent on them;

(iv) the spouse of the persons referred to in (ii) or (iii).

5. Subject to any contrary provisions of this Law, the spouse of an EC foreign national covered by paragraph 2(v) above and his children or those of his spouse who are dependent on them shall, whatever their nationality, be treated in the same way as the EC foreign national provided that they come in order to settle, or do settle, with him.

6. The spouse of a Belgian who comes in order to settle, or does settle, with him, and also their descendants who are under 21 years of age or dependent on them, their ascendants who are dependent on them and any spouse of those descendants or ascendants, who come to settle, or do settle, with them, shall also be treated in the same way as an EC foreign national.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 On 14 April 1999, Mr Ruiz Zambrano, who was in possession of a visa issued by the Belgian embassy in Bogotá (Colombia), applied for asylum in Belgium. In February 2000, his wife, also a Columbian national, likewise applied for refugee status in Belgium.

15 By decision of 11 September 2000, the Belgian authorities refused their applications and ordered them to leave Belgium. However, the order notified to them included a *non-refoulement* clause stating that they should not be sent back to Colombia in view of the civil war in that country.

16 On 20 October 2000, Mr Ruiz Zambrano applied to have his situation regularised pursuant to the third paragraph of Article 9 of the Law of 15 December 1980. In his application, he referred to the absolute impossibility of returning to Colombia and the severe deterioration of the situation there, whilst emphasising his efforts to integrate into Belgian society, his learning of French and his child's attendance at pre-school, in addition to the risk, in the event of a return to Columbia, of a worsening of the significant post-traumatic syndrome he had suffered in 1999 as a result of his son, then aged 3, being abducted for a week.

17 By decision of 8 August 2001, that application was rejected. An action was brought for annulment and suspension of that decision before the Conseil d'État, which rejected the action for suspension by a judgment of 22 May 2003.

18 Since 18 April 2001, Mr Ruiz Zambrano and his wife have been registered in the municipality of Schaerbeek (Belgium). On 2 October 2001, although he did not hold a work permit, Mr Ruiz Zambrano signed an employment contract for an unlimited period to work full-time with the Plastoria company, with effect from 1 October 2001.

19 On 1 September 2003, Mr Ruiz Zambrano's wife gave birth to a second child, Diego, who acquired Belgian nationality pursuant to Article 10(1) of the Belgian Nationality Code, since Columbian law does not recognise Colombian nationality for children born outside the territory of Colombia where the parents do not take specific steps to have them so recognised.

20 The order for reference further indicates that, at the time of his second child's birth, Mr Ruiz Zambrano had sufficient resources from his working activities to provide for his family. His work was paid according to the various applicable scales, with statutory deductions made for social security and the payment of employer contributions.

21 On 9 April 2004, Mr and Mrs Ruiz Zambrano again applied to have their situation regularised pursuant to the third paragraph of Article 9 of the Law of 15 December 1980, putting forward as a new factor the birth of their second child and relying on Article 3 of Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('ECHR'), which prevents that child from being required to leave the

territory of the State of which he is a national.

22 Following the birth of their third child, Jessica, on 26 August 2005, who, like her brother Diego, acquired Belgian nationality, on 2 September 2005 Mr and Mrs Ruiz Zambrano lodged an application to take up residence pursuant to Article 40 of the Law of 15 December 1980, in their capacity as ascendants of a Belgian national. On 13 September 2005, a registration certificate was issued to them provisionally covering their residence until 13 February 2006.

23 Mr Ruiz Zambrano's application to take up residence was rejected on 8 November 2005, on the ground that he '[could] not rely on Article 40 of the Law of 15 December 1980 because he had disregarded the laws of his country by not registering his child with the diplomatic or consular authorities, but had correctly followed the procedures available to him for acquiring Belgian nationality [for his child] and then trying on that basis to legalise his own residence'. On 26 January 2006, his wife's application to take up residence was rejected on the same ground.

24 Since the introduction of his action for review of the decision rejecting his application for residence in March 2006, Mr Ruiz Zambrano has held a special residence permit valid for the entire duration of that action.

25 In the meantime, on 10 October 2005, Mr Ruiz Zambrano's employment contract was temporarily suspended on economic grounds, which led him to lodge a first application for unemployment benefit, which was rejected by a decision notified to him on 20 February 2006. That decision was challenged before the referring court by application of 12 April 2006.

26 In the course of the inquiries in the action brought against that decision, the Office des Étrangers (Aliens' Office) confirmed that 'the applicant and his wife cannot pursue any employment, but no expulsion measure can be taken against them because their application for legalising their situation is still under consideration'.

27 In the course of an inspection carried out on 11 October 2006 by the Direction générale du contrôle des lois sociales (Directorate General, Supervision of Social Legislation) at the registered office of Mr Ruiz Zambrano's employer, he was found to be at work. He had to stop working immediately. The next day, Mr Ruiz Zambrano's employer terminated his contract of employment with immediate effect and without compensation.

28 The application lodged by Mr Ruiz Zambrano for full-time unemployment benefits as from 12 October 2006 was rejected by a decision of the ONEm (National Employment Office), which was notified on 20 November 2006. On 20 December 2006 an action was also brought against that decision before the referring court.

29 On 23 July 2007, Mr Ruiz Zambrano was notified of the decision of the Office des Étrangers rejecting his application of 9 April 2004 to regularise his situation. The action brought against that decision before the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) was declared to be devoid of purpose by a judgment of 8 January 2008, as the Office des Étrangers had withdrawn that decision.

30 By letter of 25 October 2007, the Office des Étrangers informed Mr Ruiz Zambrano that the action for review he had brought in March 2006 against the decision rejecting his application to take up residence of 2 September 2005 had to be reintroduced within 30 days of the notification of that letter, in the form of an action for annulment before the Conseil du contentieux des étrangers.

31 On 19 November 2007, Mr Ruiz Zambrano brought such an action for annulment, based, first, on the inexistence of the 'legal engineering' of which he had been charged in that decision, since the acquisition of Belgian nationality by his minor children was not the result of any steps taken by him, but rather of the application of the relevant Belgian legislation. Mr Ruiz Zambrano also alleges infringement of Articles 2 and 7 of Directive 2004/38, as well as infringement of Article 8 of the ECHR, and of Article 3(1) of Protocol No 4 thereto.

32 In its written observations lodged before the Court, the Belgian Government states that, since 30 April 2009, Mr Ruiz Zambrano has had a provisional and renewable residence permit, and should have a type C work permit, pursuant to the instructions of 26 March 2009 of the Minister for immigration and asylum policy relating to the application of the former third paragraph of Article 9 and Article 9a of the Law of 15 December 1980.

33 It is apparent from the order for reference that the two decisions which are the subject-matter of the main proceedings, by which the ONEm refused to recognise Mr Ruiz Zambrano's entitlement to unemployment benefit, first, during the periods of temporary unemployment from 10 October 2005 and then 12 October 2006, following the loss of his job, are based solely on the finding that the working days on which he relies for the purpose of completing the qualifying period for his age category, that is, 468 working days during the 27 months preceding his claim for unemployment benefit, were not completed as required by the legislation governing foreigners' residence and employment of foreign workers.

34 Mr Ruiz Zambrano challenges that argument before the referring court, stating inter alia that he enjoys a right of

residence directly by virtue of the EC Treaty or, at the very least, that he enjoys the derived right of residence, recognised in Case C-200/02 *Zhu and Chen* [2004] ECR I-9925 for the ascendants of a minor child who is a national of a Member State and that, therefore, he is exempt from the obligation to hold a work permit.

35 In those circumstances, the Tribunal du travail de Bruxelles (Employment Tribunal, Brussels) (Belgium) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Do Articles 12 [EC], 17 [EC] and 18 [EC], or one or more of them when read separately or in conjunction, confer a right of residence upon a citizen of the Union in the territory of the Member State of which that citizen is a national, irrespective of whether he has previously exercised his right to move within the territory of the Member States?

2. Must Articles 12 [EC], 17 [EC] and 18 [EC], in conjunction with the provisions of Articles 21, 24 and 34 of the Charter of Fundamental Rights, be interpreted as meaning that the right which they recognise, without discrimination on the grounds of nationality, in favour of any citizen of the Union to move and reside freely in the territory of the Member States means that, where that citizen is an infant dependent on a relative in the ascending line who is a national of a non-member State, the infant's enjoyment of the right of residence in the Member State in which he resides and of which he is a national must be safeguarded, irrespective of whether the right to move freely has been previously exercised by the child or through his legal representative, by coupling that right of residence with the useful effect whose necessity is recognised by Community case-law [*Zhu and Chen*], and granting the relative in the ascending line who is a national of a non-member State, upon whom the child is dependent and who has sufficient resources and sickness insurance, the secondary right of residence which that same national of a non-member State would have if the child who is dependent upon him were a Union citizen who is not a national of the Member State in which he resides?

3. Must Articles 12 [EC], 17 [EC] and 18 [EC], in conjunction with the provisions of Articles 21, 24 and 34 of the Charter of Fundamental Rights, be interpreted as meaning that the right of a minor child who is a national of a Member State to reside in the territory of the State in which he resides must entail the grant of an exemption from the requirement to hold a work permit to the relative in the ascending line who is a national of a non-member State, upon whom the child is dependent and who, were it not for the requirement to hold a work permit under the national law of the Member State in which he resides, fulfils the condition of sufficient resources and the possession of sickness insurance by virtue of paid employment making him subject to the social security system of that State, so that the child's right of residence is coupled with the useful effect recognised by Community case-law [*Zhu and Chen*] in favour of a minor child who is a European citizen with a nationality other than that of the Member State in which he resides and is dependent upon a relative in the ascending line who is a national of a non-member State?'

The questions referred for a preliminary ruling

36 By its questions, which it is appropriate to consider together, the referring court asks, essentially, whether the provisions of the TFEU on European Union citizenship are to be interpreted as meaning that they confer on a relative in the ascending line who is a third country national, upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of which they are nationals and in which they reside, and also exempt him from having to obtain a work permit in that Member State.

37 All governments which submitted observations to the Court and the European Commission argue that a situation such as that of Mr Ruiz Zambrano's second and third children, where those children reside in the Member State of which they are nationals and have never left the territory of that Member State, does not come within the situations envisaged by the freedoms of movement and residence guaranteed under European Union law. Therefore, the provisions of European Union law referred to by the national court are not applicable to the dispute in the main proceedings.

38 Mr Ruiz Zambrano argues in response that the reliance by his children Diego and Jessica on the provisions relating to European Union citizenship does not presuppose that they must move outside the Member State in question and that he, in his capacity as a family member, is entitled to a right of residence and is exempt from having to obtain a work permit in that Member State.

39 It should be observed at the outset that, under Article 3(1) of Directive 2004/38, entitled '[b]eneficiaries', that directive applies to 'all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members …'. Therefore, that directive does not apply to a situation such as that at issue in the main proceedings.

40 Article 20 TFEU confers the status of citizen of the Union on every person holding the nationality of a Member State (see, inter alia, Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 27, and Case C-148/02 *Garcia Avello* [2003]

ECR I-11613, paragraph 21). Since Mr Ruiz Zambrano's second and third children possess Belgian nationality, the conditions for the acquisition of which it is for the Member State in question to lay down (see, to that effect, inter alia, Case C-135/08 *Rottmann* [2010] ECR I-0000, paragraph 39), they undeniably enjoy that status (see, to that effect, *Garcia Avello*, paragraph 21, and *Zhu and Chen*, paragraph 20).

41 As the Court has stated several times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see, inter alia, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31; Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 82; *Garcia Avello*, paragraph 22; *Zhu and Chen*, paragraph 25; and *Rottmann*, paragraph 43).

42 In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union (see, to that effect, *Rottmann*, paragraph 42).

43 A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.

44 It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

45 Accordingly, the answer to the questions referred is that Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.

Germany v B and D (Joined cases C-57/09 and C-101/09)

JUDGMENT OF THE COURT (Grand Chamber)

9 November 2010 (*)

(Directive 2004/83/EC – Minimum standards for the grant of refugee status or of subsidiary protection – Article 12 – Exclusion from refugee status – Article 12(2)(b) and (c) – Notion of 'serious non-political crime' – Notion of 'acts contrary to the purposes and principles of the United Nations' – Membership of an organisation involved in terrorist acts – Subsequent inclusion of that organisation on the list of persons, groups and entities which forms the Annex to Common Position 2001/931/CFSP – Individual responsibility for part of the acts committed by that organisation – Conditions – Right of asylum by virtue of national constitutional law – Compatibility with Directive 2004/83/EC)

In Joined Cases C-57/09 and C-101/09,

REFERENCES for a preliminary ruling under Articles 68 EC and 234 EC from the Bundesverwaltungsgericht (Germany), made by decisions of 14 October and 25 November 2008, received by the Court on 10 February and 13 March 2009 respectively, in the proceedings

Bundesrepublik Deutschland
v
B (C-57/09),
D (C-101/09),
intervening parties:

Vertreter des Bundesinteresses beim Bundesverwaltungsgericht (C-57/09 and C-101/09),
Bundesbeauftragter für Asylangelegenheiten beim Bundesamt für Migration und Flüchtlinge (C-101/09),

THE COURT (Grand Chamber),
composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts and J.-C. Bonichot, Presidents of Chambers, A. Borg Barthet, M. Ilešič, U. Lõhmus and L. Bay Larsen (Rapporteur), Judges,
Advocate General: P. Mengozzi,
Registrar: B. Fülöp, Administrator,
having regard to the written procedure and further to the hearing on 9 March 2010,
after considering the observations submitted on behalf of:

– B, by R. Meister, Rechtsanwalt,
– D, by H. Jacobi and H. Odendahl, Rechtsanwälte,
– the German Government, by M. Lumma, J. Möller and N. Graf Vitzthum, acting as Agents,
– the French Government, by G. de Bergues and B. Beaupère-Manokha, acting as Agents,
– the Netherlands Government, by C. Wissels, acting as Agent,
– the Swedish Government, by A. Falk and A. Engman, acting as Agents,
– the United Kingdom Government, by S. Ossowski, acting as Agent, and by T. Eicke, Barrister,
– the European Commission, by M. Condou-Durande and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 June 2010, gives the following
Judgment

1 These references for a preliminary ruling concern (i) the interpretation of Article 12(2)(b) and (c) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12; 'Directive 2004/83') and (ii) the interpretation of Article 3 of that directive.

2 The references have been made in proceedings between, on the one hand, the Federal Republic of Germany, represented by the Bundesministerium des Inneren (Federal Ministry of the Interior), in turn represented by the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees; 'the Bundesamt'), and, on the other, B (C-57/09) and D (C-101/09), Turkish nationals of Kurdish origin. The proceedings concern the Bundesamt's rejection of B's application for asylum and recognition of refugee status and its revocation of D's refugee status and right of asylum.

Legal context: *International law*

The Convention Relating to the Status of Refugees

3 The Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, vol. 189, p. 150, No 2545 (1954)), entered into force on 22 April 1954. It was supplemented by the Protocol Relating to the Status of Refugees, concluded in New York on 31 January 1967, which entered into force on 4 October 1967 ('the 1951 Geneva Convention').

4 Article 1A of the 1951 Geneva Convention defines, inter alia, the term 'refugee' for the purposes of that act, and Article 1F states:

'The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: …

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.'

5 Article 33 of the 1951 Geneva Convention, entitled 'Prohibition of expulsion or return ("*refoulement*")', provides:

'1. No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.'

The European Convention for the Protection of Human Rights and Fundamental Freedoms

6 Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), provides:

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

Resolutions of the UN Security Council

7 On 28 September 2001, in response to the terrorist attacks committed on 11 September 2001 in New York, Washington and Pennsylvania, the UN Security Council adopted Resolution 1373 (2001) on the basis of Chapter VII of the Charter of the United Nations.

8 The preamble to Resolution 1373 (2001) reaffirms 'the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts'.

9 Under point 5 of that resolution, it is declared that 'acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and … knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations'.

10 On 12 November 2001, the UN Security Council adopted Resolution 1377 (2001), in which it '*[s]tresses* that acts of international terrorism are contrary to the purposes and principles of the Charter of the United Nations, and that the financing, planning and preparation of as well as any other form of support for acts of international terrorism are similarly contrary to the purposes and principles of [that Charter]'.

European Union ('EU') legislation

Directive 2004/83

11 Recital (3) in the preamble to Directive 2004/83 states that the 1951 Geneva Convention provides the cornerstone of the international legal regime for the protection of refugees.

12 Recital (6) to Directive 2004/83 states that the main objective of that directive is, on the one hand, to ensure that

Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for those persons in all Member States.

13 Recital (9) to Directive 2004/83 is worded as follows:

'Those third country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive.'

14 Recital (10) to Directive 2004/83 states that the directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights. In particular it seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum.

15 Recitals (16) and (17) to that directive are worded as follows:

'(16) Minimum standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the [1951] Geneva Convention.

(17) It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the [1951] Geneva Convention.'

16 Recital (22) to Directive 2004/83 states:

'Acts contrary to the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations and are, amongst others, embodied in the United Nations Resolutions relating to measures combating terrorism, which declare that "acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations" and that "knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations".'

17 In accordance with Article 1 of Directive 2004/83, the purpose of that directive is, inter alia, to lay down minimum standards in relation to the conditions which third country nationals or stateless persons must meet in order to receive international protection and in relation to the content of the protection granted.

18 Article 2 of Directive 2004/83 states that, for the purposes of that directive:

'(a) "international protection" means the refugee and subsidiary protection status as defined in (d) and (f); …

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

(d) "refugee status" means the recognition by a Member State of a third country national or a stateless person as a refugee; …

(g) "application for international protection" means a request made by a third country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately; …'

19 Article 3 of Directive 2004/83 provides:

'Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive.'

20 Paragraphs 2 and 3 of Article 12 of Directive 2004/83, which is entitled 'Exclusion' and forms part of Chapter III of the directive, itself entitled 'Qualification for being a refugee', provide:

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

(b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel

actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

3. Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.'

21 Articles 13 and 18 of Directive 2004/83 state that Member States are to grant refugee status or subsidiary protection status to a third country national who satisfies the conditions laid down in Chapters II and III or Chapters II and V, respectively, of that directive.

22 Article 14 of Directive 2004/83, which is entitled 'Revocation of, ending of or refusal to renew refugee status' and forms part of Chapter IV of the directive, itself entitled 'Refugee status', provides:

'1. Concerning applications for international protection filed after the entry into force of this Directive, Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if he or she has ceased to be a refugee in accordance with Article 11.

…

3. Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person, if, after he or she has been granted refugee status, it is established by the Member State concerned that:

(a) he or she should have been or is excluded from being a refugee in accordance with Article 12;

…'

23 Paragraphs 1 and 2 of Article 21 of Directive 2004/83, which forms part of Chapter VII of the Directive, entitled 'Content of international protection', provide:

'1. Member States shall respect the principle of non-refoulement in accordance with their international obligations.

2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognised or not, when:

(a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or

(b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.'

24 In accordance with Articles 38 and 39 of that directive, Directive 2004/83 entered into force on 9 November 2004 and had to be transposed into national law by 10 October 2006 at the latest.

Common Position 2001/931/CFSP

25 In order to implement Resolution 1373 (2001), the Council of the European Union adopted, on 27 December 2001, Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93).

26 Under Article 1(1) of Common Position 2001/931, that act applies to 'persons, groups and entities involved in terrorist acts' and listed in the Annex thereto.

27 Paragraphs 2 and 3 of Article 1 of Common Position 2001/931 provide that, for the purposes of that act:

'2. … "persons, groups and entities involved in terrorist acts" shall mean:

– persons who commit, or attempt to commit, terrorist acts or who participate in, or facilitate, the commission of terrorist acts,

– groups and entities owned or controlled directly or indirectly by such persons; and persons, groups and entities acting on behalf of, or under the direction of, such persons, groups and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons, groups and entities.

3. … "terrorist act" shall mean one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the

aim of:

…

(iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation:

…

(k) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group.

…'

28 Common Position 2001/931 includes an Annex entitled 'First list of persons, groups and entities referred to in Article 1 …'. Initially, neither the DHKP/C nor the PKK were on that list.

29 The content of that annex was updated by Council Common Position 2002/340/CFSP of 2 May 2002 (OJ 2002 L 116, p. 75).

30 In that annex, as updated, the list set out in Section 2 ('Groups and entities') names as entries 9 and 19, respectively, the 'Kurdistan Workers' Party (PKK)' and the 'Revolutionary People's Liberation Army/Front/Party (DHKP/C), (a.k.a. Devrimci Sol (Revolutionary Left), Dev Sol)'. Those organisations have subsequently been retained on the list referred to in Article 1(1) and (6) of Common Position 2001/931 by subsequent Council Common Positions, and most recently by Council Decision 2010/386/CFSP of 12 July 2010 updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931 (OJ 2010 L 178, p. 28).

Framework Decision 2002/475/JHA

31 Article 1 of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (OJ 2002 L 164, p. 3) requires Member States to take the necessary measures to ensure that the intentional acts referred to in that provision – which, given their nature or context, may seriously damage a country or an international organisation where committed with one of the aims also listed in that provision – are deemed to be terrorist offences.

32 Paragraph 2 of Article 2 of Framework Decision 2002/475, which is entitled 'Offences relating to a terrorist group', provides:

'Each Member State shall take the necessary measures to ensure that the following intentional acts are punishable:

…

(b) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group.'

National legislation

33 Article 16a(1) of the Grundgesetz (Basic Law) provides:

'Persons persecuted on political grounds shall have the right of asylum.'

34 Paragraph 1 of the German Law on asylum procedure (Asylverfahrensgesetz; 'the AsylVfG'), in the version published on 2 September 2008 (BGBl. 2008 I, p. 1798), states that that Law applies to foreigners who apply for protection from political persecution in accordance with Paragraph 16a(1) of the Basic Law, or for protection from persecution in accordance with the 1951 Geneva Convention.

35 Paragraph 2 of the AsylVfG provides that, in the Federal territory, persons entitled to asylum are to have the legal status defined by the 1951 Geneva Convention.

36 Refugee status was initially governed by Paragraph 51 of the Law on the entry and stay of foreigners on Federal territory (Gesetz über die Einreise und den Aufenthalt von Ausländern im Bundesgebiet; 'the Ausländergesetz').

37 The Law on combating international terrorism of 9 January 2002 (Gesetz zur Bekämpfung des internationalen

Terrorismus, BGBl. 2002 I, p. 361; 'the Terrorismusbekämpfungsgesetz') introduced, for the first time, in the second sentence of Paragraph 51(3) of the Ausländergesetz, with effect from 11 January 2002, grounds for exclusion reflecting those laid down in Article 1F of the 1951 Geneva Convention.

38 By the Law implementing European Union Directives on the right of residence and asylum of 19 August 2007 (Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union, BGBl. 2007 I, p. 1970), which entered into force on 28 August 2007, the Federal Republic of Germany transposed Directive 2004/83, among others, into national law.

39 Currently, the conditions for being considered a refugee are laid down in Paragraph 3 of the AsylVfG. Under Paragraph 3(1) and (2) of the AsylVfG:

'1. A foreign national is a refugee within the meaning of [the 1951 Convention] if, in his State of nationality, he is exposed to threats within the meaning of Paragraph 60(1) of the [Law on the residence, work and integration of foreign nationals on Federal territory (Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet; 'the Aufenthaltsgesetz')].

2. A foreign national shall not be accorded refugee status under subparagraph 1 if there are serious reasons for considering that:

…

(2) he has committed a serious non-political crime outside the Federal territory prior to his admission as a refugee, in particular a cruel action, even if committed with a purportedly political objective, or

(3) he has been guilty of acts contrary to the purposes and principles of the United Nations.

The first sentence shall apply also to foreign nationals who have instigated, or otherwise participated in, the commission of those crimes or acts.'

40 The grounds for exclusion listed in Paragraph 3(2) of the AsylVfG replaced, with effect from 28 August 2007, the second sentence of Paragraph 60(8) of the Aufenthaltsgesetz, which had itself replaced the second sentence of Paragraph 51(3) of the Ausländergesetz.

41 Paragraph 60(1) of the Aufenthaltsgesetz, in the version published on 25 February 2008 (BGBl. 2008 I, p. 162), provides:

'Pursuant to the [1951 Geneva] Convention, a foreign national may not be deported to a State in which his life or liberty is under threat on account of his race, religion, nationality, membership of a certain social group or political convictions. …'

42 The first sentence of Paragraph 73(1) of the AsylVfG provides that '[r]ecognition of a right of asylum and of refugee status shall be revoked without delay if the conditions on which such recognition is based are no longer satisfied'.

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-57/09

43 Born in 1975, B entered Germany at the end of 2002, where he applied for asylum and for protection as a refugee and, in the alternative, for an order prohibiting his deportation to Turkey.

44 In support of his application, B stated, inter alia, that, in Turkey, he had been a sympathiser of Dev Sol (now DHKP/C) when still a schoolboy and that, from the end of 1993 until the beginning of 1995, he had supported armed guerrilla warfare in the mountains.

45 After being arrested in February 1995, he had been subjected to serious physical abuse and had been forced to give a statement under torture.

46 In December 1995, he had been sentenced to life imprisonment.

47 In 2001, while he was in custody, B had been given another life sentence after he had confessed to killing a fellow prisoner suspected of being an informant.

48 In December 2002, B took advantage of a six-month conditional release from custody on health grounds to leave Turkey and make his way to Germany.

49 By decision of 14 September 2004, the Bundesamt rejected B's application for asylum as unfounded and found that the conditions laid down in Paragraph 51(1) of the Ausländergesetz were not satisfied. The Bundesamt took the view that, since B had committed serious non-political crimes, he fell into the second exclusion category, laid down in the second sentence of Paragraph 51(3) of the Ausländergesetz (referred to subsequently in the second sentence of Paragraph 60(8) of the Aufenthaltsgesetz, then in Paragraph 3(2)(2) of the AsylVfG).

50 In the same decision, the Bundesamt also held that there were no obstacles to B's deportation to Turkey under the applicable law and declared him liable to deportation to that country.

51 By judgment of 13 June 2006, the Verwaltungsgericht Gelsenkirchen (Administrative Court, Gelsenkirchen) annulled the decision of the Bundesamt and ordered that authority to grant B asylum and to declare that his deportation to Turkey was prohibited.

52 By judgment of 27 March 2007, the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court of North Rhine-Westphalia) dismissed the appeal brought by the Bundesamt against the judgment of the Verwaltungsgericht Gelsenkirchen, on the view that B should be granted a right of asylum in accordance with Paragraph 16a of the Grundgesetz, together with refugee status.

53 The Oberverwaltungsgericht found, in particular, that the exclusion clause relied upon by the Bundesamt must be understood to the effect that it does not seek only to punish a serious non-political crime committed in the past, but also to forestall the danger which the applicant could pose to the host Member State, and that the application of that clause requires an overall assessment of the particular case in the light of the principle of proportionality.

54 The Bundesamt appealed against that judgment on a point of law ('Revision') before the Bundesverwaltungsgericht (Federal Administrative Court), relying on the second and third exclusion clauses laid down in the second sentence of Paragraph 60(8) of the Aufenthaltsgesetz (and subsequently in Paragraph 3(2)(2) and (3) of the AsylVfG) and arguing that, contrary to the approach adopted by the appeal court, those two exclusion clauses do not imply that there must be a danger to the security of the Federal Republic of Germany; nor do they entail the need for an assessment of proportionality with regard to the particular case.

55 Furthermore, according to the Bundesamt, the exclusion clauses laid down in Article 12(2) of Directive 2004/83 are among those principles from which, by virtue of Article 3 of that directive, Member States cannot derogate.

Case C-101/09

56 Since May 2001, D, who was born in 1968, has resided in Germany where, on 11 May 2001, he applied for asylum.

57 In support of his application, he stated, inter alia, that, in 1990, he had fled to the mountains where he joined the PKK. He had been a guerrilla fighter for the PKK and one of its senior officials. At the end of 1988, the PKK had sent him to northern Iraq.

58 Because of political differences with its leadership, D had left the PKK in May 2000 and since then had been under threat. He had stayed on in northern Iraq for about one more year, but had not been safe there.

59 In May 2001, the Bundesamt granted D asylum and recognised his right to refugee status under the national law in force at that time.

60 Following the entry into force of the Terrorismusbekämpfungsgesetz, the Bundesamt initiated a revocation procedure and by decision of 6 May 2004, pursuant to Paragraph 73(1) of the AsylVfG, it revoked the decision granting D a right of asylum and refugee status. The Bundesamt found that there were serious reasons for considering that D had committed a serious non-political crime outside Germany before being admitted to its territory as a refugee and that he had been guilty of acts contrary to the purposes and principles of the United Nations.

61 By judgment of 29 November 2005, the Verwaltungsgericht Gelsenkirchen annulled that revocation decision.

62 The appeal brought by the Bundesamt was dismissed by the Oberverwaltungsgericht für das Land Nordrhein-Westfalen by judgment of 27 March 2007. On grounds similar to those underpinning the judgment handed down on the same day in the case concerning B, the Oberverwaltungsgericht held that the exclusion clauses laid down in the German legislation did not apply in D's case either.

63 The Bundesamt appealed that judgment on a point of law ('Revision'), its grounds of appeal being, in substance,

analogous to those relied upon in support of the appeal in the case concerning B.

The questions referred and the procedure before the Court

64 The Bundesverwaltungsgericht points out that, according to the findings of the appeal court, by which it is bound, B and D would not, in the event of their return to their country of origin, be sufficiently safe from renewed persecution. The Bundesverwaltungsgericht infers from this that the positive conditions for being considered a refugee are satisfied in both cases. Nevertheless, B and D will not be able to have their refugee status recognised if one of the exclusion clauses laid down in Article 12(2) of Directive 2004/83 applies.

65 The Bundesverwaltungsgericht states that, if one of those exclusion clauses were to apply, B and D would be entitled to have their right of asylum recognised under Article 16a of the Grundgesetz, which does not exclude any category of persons from that right.

66 Lastly, the Bundesverwaltungsgericht points out that neither exclusion under Article 12 of Directive 2004/83 nor a finding that Article 16a of the Grundgesetz is incompatible with Directive 2004/83 would necessarily lead B and D to lose the right to remain in Germany.

67 It is against that background that the Bundesverwaltungsgericht decided to stay the proceedings and to refer, in each of the cases before it, the following five questions – the first and fifth of which differ slightly on account of the particular facts of each of those cases – to the Court for a preliminary ruling:

'(1) Does it constitute a serious non-political crime or an act contrary to the purposes and principles of the United Nations within the meaning of Article 12(2)(b) and (c) of [Directive 2004/83] if

– the person seeking asylum was a member of an organisation which is included in the list of persons, groups and entities annexed to the … Common Position [2001/931] and employs terrorist methods, and the appellant has actively supported that organisation's armed struggle? (Case C-57/09)

– a foreign national was for many years involved as a combatant and an official – including for a time as a member of its governing body – in an organisation (in this case, the PKK) which repeatedly employed terrorist methods in the armed struggle waged against the State (in this case, Turkey) and is included in the list of persons, groups and entities annexed to the … Common Position [2001/931], and the foreign national thereby actively supported its armed struggle in a prominent position? (Case C-101-09)

(2) If Question 1 is to be answered in the affirmative: does exclusion from recognition as a refugee under Article 12(2)(b) and (c) of [Directive 2004/83] … require that the foreign national continue to constitute a danger?

(3) If Question 2 is to be answered in the negative: does exclusion from recognition as a refugee under Article 12(2)(b) and (c) of [Directive 2004/83]… require that a proportionality test be undertaken in relation to the individual case?

(4) If Question 3 is to be answered in the affirmative:

(a) Is it to be taken into account in considering proportionality that the foreign national enjoys protection against deportation under Article 3 of the [ECHR] or under national rules?

(b) Is exclusion disproportionate only in exceptional cases having particular characteristics?

(5) Is it compatible with Directive 2004/83, for the purposes of Article 3 of [Directive 2004/83] …, if

– the appellant has a right to asylum under national constitutional law even if one of the exclusion criteria laid down in Article 12(2) of the directive is satisfied? (Case C-57/09)

– the foreign national continues to be recognised as having a right of asylum under national constitutional law even if one of the exclusion criteria laid down in Article 12(2) of the directive is satisfied and refugee status under Article 14(3) of the directive is revoked? (Case C-101/09)'

68 By order of the President of the Court of 4 May 2009, Cases C-57/09 and C-101/09 were joined for the purposes of the written and oral procedure and of the judgment.

Jurisdiction of the Court

69 In the cases before the referring court, the Bundesamt adopted the contested decisions on the basis of the legislation applicable before the entry into force of Directive 2004/83, that is to say, before 9 November 2004.

70 As a consequence, those decisions, which have given rise to the present references for a preliminary ruling in the present case, do not fall within the scope *ratione temporis* of Directive 2004/83.

71 It should nevertheless be borne in mind that where the questions referred by national courts concern the interpretation of a provision of Community law, the Court is in principle obliged to give a ruling. In particular, neither the wording of Articles 68 EC and 234 EC nor the aim of the procedure established by Article 234 EC indicates that those responsible for framing the EC Treaty intended to exclude from the jurisdiction of the Court references for a preliminary ruling on a directive in the specific case where the national law of a Member State refers to the content of provisions of an international agreement which have been re-stated in that directive, in order to determine the rules applicable to a situation which is purely internal to that State. In such a case, it is clearly in the interests of the European Union that, in order to forestall future differences of interpretation, the provisions of that international agreement which have been taken over by national law and by EU law should be given a uniform interpretation, irrespective of the circumstances in which they are to apply (see, by analogy, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* [2010] ECR I-0000, paragraph 48).

72 The Bundesverwaltungsgericht points out, in the cases before it, that the Terrorismusbekämpfungsgesetz introduced into the national law grounds for excluding a person from refugee status which correspond in substance to those laid down in Article 1F of the 1951 Geneva Convention. Given that the grounds for exclusion laid down in Article 12(2) of Directive 2004/83 also correspond in substance to those laid down in Article 1F of that Convention, it follows that the exclusion clauses which were considered and applied by the Bundesamt in both the decisions at issue before the referring court, which were adopted before Directive 2004/83 entered into force, correspond in substance to the exclusion clauses subsequently inserted in the directive.

73 Moreover, as regards the decision of the Bundesamt to revoke the decision according refugee status to D, it should be noted that Article 14(3)(a) of Directive 2004/83 requires the competent authorities of a Member State to revoke refugee status if ever they establish, after according that status, that the person 'should have been or is excluded' from being a refugee, in accordance with Article 12 of the directive.

74 In contrast with the ground for revocation laid down in Article 14(1) of Directive 2004/83, the ground laid down in Article 14(3)(a) is not subject to transitional arrangements and cannot be limited to applications made or decisions taken after the directive entered into force. Nor is its application discretionary, like the grounds for revocation laid down in Article 14(4).

75 Accordingly, the questions referred for a preliminary ruling must be answered.

Consideration of the questions referred: Preliminary observations

76 One of the legal bases for Directive 2004/83 was point (1)(c) of the first paragraph of Article 63 EC, under which the Council was required to adopt measures on asylum, in accordance with the 1951 Geneva Convention and other relevant treaties, within the area of minimum standards with respect to 'the qualification of nationals of third countries as refugees'.

77 Recitals 3, 16 and 17 to Directive 2004/83 state that the 1951 Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the directive for determining who qualifies for refugee status and the content of that status were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria (*Salahadin Abdulla and Others*, paragraph 52, and Case C-31/09 *Bolbol* [2010] ECR I-0000, paragraph 37).

78 Directive 2004/83 must for that reason be interpreted in the light of its general scheme and purpose, and in a manner consistent with the 1951 Geneva Convention and the other relevant treaties referred to in point (1) of the first paragraph of Article 63 EC, now Article 78(1) TFEU. As is apparent from recital 10 to that directive, Directive 2004/83 must also be interpreted in a manner consistent with the fundamental rights and the principles recognised, in particular, by the Charter of Fundamental Rights of the European Union (*Salahadin Abdulla and Others*, paragraphs 53 and 54, and *Bolbol*, paragraph 38).

The first question

79 By its first question in each case, the Bundesverwaltungsgericht asks, in substance, whether a case where the person concerned has been a member of an organisation which, because of its involvement in terrorist acts, is on the list of persons, groups and entities annexed to Common Position 2001/931 and that person has actively supported the armed struggle waged by that organisation – and perhaps occupied a prominent position within that organisation – is a case of 'serious non-political crime' or 'acts contrary to the purposes and principles of the United Nations' within the meaning of Article 12(2)(b) or (c) of Directive 2004/83.

80 In order to answer that question, which seeks to elicit the extent to which a person's membership of an organisation on that list can bring that person within the scope of points (b) and (c) of Article 12(2) of Directive 2004/83, it is necessary at the outset to ascertain whether the acts committed by such an organisation can, as the national court assumes, fall within the categories of the serious crimes and the acts referred to in those points.

81 First, it is clear that terrorist acts, which are characterised by their violence towards civilian populations, even if committed with a purportedly political objective, fall to be regarded as serious non-political crimes within the meaning of point (b).

82 Secondly, with regard to acts contrary to the purposes and principles of the United Nations, as referred to in point (c) of Article 12(2) of Directive 2004/83, recital 22 to that directive states that such acts are referred to in the preamble to the Charter of the United Nations and in Articles 1 and 2 of that Charter and that they are among the acts identified in the UN Resolutions relating to 'measures combating international terrorism.'

83 Those include Resolutions 1373 (2001) and 1377 (2001) of the UN Security Council, from which it is clear that the Security Council takes as its starting point the principle that international terrorist acts are, generally speaking and irrespective of any State participation, contrary to the purposes and principles of the United Nations.

84 It follows that – as is argued in their written observations by all the Governments which submitted such observations to the Court, and by the European Commission – the competent authorities of the Member States can also apply Article 12(2)(c) of Directive 2004/83 to a person who, in the course of his membership of an organisation which is on the list forming the Annex to Common Position 2001/931, has been involved in terrorist acts with an international dimension.

85 Next, the question arises as to what extent membership of such an organisation implies that the person concerned falls within the scope of Article 12(2)(b) and (c) of Directive 2004/83 where he has actively supported the armed struggle waged by that organisation, possibly occupying a prominent position within that organisation.

86 On that point, it should be noted that points (b) and (c) of Article 12(2) of Directive 2004/83 – in the same way, moreover, as points (b) and (c) of Article 1F of the 1951 Geneva Convention – permit the exclusion of a person from refugee status only where there are 'serious reasons' for considering that 'he … has committed' a serious non-political crime outside the country of refuge prior to his admission as a refugee or that 'he … has been guilty' of acts contrary to the purposes and principles of the United Nations.

87 It is clear from the wording of those provisions of Directive 2004/83 that the competent authority of the Member State concerned cannot apply them until it has undertaken, for each individual case, an assessment of the specific facts within its knowledge, with a view to determining whether there are serious reasons for considering that the acts committed by the person in question, who otherwise satisfies the conditions for refugee status, are covered by one of those exclusion clauses.

88 As a consequence, first, even if the acts committed by an organisation on the list forming the Annex to Common Position 2001/931 because of its involvement in terrorist acts fall within each of the grounds for exclusion laid down in Article 12(2)(b) and (c) of Directive 2004/83, the mere fact that the person concerned was a member of such an organisation cannot automatically mean that that person must be excluded from refugee status pursuant to those provisions.

89 There is no direct relationship between Common Position 2001/931 and Directive 2004/83 in terms of the aims pursued, and it is not justifiable for a competent authority, when considering whether to exclude a person from refugee status pursuant to Article 12(2) of the directive, to base its decision solely on that person's membership of an organisation which is on a list adopted outside the framework set up by Directive 2004/83 consistently with the 1951 Geneva Convention.

90 However, the inclusion of an organisation on a list such as that which forms the Annex to Common Position 2001/931 makes it possible to establish the terrorist nature of the group of which the person concerned was a member, which is a factor which the competent authority must take into account when determining, initially, whether that group has committed

acts falling within the scope of Article 12(2)(b) or (c) of Directive 2004/83.

91 In that regard, it is important to note that the circumstances in which the two organisations to which the respondents before the Bundesverwaltungsgericht respectively belonged were placed on that list cannot be assimilated to the individual assessment of the specific facts which must be undertaken before any decision is taken to exclude a person from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83.

92 Nor, secondly, and contrary to the submissions of the Commission, can participation in the activities of a terrorist group, within the meaning of Article (2)(2)(b) of Framework Decision 2002/475, come necessarily and automatically within the grounds for exclusion laid down in Article 12(2)(b) and (c) of Directive 2004/83.

93 Not only was Framework Decision 2002/475, like Common Position 2001/931, adopted against a background different from the context of Directive 2004/83, which is essentially humanitarian, but the intentional act of participating in the activities of a terrorist group, which is defined in Article 2(2)(b) of that Framework Decision and which the Member States were required to make punishable under their national law, is not such as to trigger the automatic application of the exclusion clauses laid down in Article 12(2)(b) and (c) of the directive, which presuppose a full investigation into all the circumstances of each individual case.

94 It follows from all those considerations that the exclusion from refugee status of a person who has been a member of an organisation which uses terrorist methods is conditional on an individual assessment of the specific facts, making it possible to determine whether there are serious reasons for considering that, in the context of his activities within that organisation, that person has committed a serious non-political crime or has been guilty of acts contrary to the purposes and principles of the United Nations, or that he has instigated such a crime or such acts, or participated in them in some other way, within the meaning of Article 12(3) of Directive 2004/83.

95 Before a finding can be made that the grounds for exclusion laid down in Article 12(2)(b) and (c) of Directive 2004/83 apply, it must be possible to attribute to the person concerned – regard being had to the standard of proof required under Article 12(2) – a share of the responsibility for the acts committed by the organisation in question while that person was a member.

96 That individual responsibility must be assessed in the light of both objective and subjective criteria.

97 To that end, the competent authority must, inter alia, assess the true role played by the person concerned in the perpetration of the acts in question; his position within the organisation; the extent of the knowledge he had, or was deemed to have, of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct.

98 Any authority which finds, in the course of that assessment, that the person concerned has – like D – occupied a prominent position within an organisation which uses terrorist methods is entitled to presume that that person has individual responsibility for acts committed by that organisation during the relevant period, but it nevertheless remains necessary to examine all the relevant circumstances before a decision excluding that person from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 can be adopted.

99 In the light of all the foregoing considerations, the answer to the first question referred in each of the two cases is that Article 12(2)(b) and (c) of Directive 2004/83 must be interpreted as meaning that:

– the fact that a person has been a member of an organisation which, because of its involvement in terrorist acts, is on the list forming the Annex to Common Position 2001/931 and that that person has actively supported the armed struggle waged by that organisation does not automatically constitute a serious reason for considering that that person has committed ‘a serious non-political crime’ or ‘acts contrary to the purposes and principles of the United Nations’;

– the finding, in such a context, that there are serious reasons for considering that a person has committed such a crime or has been guilty of such acts is conditional on an assessment on a case-by-case basis of the specific facts, with a view to determining whether the acts committed by the organisation concerned meet the conditions laid down in those provisions and whether individual responsibility for carrying out those acts can be attributed to the person concerned, regard being had to the standard of proof required under Article 12(2) of the directive.

The second question

100 By its second question in each of the cases, the Bundesverwaltungsgericht wishes to know whether exclusion from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is conditional upon the person concerned continuing to

represent a danger for the host Member State.

101 It is appropriate to point out first that, within the system of Directive 2004/83, any danger which a refugee may currently pose to the Member State concerned is to be taken into consideration, not under Article 12(2) of the directive but under (i) Article 14(4)(a) of that directive, pursuant to which Member States may revoke refugee status where, in particular, there are reasonable grounds for regarding the person concerned as a danger to security and (ii) Article 21(2) of the directive, which provides that the host Member State may – as it is also entitled to do under Article 33(2) of the 1951 Geneva Convention – *refoule* a refugee where there are reasonable grounds for considering him to be a danger to the security or the community of that Member State.

102 Under points (b) and (c) of Article 12(2) of Directive 2004/83, which are analogous to points (b) and (c) of Article 1F of the 1951 Geneva Convention, a third country national is excluded from refugee status where there are serious reasons for considering that 'he … has committed' a serious non-political crime outside the country of refuge 'prior to his … admission as a refugee' or that he 'has been guilty' of acts contrary to the purposes and principles of the United Nations.

103 In accordance with the wording of the provisions in which they are laid down, both those grounds for exclusion are intended as a penalty for acts committed in the past, as has been pointed out by all the Governments which submitted observations and by the Commission.

104 In that regard it should be pointed out that the grounds for exclusion at issue were introduced with the aim of excluding from refugee status persons who are deemed to be undeserving of the protection which that status entails and of preventing that status from enabling those who have committed certain serious crimes to escape criminal liability. Accordingly, it would not be consistent with that dual objective to make exclusion from refugee status conditional upon the existence of a present danger to the host Member State.

105 In those circumstances, the answer to the second question is that exclusion from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is not conditional on the person concerned representing a present danger to the host Member State.

The third question

106 By its third question in each of the cases, the Bundesverwaltungsgericht asks whether exclusion from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is conditional upon a proportionality test being undertaken in relation to the particular case.

107 In that regard, it should be borne in mind that it is clear from the wording of Article 12(2) of Directive 2004/83 that, if the conditions laid down therein are met, the person concerned 'is excluded' from refugee status and that, within the system of the directive, Article 2(c) expressly makes the status of 'refugee' conditional upon the fact that the person concerned does not fall within the scope of Article 12.

108 Exclusion from refugee status on one of the grounds laid down in Article 12(2)(b) or (c) of Directive 2004/83, as stated in respect of the answer to the first question, is linked to the seriousness of the acts committed, which must be of such a degree that the person concerned cannot legitimately claim the protection attaching to refugee status under Article 2(d) of that directive.

109 Since the competent authority has already, in its assessment of the seriousness of the acts committed by the person concerned and of that person's individual responsibility, taken into account all the circumstances surrounding those acts and the situation of that person, it cannot – as the German, French, Netherlands and United Kingdom Governments have submitted – be required, if it reaches the conclusion that Article 12(2) applies, to undertake an assessment of proportionality, implying as that does a fresh assessment of the level of seriousness of the acts committed.

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

111 The answer to the third question is that the exclusion of a person from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is not conditional on an assessment of proportionality in relation to the particular case.

The fourth question

112 In view of the answer given to the third question, there is no need to answer the fourth question referred by the Bundesverwaltungsgericht in each of these two cases.

The fifth question

113 By its fifth question in both cases, the Bundesverwaltungsgericht wishes, in substance, to know whether it is compatible with Directive 2004/83, for the purposes of Article 3 of that directive, for a Member State to recognise that a person excluded from refugee status pursuant to Article 12(2) of the directive has a right of asylum under its constitutional law.

114 In that regard, it should be borne in mind that Article 3 permits Member States to introduce or retain more favourable standards for determining who qualifies as a refugee in so far, however, as those standards are compatible with Directive 2004/83.

115 In view of the purpose underlying the grounds for exclusion laid down in Directive 2004/83, which is to maintain the credibility of the protection system provided for in that directive in accordance with the 1951 Geneva Convention, the reservation in Article 3 of the directive precludes Member States from introducing or retaining provisions granting refugee status under Directive 2004/83 to persons who are excluded from that status pursuant to Article 12(2).

116 However, it is clear from the closing words of Article 2(g) of Directive 2004/83 that the directive does not preclude a person from applying for 'another kind of protection' outside the scope of Directive 2004/83.

117 Directive 2004/83, like the 1951 Geneva Convention, is based on the principle that host Member States may, in accordance with their national law, grant national protection which includes rights enabling persons excluded from refugee status under Article 12(2) of the directive to remain in the territory of the Member State concerned.

118 The grant by a Member State of such national protection status, for reasons other than the need for international protection within the meaning of Article 2(a) of Directive 2004/83 – that is to say, on a discretionary and goodwill basis or for humanitarian reasons – does not, as is stated in recital 9, fall within the scope of that directive.

119 That other kind of protection which Member States have discretion to grant must not, however, be confused with refugee status within the meaning of Directive 2004/83, as the Commission, amongst others, has rightly stated.

120 Accordingly, in so far as national rules under a right of asylum is granted to persons excluded from refugee status within the meaning of Directive 2004/83 permit a clear distinction to be drawn between national protection and protection under the directive, they do not infringe the system established by that directive.

121 In the light of those considerations, the answer to the fifth question referred is that Article 3 of Directive 2004/83 must be interpreted as meaning that Member States may grant a right of asylum under their national law to a person who is excluded from refugee status pursuant to Article 12(2) of the directive, provided that that other kind of protection does not entail a risk of confusion with refugee status within the meaning of the directive.

On those grounds, the Court (Grand Chamber) hereby rules:

1. Article 12(2)(b) and (c) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted must be interpreted as meaning that:

– the fact that a person has been a member of an organisation which, because of its involvement in terrorist acts, is on the list forming the Annex to Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and that that person has actively supported the armed struggle waged by that organisation does not automatically constitute a serious reason for considering that that person has committed 'a serious non-political crime' or 'acts contrary to the purposes and principles of the United Nations';

– the finding, in such a context, that there are serious reasons for considering that a person has committed such a crime or has been guilty of such acts is conditional on an assessment on a case-by-case basis of the specific facts, with a view to determining whether the acts committed by the organisation concerned meet the conditions laid down in those provisions and whether individual responsibility for carrying out those acts can be attributed to the person concerned, regard being had to the standard of proof required under Article 12(2) of the

directive.

2. Exclusion from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is not conditional on the person concerned representing a present danger to the host Member State.

3. The exclusion of a person from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 is not conditional on an assessment of proportionality in relation to the particular case.

4. Article 3 of Directive 2004/83 must be interpreted as meaning that Member States may grant a right of asylum under their national law to a person who is excluded from refugee status pursuant to Article 12(2) of the directive, provided that that other kind of protection does not entail a risk of confusion with refugee status within the meaning of the directive.

JUDGMENT OF THE COURT (Third Chamber)

5 May 2011 (*)

(Freedom of movement for persons – Article 21 TFEU – Directive 2004/38/EC – 'Beneficiary' – Article 3(1) – National who has never made use of his right of free movement and has always resided in the Member State of his nationality – Effect of being a national of another Member State – Purely internal situation)

In Case C-434/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Supreme Court of the United Kingdom, formerly the House of Lords (United Kingdom), made by decision of 5 May 2009, received at the Court on 5 November 2009, in the proceedings

Shirley McCarthy

v

Secretary of State for the Home Department,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby, R. Silva de Lapuerta (Rapporteur), E. Juhász and J. Malenovský, Judges,

Advocate General: J. Kokott,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 October 2010,

after considering the observations submitted on behalf of:

– Mrs McCarthy, by S. Cox, Barrister, and K. Lewis, Solicitor,

– the United Kingdom Government, by S. Ossowski, acting as Agent, and by T. Ward, Barrister,

– the Danish Government, by C. Vang, acting as Agent,

– the Estonian Government, by M. Linntam, acting as Agent,

– Ireland, by D. O'Hagan and D. Conlan Smyth, acting as Agents, and by B. Lennon, Barrister,

– the Netherlands Government, by C. Wissels and M. de Ree, acting as Agents,

– the European Commission, by D. Maidani and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 November 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 3(1) and Article 16 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigendum OJ 2004 L 229, p. 35).

2 The reference was made in the course of proceedings between Mrs McCarthy and the Secretary of State for the Home Department ('the Secretary of State') concerning an application for a residence permit made by Mrs McCarthy.

Legal context

European Union law

3 According to recitals 1 to 3 in the preamble to Directive 2004/38:

‘(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.

(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.’

4 Chapter I of Directive 2004/38, entitled ‘General provisions’, comprises Articles 1 to 3 of the directive.

5 Article 1, entitled ‘Subject’, states:

‘This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

(b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;

(c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.’

6 Article 2 of Directive 2004/38, entitled ‘Definitions’, provides:

‘For the purposes of this Directive:

1. “Union citizen” means any person having the nationality of a Member State;

2. “family member” means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3. “host Member State” means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.’

7 Article 3 of Directive 2004/38, entitled ‘Beneficiaries’, provides in paragraph 1:

‘This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.’

8 Chapter III of that directive, entitled ‘Right of residence’, comprises Articles 6 to 15 of the directive.

9 Article 6 provides:

‘1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.’

10 Article 7 of Directive 2004/38 states:

‘1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

…

4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.'

11 Under Chapter IV, headed 'Right of permanent residence', Article 16 of Directive 2004/38, entitled 'General rule for Union citizens and their family members', provides:

'1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

…

4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.'

12 Chapter V of that directive, entitled 'Provisions common to the right of residence and the right of permanent residence', includes Article 22 which, under the heading 'Territorial scope', provides:

'The right of residence and the right of permanent residence shall cover the whole territory of the host Member State. Member States may impose territorial restrictions on the right of residence and the right of permanent residence only where the same restrictions apply to their own nationals.'

National law

13 Under the United Kingdom Immigration Rules, nationals of third countries who do not have leave to remain in the United Kingdom thereunder also do not meet the requirements to be granted leave to remain under those Rules as the spouse of a person settled in the United Kingdom.

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 Mrs McCarthy, a national of the United Kingdom, is also an Irish national. She was born and has always lived in the United Kingdom, and has never argued that she is or has been a worker, self-employed person or self-sufficient person. She is in receipt of State benefits.

15 On 15 November 2002, Mrs McCarthy married a Jamaican national who lacks leave to remain in the United Kingdom under the Immigration Rules of that Member State.

16 Following her marriage, Mrs McCarthy applied for an Irish passport for the first time and obtained it.

17 On 23 July 2004, Mrs McCarthy and her husband applied to the Secretary of State for a residence permit and residence document under European Union law as, respectively, a Union citizen and the spouse of a Union citizen. The Secretary of State refused their applications on the ground that Mrs McCarthy was not 'a qualified person' (essentially, a worker, self-employed person or self-sufficient person) and, accordingly, that Mr McCarthy was not the spouse of 'a qualified person'.

18 Mrs McCarthy appealed against the decision that had been made in relation to her by the Secretary of State before the Asylum and Immigration Tribunal ('the Tribunal'), which dismissed the appeal on 17 October 2006. The High Court of Justice of England and Wales ordered the Tribunal to reconsider the appeal, and on 16 August 2007 the Tribunal upheld the decision to dismiss it.

19 The appeal brought by Mrs McCarthy against the decision of the Tribunal was dismissed by the Court of Appeal (Civil Division) (England and Wales). Mrs McCarthy brought an appeal against the decision of that court before the referring court.

20 For his part, Mr McCarthy did not appeal against the decision of the Secretary of State in relation to him, but nevertheless made a further application which was also refused. Mr McCarthy then appealed against that second decision to the Tribunal, which adjourned the appeal to await the final outcome of Mrs McCarthy's appeal.

21 In that context, the Supreme Court of the United Kingdom decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is a person of dual Irish and United Kingdom nationality who has resided in the United Kingdom for her entire life a "beneficiary" within the meaning of Article 3 of Directive 2004/38 …?

2. Has such a person "resided legally" within the host Member State for the purpose of Article 16 of [that] directive in circumstances where she was unable to satisfy the requirements of Article 7 of [that directive]?'

Consideration of the questions referred

22 As is apparent from paragraphs 14 to 19 of this judgment, the main proceedings concern an application for a right of residence under European Union law brought by Mrs McCarthy, a Union citizen, to a Member State of which she is a national and where she has always resided.

23 That application is in fact intended to confer on Mr McCarthy, a national of a third country, a right of residence under Directive 2004/38, as a member of Mrs McCarthy's family, given that a comparable right of residence does not arise under the Immigration Rules of the United Kingdom.

The first question

24 At the outset, it should be noted that, even though, formally, the national court has limited its questions to the interpretation of Articles 3(1) and 16 of Directive 2004/38, such a situation does not prevent the Court from providing the national court with all the elements of interpretation of European Union law which may be of assistance in adjudicating on the case before it, whether or not that court has specifically referred to them in the questions (see Case C-251/06 *ING. AUER* [2007] ECR I-9689, paragraph 38 and the case-law cited).

25 There is no indication in the order for reference, in the case-file or in the observations submitted to the Court that Mrs McCarthy has ever exercised her right of free movement within the territory of the Member States, either individually or as a family member of a Union citizen who has exercised such a right. Likewise, Mrs McCarthy is applying for a right of residence under European Union law even though she does not argue that she is or has been a worker, self-employed person or self-sufficient person.

26 Thus, the first question from the national court must be understood as asking, in essence, whether Article 3(1) of Directive 2004/38 or Article 21 TFEU is applicable to the situation of a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.

Preliminary observations

27 As a preliminary point, it should be observed that citizenship of the Union confers on each Union citizen a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and restrictions laid down by the Treaties and the measures adopted for their implementation, freedom of movement for persons being,

moreover, one of the fundamental freedoms of the internal market, which was also reaffirmed in Article 45 of the Charter of Fundamental Rights of the European Union (Case C-162/09 *Lassal* [2010] ECR I-0000, paragraph 29).

28 With regard to Directive 2004/38, the Court has already had occasion to point out that it aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by the Treaty and that it aims in particular to strengthen that right (see Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraphs 82 and 59, and *Lassal*, paragraph 30).

29 Likewise, the Court has also held that a principle of international law, reaffirmed in Article 3 of Protocol No 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, that European Union law cannot be assumed to disregard in the context of relations between Member States, precludes a Member State from refusing its own nationals the right to enter its territory and remain there for any reason (see Case 41/74 *van Duyn* [1974] ECR 1337, paragraph 22, and Case C-257/99 *Barkoci and Malik* [2001] ECR I-6557, paragraph 81); that principle also precludes that Member State from expelling its own nationals from its territory or refusing their right to reside in that territory or making such right conditional (see Cases C-370/90 *Singh* [1992] ECR I-4265, paragraph 22 and C-291/05 *Eind* [2007] ECR I-10719, paragraph 31).

The applicability of Directive 2004/38

30 The first part of the first question, as reformulated by the Court, concerns whether Article 3(1) of Directive 2004/38 is to be interpreted as meaning that that directive applies to a citizen in a situation such as that of Mrs McCarthy, who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.

31 A literal, teleological and contextual interpretation of that provision leads to a negative reply to that question.

32 First, according to Article 3(1) of Directive 2004/38, all Union citizens who 'move to' or reside in a Member State 'other' than that of which they are a national are beneficiaries of that directive.

33 Secondly, whilst it is true that, as stated in paragraph 28 of this judgment, Directive 2004/38 aims to facilitate and strengthen the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on each citizen of the Union, the fact remains that the subject of the directive concerns, as is apparent from Article 1(a), the conditions governing the exercise of that right.

34 Since, as stated in paragraph 29 of this judgment, the residence of a person residing in the Member State of which he is a national cannot be made subject to conditions, Directive 2004/38, concerning the conditions governing the exercise of the right to move and reside freely within the territory of the Member States, cannot apply to a Union citizen who enjoys an unconditional right of residence due to the fact that he resides in the Member State of which he is a national.

35 Thirdly, it is apparent from Directive 2004/38, taken as a whole, that the residence to which it refers is linked to the exercise of the freedom of movement for persons.

36 Thus, first of all, Article 1(a) of that directive defines its subject by reference to the exercise of 'the' right 'of free movement and residence' within the territory of the Member States by Union citizens. Such a relationship between residence and free movement is also apparent both from the title of that directive and from the majority of its recitals, the second of which refers, moreover, exclusively to the free movement of persons.

37 Furthermore, the rights of residence referred to in Directive 2004/38, namely both the right of residence under Articles 6 and 7 and the permanent right of residence under Article 16, refer to the residence of a Union citizen either in 'another Member State' or in 'the host Member State' and therefore govern the legal situation of a Union citizen in a Member State of which he is not a national.

38 Lastly, although, as stated in paragraph 32 of this judgment, Article 3(1) of Directive 2004/38 designates as 'beneficiaries' of that directive all Union citizens who move to 'or' reside in a Member State, it is apparent from Article 22 that the territorial scope of the right of residence and the right of permanent residence referred to in that directive covers the whole territory of 'the host Member State', the latter being defined in Article 2(3) as the Member State to which a Union citizen 'moves' in order to exercise 'his/her' right of free movement and residence within the territory of the Member States.

39 Hence, in circumstances such as those of the main proceedings, in so far as the Union citizen concerned has never exercised his right of free movement and has always resided in a Member State of which he is a national, that citizen is not covered by the concept of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, so that that directive is not applicable to him.

40 That finding cannot be influenced by the fact that the citizen concerned is also a national of a Member State other than that where he resides.

41 Indeed, the fact that a Union citizen is a national of more than one Member State does not mean that he has made use of his right of freedom of movement.

42 Lastly, it should also be noted that, since a Union citizen such as Mrs McCarthy is not covered by the concept of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, her spouse is not covered by that concept either, given that the rights conferred by that directive on the family members of a beneficiary of that directive are not autonomous rights of those family members, but derived rights, acquired through their status as members of the beneficiary's family (see, in relation to instruments of European Union law prior to Directive 2004/38, Case C-243/91 *Taghavi* [1992] ECR I-4401, paragraph 7, and *Eind*, paragraph 23).

43 It follows that Article 3(1) of Directive 2004/38 is to be interpreted as meaning that that directive is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.

The applicability of Article 21 TFEU

44 The second part of this question, as reformulated by the Court, concerns whether Article 21 TFEU is applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.

45 In that regard, it is settled case-law that the Treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to situations which have no factor linking them with any of the situations governed by European Union law and which are confined in all relevant respects within a single Member State (see, to that effect, Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, paragraph 33, and *Metock and Others*, paragraph 77).

46 On this point, it must be observed, however, that the situation of a Union citizen who, like Mrs McCarthy, has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation (see Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 22).

47 Indeed, the Court has stated several times that citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000, paragraph 41 and case-law cited). Furthermore, the Court has held that Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status (see *Ruiz Zambrano*, paragraph 42).

48 As a national of at least one Member State, a person such as Mrs McCarthy enjoys the status of a Union citizen under Article 20(1) TFEU and may therefore rely on the rights pertaining to that status, including against his Member State of origin, in particular the right conferred by Article 21 TFEU to move and reside freely within the territory of the Member States (see Case C-33/07 *Jipa* [2008] ECR I-5157, paragraph 17 and case-law cited).

49 However, no element of the situation of Mrs McCarthy, as described by the national court, indicates that the national measure at issue in the main proceedings has the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the Member States, in accordance with Article 21 TFEU. Indeed, the failure by the authorities of the United Kingdom to take into account the Irish nationality of Mrs McCarthy for the purposes of granting her a right of residence in the United Kingdom in no way affects her in her right to move and reside freely within the territory of the Member States, or any other right conferred on her by virtue of her status as a Union citizen.

50 In that regard, by contrast with the case of *Ruiz Zambrano*, the national measure at issue in the main proceedings in the present case does not have the effect of obliging Mrs McCarthy to leave the territory of the European Union. Indeed, as is clear from paragraph 29 of the present judgment, Mrs McCarthy enjoys, under a principle of international law, an unconditional right of residence in the United Kingdom since she is a national of the United Kingdom.

51 The case in the main proceedings also differs from Case C-148/02 *García Avello* [2003] ECR I-11613. In that judgment, the Court held that the application of the law of one Member State to nationals of that Member State who were also nationals of another Member State had the effect that those Union citizens had different surnames under the two legal systems concerned, and that that situation was liable to cause serious inconvenience for them at both professional and

private levels resulting from, inter alia, difficulties in benefiting, in one Member State of which they are nationals, from the legal effects of diplomas or documents drawn up in the surname recognised in the other Member State of which they are also nationals.

52 As the Court noted in Case C-353/06 *Grunkin and Paul* [2008] ECR I-7639, in circumstances such as those examined in *Garcia Avello*, what mattered was not whether the discrepancy in surnames was the result of the dual nationality of the persons concerned, but the fact that that discrepancy was liable to cause serious inconvenience for the Union citizens concerned that constituted an obstacle to freedom of movement that could be justified only if it was based on objective considerations and was proportionate to the legitimate aim pursued (see, to that effect, *Grunkin et Paul*, paragraphs 23, 24 and 29).

53 Thus, in *Ruiz Zambrano* and *García Avello*, the national measure at issue had the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status or of impeding the exercise of their right of free movement and residence within the territory of the Member States.

54 As stated in paragraph 49 of the present judgment, in the context of the main proceedings in this case, the fact that Mrs McCarthy, in addition to being a national of the United Kingdom, is also a national of Ireland does not mean that a Member State has applied measures that have the effect of depriving her of the genuine enjoyment of the substance of the rights conferred by virtue of her status as a Union citizen or of impeding the exercise of her right of free movement and residence within the territory of the Member States. Accordingly, in such a context, such a factor is not sufficient, in itself, for a finding that the situation of the person concerned is covered by Article 21 TFEU.

55 In those circumstances, the situation of a person such as Mrs McCarthy has no factor linking it with any of the situations governed by European Union law and the situation is confined in all relevant respects within a single Member State.

56 It follows that Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States.

57 In the light of the foregoing, the answer to the first question is as follows:

– Article 3(1) of Directive 2004/38 must be interpreted as meaning that that directive is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.

– Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States.

The second question

58 In view of the answer to the first question referred by the national court, there is no need to answer the second question.

Costs

59 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. Article 3(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, must be interpreted as meaning that that

directive is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.

2. Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States.

N.S. v Secretary of State for the Home Department (Joined Cases C-411/10 and C-493/10)

JUDGMENT OF THE COURT (Grand Chamber)

21 December 2011 (*)

(European Union law – Principles – Fundamental rights – Implementation of European Union law – Prohibition of inhuman or degrading treatment – Common European Asylum System – Regulation (EC) No 343/2003 – Concept of 'safe countries' – Transfer of an asylum seeker to the Member State responsible – Obligation – Rebuttable presumption of compliance, by that Member State, with fundamental rights)

In Joined Cases C-411/10 and C-493/10,

REFERENCES for a preliminary ruling under Article 267 TFEU from the Court of Appeal (England & Wales) (Civil Division) (United Kingdom) and the High Court (Ireland), by decisions of 12 July and 11 October 2010, lodged at the Court on 18 August and 15 October 2010 respectively, in the proceedings

N. S. (C-411/10)
v
Secretary of State for the Home Department
and
M. E. (C-493/10),
A. S. M.,
M. T.,
K. P.,
E. H.
v
Refugee Applications Commissioner,
Minister for Justice, Equality and Law Reform,

intervening parties:
Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (UK) (C-411/10),
United Nations High Commissioner for Refugees (UNHCR) (UK) (C-411/10),
Equality and Human Rights Commission (EHRC) (C-411/10),
Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (IRL) (C-493/10),
United Nations High Commissioner for Refugees (UNHCR) (IRL) (C-493/10),

THE COURT (Grand Chamber),
composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, J. Malenosvský and U. Lõhmus, Presidents of Chambers, A. Rosas (Rapporteur), M. Ilešič, T. von Danwitz, A. Arabadjiev, C. Toader and J.J. Kasel, Judges,
Advocate General: V. Trstenjak,
Registrar: L. Hewlett, Principal Administrator,
having regard to the written procedure and further to the hearing on 28 June 2011,
after considering the observations submitted on behalf of:
– N. S., by D. Rose, QC, M. Henderson and A. Pickup, Barristers, and by S. York, Legal Officer,
– M.E. and Others., by C. Power, BL, F. McDonagh, SC, and G. Searson, Solicitor,
– Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (UK) (Case C-411/10), by S. Cox and S. Taghavi, Barristers, and J. Tomkin, BL,
– Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (IRL) (Case C-493/10), by B. Shipsey, SC, J. Tomkin, BL, and C. Ó Briain, Solicitor,
– The Equality and Human Rights Commission (EHRC), by G. Robertson, QC, J. Cooper and C. Collier, Solicitors,
– The United Nations High Commissioner for Refugees (UNHCR) (UK), by R. Husain, QC, R. Davies, Solicitor, and S. Knights and M. Demetriou, Barristers,
– Ireland, by D. O'Hagan, acting as Agent, assisted by S. Moorhead, SC, and D. Conlan Smyth, BL,
– the United Kingdom Government, by C. Murrell, acting as Agent, and D. Beard, Barrister,
– the Belgian Government, by C. Pochet and T. Materne, acting as Agents,
– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

– the German Government, by T. Henze and N. Graf Vitzthum, acting as Agents,
– the Government of the Hellenic Republic, by A. Samoni-Rantou, M. Michelogiannaki, T. Papadopoulou, F. Dedousi and M. Germani, acting as Agents,
– the French Government, by G. de Bergues, and by E. Belliard and B. Beaupère-Manokha, acting as Agents,
– the Italian Government, by G. Palmieri, acting as Agent, assisted by M. Russo, avvocato dello Stato,
– the Netherlands Government, by C.M. Wissels and M. Noort, acting as Agents,
– the Austrian Government, by G. Hesse, acting as Agent,
– the Polish Government, by M. Arciszewski, B. Majczyna and M. Szpunar, acting as Agents,
– the Slovenian Government, by N. Aleš Verdir and V. Klemenc, acting as Agents,
– the Finnish Government, by J. Heliskoski, acting as Agent,
– the European Commission, by M. Condou-Durande and by M. Wilderspin and H. Kraemer, acting as Agents,
– the Swiss Confederation, by O. Kjelsen, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 22 September 2011,

gives the following

Judgment

1 The two references for preliminary rulings concern the interpretation, first, of Article 3(2) of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1) and, second, the fundamental rights of the European Union, including the rights set out in Articles 1, 4, 18, 19(2) and 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and, third, Protocol (No 30) on the application of the Charter to Poland and to the United Kingdom (OJ 2010 C 83, p. 313; 'Protocol (No 30)').

2 The references have been made in proceedings between asylum seekers who were to be returned to Greece pursuant to Regulation No 343/2003 and, respectively, the United Kingdom and Irish authorities.

Legal context

International law

3 The Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (United Nations Treaty Series, Vol 189, p. 150, No 2545 (1954)) ('the Geneva Convention'), entered into force on 22 April 1954. It was extended by the Protocol relating to the Status of Refugees of 31 January 1967 ('the 1967 Protocol'), which entered into force on 4 October 1967.

4 All the Member States are contracting parties to the Geneva Convention and the 1967 Protocol, as are the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Principality of Liechtenstein. The European Union is not a contracting party to the Geneva Convention or to the 1967 Protocol, but Article 78 TFEU and Article 18 of the Charter provide that the right to asylum is to be guaranteed with due respect for the Geneva Convention and the 1967 Protocol.

5 Article 33(1) of the Geneva Convention, headed 'Prohibition of expulsion or return ("refoulement")', provides:

> 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

The Common European Asylum System

6 In order to achieve the objective, laid down by the European Council meeting in Strasbourg on 8 and 9 December 1989, of the harmonisation of their asylum policies, the Member States signed in Dublin, on 15 June 1990, the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (OJ 1997 C 254, p. 1; 'the Dublin Convention'). The Dublin Convention entered into force on 1 September 1997 for the twelve original signatories, on 1 October 1997 for the Republic of Austria and the Kingdom of Sweden, and on 1 January 1998 for the Republic of Finland.

7 The conclusions of the European Council meeting in Tampere on 15 and 16 October 1999 envisaged, inter alia, the establishment of a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to a place where they again risk being persecuted, that is to say,

maintaining the principle of non-refoulement.

8 The Amsterdam Treaty of 2 October 1997 introduced Article 63 into the EC Treaty, which conferred competence on the European Community to adopt the measures recommended by the European Council in Tampere. That treaty also annexed to the EC Treaty the Protocol (No 24) on asylum for nationals of Member States of the European Union (OJ 2010 C 83, p. 305), according to which those States are to be regarded as constituting safe countries of origin in respect to each other for all legal and practical purposes in relation to asylum matters.

9 The adoption of Article 63 EC made it possible, inter alia, to replace between the Member States, with the exception of the Kingdom of Denmark, the Dublin Convention by Regulation No 343/2003, which entered into force on 17 March 2003. It is also on that legal basis that the directives applicable to the cases in the main proceedings were adopted, for the purpose of establishing the Common European Asylum System foreseen by the conclusions of the Tampere European Council.

10 Since entry into force of the Lisbon Treaty, the relevant provisions in asylum matters are Article 78 TFEU, which provides for the establishment of a Common European Asylum System, and Article 80 TFEU, which reiterates the principle of solidarity and fair sharing of responsibility between the Member States.

11 The European Union legislation of relevance to the present cases includes:

(1) Regulation No 343/2003;

(2) Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31, p. 18);

(3) Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12, and corrigendum, OJ 2005 L 204, p. 24);

(4) Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13, and corrigendum, OJ 2006 L 236, p. 36).

12 It is also appropriate to mention *Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ 2001 L 212, p. 12).* As is apparent from recital 20 in the preamble to that directive, one of its objectives is to provide for a solidarity mechanism intended to contribute to the attainment of a balance of effort between Member States in receiving and bearing the consequences of receiving displaced persons in the event of a mass influx.

13 The recording of the fingerprint data of foreign nationals illegally crossing an external border of the European Union makes it possible to determine the Member State responsible for an asylum application. Such recording is provided for by Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (OJ 2000 L 316, p. 1).

14 Regulation No 343/2003 and Directives 2003/9, 2004/83 and 2005/85 refer, in their first recitals, to the fact that a common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community. They also refer, in their second recitals, to the conclusions of the Tampere European Council.

15 Each of those texts states that it respects the fundamental rights and observes the principles recognised, in particular, by the Charter. Among others, recital 15 in the preamble to Regulation No 343/2003 states that it seeks to ensure full observance of the right to asylum guaranteed by Article 18 of the Charter; recital 5 in the preamble to Directive 2003/9 states that, in particular, that directive seeks to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the Charter; and recital 10 in the preamble to Directive 2004/83 states that, in particular, that directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.

16 Article 1 of Regulation No 343/2003 lays down the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national.

17 Article 3(1) and (2) of that regulation provide:

‘1. Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.

2. By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant.’

18 In order to determine which is ‘the Member State responsible’ for the purposes of Article 3(1) of Regulation No 343/2003, Chapter III of that regulation lists objective and hierarchical criteria relating to unaccompanied minors, family unity, the issue of a residence document or visa, irregular entry into or residence in a Member State and applications made in an international transit area of an airport.

19 Article 13 of that regulation provides that, where no Member State can be designated according to the hierarchy of criteria, the default rule is that the first Member State with which the application was lodged will be responsible for examining the asylum application.

20 According to Article 17 of Regulation No 343/2003, where a Member State with which an application for asylum has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible, call upon the other Member State to take charge of the applicant.

21 Article 18(7) of that regulation provides that failure by the requested Member State to act before the expiry of a two-month period, or within one month where urgency is pleaded, is to be tantamount to accepting the request, and entails the obligation, for that Member State, to take charge of the person, including the provisions for proper arrangements for arrival.

22 Article 19 of Regulation No 343/2003 is worded as follows:

‘1. Where the requested Member State accepts that it should take charge of an applicant, the Member State in which the application for asylum was lodged shall notify the applicant of the decision not to examine the application, and of the obligation to transfer the applicant to the responsible Member State.

2. The decision referred to in paragraph 1 shall set out the grounds on which it is based. It shall contain details of the time limit for carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means. This decision may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer unless the courts or competent bodies so decide on a case-by-case basis if national legislation allows for this.

…

4. Where the transfer does not take place within the six months’ time limit, responsibility shall lie with the Member State in which the application for asylum was lodged. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the asylum seeker or up to a maximum of eighteen months if the asylum seeker absconds.

…’

23 The United Kingdom participates in the application of each of the regulations and the four directives mentioned in paragraphs 11 to 13 of the present judgment. Ireland, by contrast, participates in the application of the regulations and of Directives 2004/83, 2005/85 and 2001/55, but not Directive 2003/9.

24 The Kingdom of Denmark is bound by the Agreement which it concluded with the European Community extending to Denmark the provisions of Council Regulation (EC) No 2725/2000, approved by Council Decision 2006/188/EC of 21 February 2006 (OJ 2006 L 66, p. 37). It is not bound by the directives referred to in paragraph 11 of the present judgment.

25 The European Community has also concluded an Agreement with the Republic of Iceland and the Kingdom of Norway

concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or Iceland or Norway, approved by Council Decision 2001/258/EC of 15 March 2001 (OJ 2001 L 93, p. 38).

26 The European Community has similarly concluded an Agreement with the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, approved by Council Decision 2008/147/EC of 28 January 2008 (OJ 2008 L 53, p. 3), and the Protocol with the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, approved by Council Decision 2009/487/EC of 24 October 2008 (OJ 2009 L 161, p. 6).

27 Directive 2003/9 lays down minimum standards for the reception of asylum seekers in Member States. Those standards concern in particular the obligations concerning the information and documents which must be provided to asylum seekers, the decisions which may be adopted by the Member States concerning residence and freedom of movement of asylum seekers within their territory, families, medical screening, schooling and education of minors, employment of asylum seekers and their access to vocational training, the general rules on material reception conditions and health care available to asylum applicants, the modalities for material reception conditions and the health care which must be granted to asylum applicants.

28 Directive 2003/9 also provides for an obligation to control the level of reception conditions and the possibility of appealing with regard to the matters and decisions covered by it. In addition, it contains rules concerning the training of the authorities and the necessary resources in connection with the national provisions enacted to implement the Directive.

29 Directive 2004/83 lays down minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. Chapter II thereof contains several provisions explaining how to assess applications. Chapter III thereof lays down the conditions which must be satisfied in order to qualify for being a refugee. Chapter IV concerns refugee status. Chapters V and VI concern the conditions which must be satisfied in order to qualify for subsidiary protection and the status conferred thereby. Chapter VII contains various rules setting out the content of international protection. According to Article 20(1) of Directive 2004/83, that chapter is to be without prejudice to the rights laid down in the Geneva Convention.

30 Directive 2005/85 lays down the rights of asylum seekers and the procedures for examining applications.

31 Article 36(1) of Directive 2005/85, under the heading 'The European safe third countries concept' states:

'Member States may provide that no, or no full, examination of the asylum application and of the safety of the applicant in his/her particular circumstances as described in Chapter II, shall take place in cases where a competent authority has established, on the basis of the facts, that the applicant for asylum is seeking to enter or has entered illegally into its territory from a safe third country according to paragraph 2.'

32 The conditions laid down in Article 36(2) include:

– ratification of and compliance with the provisions of the Geneva Convention;

– the existence of an asylum procedure prescribed by law;

– ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), and compliance with its provisions, including the standards relating to effective remedies.

33 Article 39 of Directive 2005/85 sets out the effective remedies that it must be possible to pursue before the courts of the Member States. Article 39(1)(a)(iii) refers to decisions not to conduct an examination pursuant to Article 36 of the directive.

The actions in the main proceedings and the questions referred for a preliminary ruling

Case C-411/10

34 N.S., the appellant in the main proceedings, is an Afghan national who came to the United Kingdom after travelling through, among other countries, Greece. He was arrested in Greece on 24 September 2008 but did not make an

asylum application.

35 According to him, the Greek authorities detained him for four days and, on his release, gave him an order to leave Greece within 30 days. He claims that, when he tried to leave Greece, he was arrested by the police and was expelled to Turkey, where he was detained in appalling conditions for two months. He states that he escaped from his place of detention in Turkey and travelled from that State to the United Kingdom, where he arrived on 12 January 2009 and where, that same day, he lodged an asylum application.

36 On 1 April 2009, the Secretary of State for the Home Department ('the Secretary of State') made a request to the Hellenic Republic, pursuant to Article 17 of Regulation No 343/2003, to take charge of the appellant in the main proceedings in order to examine his asylum application. The Hellenic Republic failed to respond to that request within the time limit stipulated by Article 18(7) of the Regulation and was accordingly deemed, on 18 June 2009, pursuant to that provision, to have accepted responsibility for examining the appellant's claim.

37 On 30 July 2009, the Secretary of State notified the appellant in the main proceedings that directions had been given for his removal to Greece on 6 August 2009.

38 On 31 July 2009, the Secretary of State notified the appellant in the main proceedings of a decision certifying that, under paragraph 5(4) of Part 2 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 ('the 2004 Asylum Act'), his claim that his removal to Greece would violate his rights under the ECHR was clearly unfounded, since Greece is on the 'list of safe countries' in Part 2 of Schedule 3 to the 2004 Asylum Act.

39 The consequence of that certification decision was, in accordance with paragraph 5(4) of Part 2 of Schedule 3 to the 2004 Asylum Act, that the appellant in the main proceedings did not have a right to lodge an immigration appeal in the United Kingdom, with suspensive effect, against the decision ordering his transfer to Greece, an appeal to which he would have been entitled in the absence of such a certification decision.

40 On 31 July 2009, the appellant in the main proceedings requested the Secretary of State to accept responsibility for examining his asylum claim under Article 3(2) of the Regulation, on the ground that there was a risk that his fundamental rights under European Union law, the ECHR and/or the Geneva Convention would be breached if he were returned to Greece. By letter of 4 August 2009, the Secretary of State maintained his decision to transfer the appellant in the main proceedings to Greece and his decision certifying that the claim of the appellant in the main proceedings based on the ECHR was clearly unfounded.

41 On 6 August 2009, the appellant in the main proceedings issued proceedings seeking judicial review of the Secretary of State's decisions. As a result, the Secretary of State annulled the directions for his transfer. On 14 October 2009, the permission sought by the appellant for judicial review was granted.

42 The application was examined by the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) from 24 to 26 February 2010. By judgment of 31 March 2010, Mr Justice Cranston dismissed the application but granted the appellant in the main proceedings leave to appeal to the Court of Appeal (England & Wales) (Civil Division).

43 The appellant in the main proceedings appealed to that court on 21 April 2010.

44 It emerges from the order for reference, in which the Court of Appeal refers to the judgment of the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court), that:

(1) asylum procedures in Greece are said to have serious shortcomings: applicants encounter numerous difficulties in carrying out the necessary formalities; they are not provided with sufficient information and assistance; their claims are not examined with due care;

(2) the proportion of asylum applications which are granted is understood to be extremely low;

(3) judicial remedies are stated to be inadequate and very difficult to access;

(4) the conditions for reception of asylum seekers are considered to be inadequate: applicants are either detained in inadequate conditions or they live outside in destitution, without shelter or food.

45 The High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) considered that the risks of refoulement from Greece to Afghanistan and Turkey were not established in the case of persons returned under Regulation No 343/2003, but that view is contested by the appellant in the main proceedings before the referring court.

46 Before the Court of Appeal (England & Wales) (Civil Division), the Secretary of State accepted that 'the fundamental rights set out in the Charter can be relied on as against the United Kingdom and … that the Administrative Court erred in holding otherwise'. According to the Secretary of State, the Charter simply restates rights which already form an integral part of European Union law and does not create any new rights. However, the Secretary of State contended that the High Court of Justice (England & Wales) Queen's Bench Division (Administrative Court) was wrong to find that she was bound to take into account European Union fundamental rights when exercising her discretion under Article 3(2) of the Regulation. According to the Secretary of State, that discretionary power does not fall within the scope of European Union law.

47 In the alternative, the Secretary of State contended that the obligation to observe European Union fundamental rights does not require her to take into account the evidence that, if the appellant were returned to Greece, there would be a substantial risk that his fundamental rights under European Union law would be infringed. She maintained that the scheme of Regulation No 343/2003 entitles her to rely on the conclusive presumption that Greece (or any other Member State) would comply with its obligations under European Union law.

48 Finally, the appellant in the main proceedings contended before the referring court that the protection conferred by the Charter is higher than and goes beyond that guaranteed by, inter alia, Article 3 of the ECHR, which might lead to a different outcome in the present case.

49 At the hearing of 12 July 2010, the referring court decided that decisions on certain questions of European Union law were necessary for it to give judgment on the appeal.

50 In those circumstances, the Court of Appeal (England & Wales) (Civil Division) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does a decision made by a Member State under Article 3(2) of … Regulation No 343/2003 whether to examine a claim for asylum which is not its responsibility under the criteria set out in Chapter III of the Regulation fall within the scope of EU law for the purposes of Article 6 [TEU] and/or Article 51 of the Charter …?

If Question 1 is answered in the affirmative:

(2) Is the duty of a Member State to observe EU fundamental rights (including the rights set out in Articles 1, 4, 18, 19(2) and 47 of the Charter) discharged where that State sends the asylum seeker to the Member State which Article 3(1) [of Regulation No 343/2003] designates as the responsible State in accordance with the criteria set out in Chapter III of the regulation ("the responsible State"), regardless of the situation in the responsible State?

(3) In particular, does the obligation to observe EU fundamental rights preclude the operation of a conclusive presumption that the responsible State will observe (i) the claimant's fundamental rights under European Union law; and/ or (ii) the minimum standards imposed by Directives 2003/9 …, 2004/83 … and 2005/85 …?

(4) Alternatively, is a Member State obliged by European Union law, and, if so, in what circumstances, to exercise the power under Article 3(2) of the Regulation to examine and take responsibility for a claim, where transfer to the responsible State would expose the [asylum] claimant to a risk of violation of his fundamental rights, in particular the rights set out in Articles 1, 4, 18, 19(2) and/or 47 of the Charter, and/or to a risk that the minimum standards set out in Directives [2003/9, 2004/83 and 2005/85] will not be applied to him?

(5) Is the scope of the protection conferred upon a person to whom Regulation [No 343/2003] applies by the general principles of European Union law, and, in particular, the rights set out in Articles 1, 18 and 47 of the Charter wider than the protection conferred by Article 3 of the ECHR?

(6) Is it compatible with the rights set out in Article 47 of the Charter for a provision of national law to require a court, for the purpose of determining whether a person may lawfully be removed to another Member State pursuant to Regulation [No 343/2003], to treat that Member State as a State from which the person will not be sent to another State in contravention of his rights pursuant to the [ECHR] or his rights pursuant to the [Geneva Convention] and [the 1967 Protocol]?

(7) In so far as the preceding questions arise in respect of the obligations of the United Kingdom, are the answers to [the second to sixth questions] qualified in any respect so as to take account of the Protocol (No 30)?'

51 This case concerns five appellants in the main proceedings, all unconnected with each other, originating from Afghanistan, Iran and Algeria. Each of them travelled via Greece and was arrested there for illegal entry. They then travelled to Ireland, where they claimed asylum. Three of the appellants in the main proceedings claimed asylum without disclosing that they had previously been in Greece, whilst the other two admitted they had previously been in Greece. The Eurodac system confirmed that all five appellants had previously entered Greece, but that none of them had claimed asylum there.

52 Each of the appellants in the main proceedings resists return to Greece. As is apparent from the order for reference, it has not been argued that the transfer of the appellants to Greece under Regulation No 343/2003 would violate Article 3 ECHR because of a risk of refoulement, chain refoulement, ill treatment or suspension of asylum claims. It is also not alleged that the transfer would breach another article of the ECHR. The appellants in the main proceedings argued that the procedures and conditions for asylum seekers in Greece are inadequate and that Ireland is therefore required to exercise its power under Article 3(2) of Regulation No 343/2003 to accept responsibility for examining and deciding on their asylum claims.

53 In those circumstances, the High Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the transferring Member State under … Regulation (EC) No 343/2003 obliged to assess the compliance of the receiving Member State with Article 18 of the Charter …, … Directives 2003/9/EC, 2004/83/EC and 2005/85/EC and Regulation (EC) No 343/2003?

(2) If the answer is yes, and if the receiving Member State is found not to be in compliance with one or more of those provisions, is the transferring Member Sate obliged to accept responsibility for examining the application under Article 3(2) of … Regulation (EC) No 343/2003?'

54 Cases C-411/10 and C-493/10 were, by order of the President of the Court of 16 May 2011, joined for the purposes of the written and oral procedure and the judgment.

Consideration of the questions referred for a preliminary ruling

The first question in Case C-411/10

55 By its first question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether the decision adopted by a Member State on the basis of Article 3(2) of Regulation No 343/2003 to examine a claim for asylum which is not its responsibility under the criteria set out in Chapter III of that regulation falls within the scope of European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter.

Observations submitted to the Court

56 N.S., the Equality and Human Rights Commission (EHRC), Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (UK), the United Nations High Commissioner for Refugees (UNHCR), the French, Netherlands, Austrian and Finnish Governments and the European Commission consider that a decision adopted on the basis of Article 3(2) of Regulation No 343/2003 falls within the scope of European Union law.

57 N.S. points out, in that regard, that the exercise of the power provided for by that provision will not necessarily be more favourable to the applicant, which explains why, in its assessment of the Dublin system (COM (2007) 299 final), the Commission proposed that exercise of the power provided for by Article 3(2) of Regulation No 343/2003 should be subject to the consent of the asylum seeker.

58 According to Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (UK) and the French Government, in particular, the possibility provided for in Article 3(2) of Regulation No 343/2003 is justified by the fact that the purpose of the Regulation is to protect fundamental rights and that it might be necessary to exercise the power provided for by that article.

59 The Finnish Government emphasises that Regulation No 343/2003 forms part of a set of rules establishing a system.

60 According to the Commission, when a regulation confers a discretionary power on a Member State, it must exercise that power in accordance with European Union law (Case 5/88 *Wachauf* [1989] ECR 2609; Case C-578/08 *Chakroun* [2010] ECR I-1839; and Case C-400/10 PPU *McB.* [2010] ECR I-0000). It points out that a decision adopted by a Member State on the basis of Article 3(2) of Regulation No 343/2003 has consequences for that Member State,

which will be bound by the procedural obligations of the European Union and by the directives.

61 Ireland, the United Kingdom, the Belgian Government and the Italian Government, on the other hand, consider that such a decision under Article 3(2) of the Regulation does not fall within the scope of European Union law. The arguments put forward are the clarity of the text, which provides for an option, the reference to a 'sovereignty' clause or 'discretionary clause' in the Commission documents, the raison d'être of such a clause, that is humanitarian grounds, and, lastly, the logic of the system established by Regulation No 343/2003.

62 The United Kingdom emphasises that a sovereignty clause is not a derogation within the meaning of Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 43. It also points out that the fact that the exercise of that clause does not implement European Union law does not mean that Member States are disregarding fundamental rights, since they are bound by the Geneva Convention and the ECHR. The Belgian Government, however, submits that carrying out the decision to transfer the asylum seeker implements Regulation No 343/2003 and therefore falls within the scope of Article 6 TEU and the Charter.

63 The Czech Government takes the view that the decision by a Member State falls within European Union law when that State exercises the sovereignty clause, but not when it does not exercise that power.

The Court's reply

64 Article 51(1) of the Charter states that the provisions thereof are addressed to the Member States only when they are implementing European Union law.

65 Scrutiny of Article 3(2) of Regulation No 343/2003 shows that it grants Member States a discretionary power which forms an integral part of the Common European Asylum System provided for by the FEU Treaty and developed by the European Union legislature.

66 As stated by the Commission, that discretionary power must be exercised in accordance with the other provisions of that regulation.

67 In addition, Article 3(2) of Regulation No 343/2003 states that the derogation from the principle laid down in Article 3(1) of that regulation gives rise to the specific consequences provided for by that regulation. Thus, a Member State which decides to examine an asylum application itself becomes the Member State responsible within the meaning of Regulation No 343/2003 and must, where appropriate, inform the other Member State or Member States concerned by the asylum application.

68 Those factors reinforce the interpretation according to which the discretionary power conferred on the Member States by Article 3(2) of Regulation No 343/2003 forms part of the mechanisms for determining the Member State responsible for an asylum application provided for under that regulation and, therefore, merely an element of the Common European Asylum System. Thus, a Member State which exercises that discretionary power must be considered as implementing European Union law within the meaning of Article 51(1) of the Charter.

69 The answer to the first question in Case C-411/10 is therefore that the decision by a Member State on the basis of Article 3(2) of Regulation No 343/2003 whether to examine an asylum application which is not its responsibility according to the criteria laid down in Chapter III of that Regulation, implements European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter.

The second to fourth questions and the sixth question in Case C-411/10 and the two questions in Case C-493/10

70 By the second question in Case C-411/10 and the first question in Case C-493/10, the referring courts ask, in essence, whether the Member State which should transfer the asylum seeker to the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible is obliged to assess the compliance, by that Member State, with the fundamental rights of the European Union, Directives 2003/9, 2004/83 and 2005/85 and with Regulation No 343/2003.

71 By the third question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether the obligation on the Member State which should transfer the asylum seeker to observe fundamental rights precludes the operation of a conclusive presumption that the responsible State will observe the claimant's fundamental rights under European Union law and/or the minimum standards imposed by the abovementioned

directives.

72 By the fourth question in Case C-411/10 and the second question in Case C-493/10, the referring courts ask, in essence, whether, where the Member State responsible is found not to be in compliance with fundamental rights, the Member State which should transfer the asylum seeker is obliged to accept responsibility for examining the asylum application under Article 3(2) of Council Regulation (EC) No 343/2003?

73 Finally, by its sixth question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether a provision of national law which requires a court, for the purpose of determining whether a person may lawfully be removed to another Member State pursuant to Regulation No 343/2003, to treat that Member State as a 'safe country' is compatible with the rights set out in Article 47 of the Charter.

74 Those questions should be considered together.

75 The Common European Asylum System is based on the full and inclusive application of the Geneva Convention and the guarantee that nobody will be sent back to a place where they again risk being persecuted. Article 18 of the Charter and Article 78 TFEU provide that the rules of the Geneva Convention and the 1967 Protocol are to be respected (see Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* [2010] ECR I-1493, paragraph 53, and Case C-31/09 *Bolbol* [2010] ECR I-5539, paragraph 38).

76 As stated in paragraph 15 above, the various regulations and directives relevant to in the cases in the main proceedings provide that they comply with the fundamental rights and principles recognised by the Charter.

77 According to settled case-law, the Member States must not only interpret their national law in a manner consistent with European Union law but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the European Union legal order or with the other general principles of European Union law (see, to that effect, Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 87, and Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 28).

78 Consideration of the texts which constitute the Common European Asylum System shows that it was conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard.

79 It is precisely because of that principle of mutual confidence that the European Union legislature adopted Regulation No 343/2003 and the conventions referred to in paragraphs 24 to 26 of the present judgment in order to rationalise the treatment of asylum claims and to avoid blockages in the system as a result of the obligation on State authorities to examine multiple claims by the same applicant, and in order to increase legal certainty with regard to the determination of the State responsible for examining the asylum claim and thus to avoid forum shopping, it being the principal objective of all these measures to speed up the handling of claims in the interests both of asylum seekers and the participating Member States.

80 In those circumstances, it must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR.

81 It is not however inconceivable that that system may, in practice, experience major operational problems in a given Member State, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights.

82 Nevertheless, it cannot be concluded from the above that any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No 343/2003.

83 At issue here is the raison d'être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights.

84 In addition, it would be not be compatible with the aims of Regulation No 343/2003 were the slightest infringement of Directives 2003/9, 2004/83 or 2005/85 to be sufficient to prevent the transfer of an asylum seeker to the Member State primarily responsible. Regulation No 343/2003 aims – on the assumption that the fundamental rights of the asylum seeker are observed in the Member State primarily responsible for examining the application – to establish,

as is apparent inter alia from points 124 and 125 of the Opinion in Case C-411/10, a clear and effective method for dealing with an asylum application. In order to achieve that objective, Regulation No 343/2003 provides that responsibility for examining an asylum application lodged in a European Union country rests with a single Member State, which is determined on the basis of objective criteria.

85 If the mandatory consequence of any infringement of the individual provisions of Directives 2003/9, 2004/83 or 2005/85 by the Member State responsible were that the Member State in which the asylum application was lodged is precluded from transferring the applicant to the first mentioned State, that would add to the criteria for determining the Member State responsible set out in Chapter III of Regulation No 343/2003 another exclusionary criterion according to which minor infringements of the abovementioned directives committed in a certain Member State may exempt that Member State from the obligations provided for under Regulation No 343/2003. Such a result would deprive those obligations of their substance and endanger the realisation of the objective of quickly designating the Member State responsible for examining an asylum claim lodged in the European Union.

86 By contrast, if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision.

87 With regard to the situation in Greece, the parties who have submitted observations to the Court are in agreement that that Member State was, in 2010, the point of entry in the European Union of almost 90% of illegal immigrants, that influx resulting in a disproportionate burden being borne by it compared to other Member States and the inability to cope with the situation in practice. The Hellenic Republic stated that the Member States had not agreed to the Commission's proposal that the application of Regulation No 343/2003 be suspended and that it be amended by mitigating the criterion of first entry.

88 In a situation similar to those at issue in the cases in the main proceedings, that is to say the transfer, in June 2009, of an asylum seeker to Greece, the Member State responsible within the meaning of Regulation No 343/2003, the European Court of Human Rights held, inter alia, that the Kingdom of Belgium had infringed Article 3 of the ECHR, first, by exposing the applicant to the risks arising from the deficiencies in the asylum procedure in Greece, since the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities and, second, by knowingly exposing him to conditions of detention and living conditions that amounted to degrading treatment (European Court of Human Rights, *M.S.S.* v. *Belgium and Greece*, § 358, 360 and 367, judgment of 21 January 2011, not yet published in the *Reports of Judgments and Decisions*).

89 The extent of the infringement of fundamental rights described in that judgment shows that there existed in Greece, at the time of the transfer of the applicant M.S.S., a systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers.

90 In finding that the risks to which the applicant was exposed were proved, the European Court of Human Rights took into account the regular and unanimous reports of international non-governmental organisations bearing witness to the practical difficulties in the implementation of the Common European Asylum System in Greece, the correspondence sent by the United Nations High Commissioner for Refugees (UNHCR) to the Belgian minister responsible, and also the Commission reports on the evaluation of the Dublin system and the proposals for recasting Regulation No 343/2003 in order to improve the efficiency of the system and the effective protection of fundamental rights (*M.S.S.* v *Belgium and Greece*, § 347-350).

91 Thus, and contrary to the submissions of the Belgian, Italian and Polish Governments, according to which the Member States lack the instruments necessary to assess compliance with fundamental rights by the Member State responsible and, therefore, the risks to which the asylum seeker would be exposed were he to be transferred to that Member State, information such as that cited by the European Court of Human Rights enables the Member States to assess the functioning of the asylum system in the Member State responsible, making it possible to evaluate those risks.

92 The relevance of the reports and proposals for amendment of Regulation No 343/2003 emanating from the Commission should be noted – these must be known to the Member State which has to carry out the transfer, given its participation in the work of the Council of the European Union, which is one of the addressees of those documents.

93 In addition, Article 80 TFEU provides that asylum policy and its implementation are to be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Directive 2001/55 is an example of that solidarity but, as was stated at the hearing, the solidarity mechanisms which it contains apply only to wholly exceptional situations falling within the scope of that directive, that is to say, a mass influx of displaced persons.

94 It follows from the foregoing that in situations such as that at issue in the cases in the main proceedings, to ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.

95 With regard to the question whether the Member State which cannot carry out the transfer of the asylum seeker to the Member State identified as 'responsible' in accordance with Regulation No 343/2003 is obliged to examine the application itself, it should be recalled that Chapter III of that Regulation refers to a number of criteria and that, in accordance with Article 5(1) of that regulation, those criteria apply in the order in which they are set out in that chapter.

96 Subject to the right itself to examine the application referred to in Article 3(2) of Regulation No 343/2003, the finding that it is impossible to transfer an applicant to Greece, where that State is identified as the Member State responsible in accordance with the criteria set out in Chapter III of that regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.

97 In accordance with Article 13 of Regulation No 343/2003, where the Member State responsible for examining the application for asylum cannot be designated on the basis of the criteria listed in that Regulation, the first Member State with which the application for asylum was lodged is to be responsible for examining it.

98 The Member State in which the asylum seeker is present must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, that Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.

99 It follows from all of the foregoing considerations that, as stated by the Advocate General in paragraph 131 of her Opinion, an application of Regulation No 343/2003 on the basis of the conclusive presumption that the asylum seeker's fundamental rights will be observed in the Member State primarily responsible for his application is incompatible with the duty of the Member States to interpret and apply Regulation No 343/2003 in a manner consistent with fundamental rights.

100 In addition, as stated by N.S., were Regulation No 343/2003 to require a conclusive presumption of compliance with fundamental rights, it could itself be regarded as undermining the safeguards which are intended to ensure compliance with fundamental rights by the European Union and its Member States.

101 That would be the case, inter alia, with regard to a provision which laid down that certain States are 'safe countries' with regard to compliance with fundamental rights, if that provision had to be interpreted as constituting a conclusive presumption, not admitting of any evidence to the contrary.

102 In that regard, it should be pointed out that Article 36 of Directive 2005/85, concerning the safe third country concept, provides, in paragraph 2(a) and (c), that a third country can only be considered as a 'safe third country' where not only has it ratified the Geneva Convention and the ECHR but it also observes the provisions thereof.

103 Such wording indicates that the mere ratification of conventions by a Member State cannot result in the application of a conclusive presumption that that State observes those conventions. The same principle is applicable both to Member States and third countries.

104 In those circumstances, the presumption underlying the relevant legislation, stated in paragraph 80 above, that asylum seekers will be treated in a way which complies with fundamental rights, must be regarded as rebuttable.

105 In the light of those factors, the answer to the questions referred is that European Union law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible observes the fundamental rights of the European Union.

106 Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.

107 Subject to the right itself to examine the application referred to in Article 3(2) of Regulation No 343/2003, the finding that it is impossible to transfer an applicant to another Member State, where that State is identified as the Member State responsible in accordance with the criteria set out in Chapter III of that regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.

108 The Member State in which the asylum seeker is present must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.

The fifth question in Case C-411/10

109 By its fifth question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether the extent of the protection conferred on a person to whom Regulation No 343/2003 applies by the general principles of EU law, and, in particular, the rights set out in Articles 1, concerning human dignity, 18, concerning the right to asylum, and 47, concerning the right to an effective remedy, of the Charter, is wider than the protection conferred by Article 3 of the ECHR.

110 According to the Commission, the answer to that question must make it possible to identify the provisions of the Charter the infringement of which by the Member State responsible would result in the secondary responsibility of the Member State which has to decide on the transfer.

111 Even if the Court of Appeal (England & Wales) (Civil Division) did not expressly provide reasons, in the order for reference, why it required an answer to the question in order to give judgment, a reading of that decision in fact suggests that that question can be accounted for by the decision of 2 December 2008 in *K.R.S.* v. *United Kingdom*, not yet published in the *Reports of Judgments and Decisions*, in which the European Court of Human Rights held inadmissible an application claiming that Article 3 and 13 of the ECHR would be infringed were the applicant to be transferred by the United Kingdom to Greece. Before the Court of Appeal (England & Wales) (Civil Division), a number of parties claimed that the protection of fundamental rights stemming from the Charter is wider than that conferred by the ECHR and that, taking the Charter into account, their request not to transfer the applicant in the main proceedings to Greece would have to be granted.

112 After the order for reference was made, the European Court of Human Rights reviewed its position in the light of new evidence and held, in *M.S.S.* v *Belgium and Greece*, not only that the Hellenic Republic had infringed Article 3 of the ECHR owing to the applicant's detention and living conditions in Greece and also Article 13 of the ECHR read in conjunction with the aforesaid Article 3 on account of the deficiencies in the asylum procedure conducted in the applicant's case, but also that the Kingdom of Belgium had infringed Article 3 of the ECHR by exposing the applicant to the risks linked to the deficiencies in the asylum procedure in Greece and to detention and living conditions in Greece which did not comply with that article.

113 As follows from paragraph 106 above, a Member State would infringe Article 4 of the Charter if it transferred an asylum seeker to the Member State responsible within the meaning of Regulation No 343/2003 in the circumstances described in paragraph 94 of the present judgment.

114 Articles 1, 18 and 47 of the Charter do not lead to a different answer than that given to the second to fourth questions and to the sixth question in Case C-411/10 and to the two questions in Case C-493/10.

115 Consequently, the answer to the fifth question in Case C-411/10 is that Articles 1, 18 and 47 of the Charter do not lead to a different answer than that given to the second to fourth questions and to the sixth question in Case C-411/10 and to the two questions in Case C-493/10.

The seventh question in Case C-411/10

116 By its seventh question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether, in so far as the preceding questions arise in respect of the obligations of the United Kingdom, the answers to the second to sixth questions should be qualified in any respect so as to take account of Protocol (No 30).

117 As noted by the EHRC, that question arises because of the position taken by the Secretary of State before the High Court of Justice (England & Wales) (Administrative Court) that the provisions of the Charter do not apply in the United Kingdom.

118 Even if the Secretary of State no longer maintained that position before the Court of Appeal (England & Wales) (Civil Division), it must be noted that Protocol (No 30) provides, in Article 1(1), that the Charter is not to extend the ability of the Court of Justice or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it affirms.

119 According to the wording of that provision, as noted by the Advocate General in points 169 and 170 of her Opinion in Case C-411/10, Protocol (No 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol. Thus, according to the third recital in the preamble to Protocol (No 30), Article 6 TEU requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that article. In addition, according to the sixth recital in the preamble to that protocol, the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles.

120 In those circumstances, Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.

121 Since the rights referred to in the cases in the main proceedings do not form part of Title IV of the Charter, there is no need to rule on the interpretation of Article 1(2) of Protocol (No 30).

122 The answer to the seventh question in Case C-411/10 is therefore that, in so far as the preceding questions arise in respect of the obligations of the United Kingdom, the answers to the second to sixth questions referred in Case C-411/10 do not require to be qualified in any respect so as to take account of Protocol (No 30).

On those grounds, the Court (Grand Chamber) hereby rules:

1. The decision adopted by a Member State on the basis of Article 3(2) of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, whether to examine an asylum application which is not its responsibility according to the criteria laid down in Chapter III of that Regulation, implements European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter of Fundamental Rights of the European Union.

2. European Union law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible observes the fundamental rights of the European Union.

Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial

grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.

Subject to the right itself to examine the application referred to in Article 3(2) of Regulation No 343/2003, the finding that it is impossible to transfer an applicant to another Member State, where that State is identified as the Member State responsible in accordance with the criteria set out in Chapter III of that regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.

The Member State in which the asylum seeker is present must ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.

3. Articles 1, 18 and 47 of the Charter of Fundamental Rights of the European Union do not lead to a different answer.

4. In so far as the preceding questions arise in respect of the obligations of the United Kingdom of Great Britain and Northern Ireland, the answers to the second to sixth questions referred in Case C-411/10 do not require to be qualified in any respect so as to take account of Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom.

JUDGMENT OF THE COURT (Grand Chamber)
15 November 2011 (*)

(Citizenship of the Union – Right of residence of nationals of third countries who are family members of Union citizens – Refusal based on the citizen's failure to exercise the right to freedom of movement – Possible difference in treatment compared with EU citizens who have exercised their right to freedom of movement – EEC-Turkey Association Agreement – Article 13 of Decision No 1/80 of the Association Council – Article 41 of the Additional Protocol – 'Standstill' clauses)

In Case C-256/11,
REFERENCE for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Austria), made by decision of 5 May 2011, received at the Court on 25 May 2011, in the proceedings

Murat Dereci,
Vishaka Heiml,
Alban Kokollari,
Izunna Emmanuel Maduike,
Dragica Stevic

v

Bundesministerium für Inneres,

THE COURT (Grand Chamber),

composed of V. Skouris, President, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, J. Malenovský, U. Lõhmus, Presidents of Chambers, R. Silva de Lapuerta (Rapporteur), M. Ilešič and E. Levits, Judges,
Advocate General: P. Mengozzi,
Registrar: K. Malacek, Administrator,

having regard to the order of the President of the Court of 9 September 2011 applying an accelerated procedure to the reference for a preliminary ruling under Article 23a of the Statute of the Court of Justice of the European Union and the first paragraph of Article 104a of the Rules of Procedure of the Court,

having regard to the written procedure and further to the hearing on 27 September 2011,

after considering the observations submitted on behalf of:

– M. Dereci, by H. Blum, Rechtsanwalt,

– the Austrian Government, by G. Hesse, acting as Agent,

– the Danish Government, by C. Vang, acting as Agent,

– the German Government, by T. Henze and N. Graf Vitzthum, acting as Agents,

– Ireland, by D. O'Hagan, acting as Agent, assisted by P. McCann, BL,

– the Greek Government, by T. Papadopoulou, acting as Agent,

– the Netherlands Government, by C. Wissels and J. Langer, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the United Kingdom Government, by S. Hathaway and S. Ossowski, acting as Agents, assisted by K. Beal, barrister,

– the European Commission, by D. Maidani and C. Tufvesson and by B.-R. Killmann, acting as Agents,

after hearing the Advocate General,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of European Union law provisions on citizenship of the Union, and Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association set up by the Agreement establishing an Association between the European Economic Community and Turkey, signed in

Ankara on 12 September 1963 by Turkey, on the one hand, and by Member States of the EEC and the Community, on the other, and concluded, approved and confirmed on behalf of the Community by Council Decision No 64/732/EEC of 23 December 1963 (OJ 1964, 217, p. 3685) ('Decision No 1/80' and 'the Association Agreement' respectively), and the Additional Protocol, signed in Brussels on 23 November 1970 and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1972 L 293, p. 1) ('the Additional Protocol').

2 The reference has been made in proceedings between Mr Dereci, Mrs Heiml, Mr Kokollari, Mr Maduike and Mrs Stevic, on the one hand, and the Bundesministerium für Inneres (Ministry of Home Affairs), on the other, concerning the latter's rejection of the application for residence authorisations by the applicants in the main proceedings, coupled with, in four of the disputes in the main proceedings, an expulsion order and individual removal orders from Austria.

Legal context

International Law

3 Under the heading 'Right to respect for private and family life', Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, ('ECHR') provides:

'(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

European UnionLaw

Association Agreement

4 The Association Agreement is intended, in the words of Article 2(1), 'to promote the continuous and balanced strengthening of trade and economic relations between the parties, while taking full account of the need to ensure an accelerated development of the Turkish economy and to improve the level of employment and the living conditions of the Turkish people'. Under Article 12 of the Association Agreement, 'the Contracting Parties agree to be guided by Articles [39 EC], [40 EC] and [41 EC] for the purpose of progressively securing freedom of movement for workers between them' and, under Article 13 of that agreement, those parties 'agree to be guided by Articles [43 EC] to [46 EC] and [48 EC] for the purpose of abolishing restrictions on freedom of establishment between them'.

Decision No 1/80

5 Article 13 of Decision No 1/80 states:

'The Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories.'

Additional Protocol

6 According to Article 62 thereof, the Additional Protocol and its Annexes form an integral part of the Association Agreement.

7 Article 41(1) of the Additional Protocol provides:

'The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.'

Directive 2003/86/EC

8 Article 1 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12) states:

'The purpose of this Directive is to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States.'

9 According to Article 3(3) of that directive:

'This Directive shall not apply to members of the family of a Union citizen.'

Directive 2004/38/EC

10 Under the heading ‘General provisions’, Chapter I of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35 and OJ 2005 L 197, p. 34) consists of Articles 1 to 3.

11 Article 1 of that directive, which is entitled ‘Subject’, provides:

‘This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

(b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;

(c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.’

12 Under the heading ‘Definitions’, Article 2 of that directive states:

‘For the purposes of this Directive:

(1) “Union citizen” means any person having the nationality of a Member State;

(2) “Family member” means:

a) the spouse;

b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3) “Host Member State” means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.’

13 Article 3 of Directive 2004/38, which is entitled ‘Beneficiaries’, provides in paragraph 1:

‘This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.’

National law

14 The Federal Law on establishment and residence in Austria (Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich, BGBl. I, 100/2005, ‘NAG’), makes a distinction, in its provisions on establishment and residence in Austria, between rights derived from European Union law, on the one hand, and those derived from Austrian law, on the other.

15 Under the heading ‘General conditions for obtaining a residence permit’, Paragraph 11 of the NAG provides:

‘...

(2) A residence permit may be issued to an alien only if

1. the residence of the alien is not contrary to the public interest;

2. the alien can provide evidence of a legal right to accommodation considered usual for a family of comparable size;

3. the alien has comprehensive sickness insurance cover valid in Austria;

4. the residence of the alien is not liable to entail a financial burden for the public authorities in Austria;

…

(3) a residence permit may be issued despite a ground for refusal under subparagraph 1(3), (5) or (6) or where the conditions under subparagraph 2(1) to (6) are not met if required by respect for private and family life within the meaning of Article 8 of the [ECHR]. Private and family life within the meaning of Article 8 of the [ECHR] shall be assessed in the light, in particular, of:

1. the nature and duration of residence so far and the question of the lawfulness or otherwise of the residence so far of the third country national;

2. the actual existence of family life;

3. whether the private life is worthy of protection;

4. the degree of integration;

5. the links of the third country national with his own country;

6. the absence of a criminal record;

7. breaches of public policy, in particular in the area of the law on asylum, on border policing and on immigration;

8. whether the private and family life of the third country national arose at the time the persons concerned became aware of the uncertain status of their residence;

(4) the residence of an alien is contrary to the public interest (subparagraph 2(1)) where

1. his residence would compromise public policy or public security …

(5) The residence of an alien does not entail a financial burden for the public authorities in Austria (subparagraph 2(4)) where the alien has a fixed and regular income of his own which allows him to live without seeking social security benefits from the public authorities and the amount of which corresponds to the scales laid down by Paragraph 293 of the General law on social security (Allgemeines Sozialversicherungsgesetz) …'

16 Paragraph 21 of the NAG, entitled 'Procedure applicable to initial applications', provides:

'(1) the initial application must be made abroad, before entering Austrian territory, to the competent local diplomatic services. The applicant is required to remain abroad until a decision has been made on his application.

(2) By way of derogation from subparagraph 1, the following persons are authorised to submit their application in Austria:

1. Family members of Austrians, EEA nationals and Swiss nationals, residing permanently in Austria who have not exercised the right of residence of more than three months conferred on them by Community law or by the [Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed in Luxembourg on 21 June 1999 (OJ 2002 L 114, p. 6)], following lawful entry and during their lawful residence;

...

(3) By way of derogation from subparagraph 1, the authorities may accept, on submission of a reasoned request, the lodging of an application in Austria if there are no grounds for refusal under Paragraph 11(1)(1), (2) or (4), and if it is established that it is impossible for the alien to leave Austria in order to submit his application or if this cannot reasonably be required of him:

...

2. in order to respect private and family life within the meaning of Article 8 of the ECHR (Paragraph 11(3)).

...

(6) An application submitted in Austria under subparagraph 2(1) and (4) to (6), subparagraph 3 and subparagraph 5, does not confer any right to remain in Austria beyond the authorised residence without a visa or with a visa. Nor does it preclude the adoption and implementation of measures for the registration of aliens and therefore can have no suspensory effect on aliens' registration procedures.'

17 Paragraph 47 of the NAG provides:

'(1) Persons seeking to reunite their family within the meaning of subparagraphs 2 to 4 are Austrians or EEC or Swiss nationals residing permanently in Austria who have not exercised their right of residence of more than three months

conferred on them by Community law or the [agreement mentioned in Paragraph 21(2)].

(2) Third country nationals who are family members of a person seeking to reunite their family within the meaning of subparagraph 1 shall be issued with a 'residence permit for family members in the strict sense' if they fulfil the conditions of part 1. If the conditions of part 1 are met, that residence permit shall be renewed for the first time after 12 months and thereafter every 24 months.

(3) Other family members of a person seeking to reunite a family within the meaning of subparagraph 1 may be issued on request with a 'residence authorisation for other family members' if they fulfil the conditions of part 1 and

1. they are relatives in the direct ascending line of the person seeking family reunification, his spouse or registered partner, provided that they are actually maintained by that person;

2. they are partners of that person who can demonstrate the existence of a permanent relationship in their country of origin and are actually being maintained; or

3. they are other family members,

a) who have already been maintained in their country of origin by the person seeking family reunification;

b) who have already lived in their country of origin under the same roof as the person seeking family reunification or

c) who suffer from serious health problems such that the person seeking family reunification is required to take care of them personally.

…'

18 The NAG considers only spouses, registered partners and unmarried minor children to be 'family members in the strict sense' and spouses and registered partners must additionally be over 21 at the time of the application. Other members of the family, in particular parents and adult children, are considered to be 'other family members'.

19 According to Paragraph 57 of the NAG, third country nationals who are family members of an Austrian citizen are given the status granted to family members of a citizen of a Member State other than the Republic of Austria where that Austrian citizen has exercised in such a Member State or in Switzerland a right of residence of more than three months and has returned to Austria at the end of that period of residence. Other than in that situation, such nationals must meet the same conditions as those imposed on other third country nationals who have moved to Austria, that is to say the conditions laid down in Paragraph 47 of the NAG.

20 The NAG repealed, with effect from 1 January 2006, the Federal Law on the entry, residence and establishment of aliens (Bundesgesetz über die Einreise, den Aufenthalt und die Niederlassung von Fremden, BGBl. I, 75/1997, 'the 1997 Law'). Under Paragraph 49 of the 1997 Law:

'(1) The family members of Austrian nationals pursuant to Paragraph 47(3), who are nationals of a third country, enjoy freedom of establishment; they are covered, save as otherwise provided below, by the provisions applicable to nationals of third countries enjoying a favourable regime under section 1. Such aliens may submit in Austria an application for an initial residence authorisation. The residence authorisations issued to them on the first two occasions shall be valid for one year each.

(2) Such third country nationals shall be issued on request with a residence authorisation of unlimited duration if the conditions for the issue of a residence permit (Paragraph 8(1)) are fulfilled and if the aliens

1. have been married for two years at least to an Austrian citizen and live with that citizen under the same roof in Austria;

…'

21 The 1997 Law also repealed the Law on Residence (Aufenthaltsgesetz, BGBl. 466/1992) and the Law on Aliens (Fremdengesetz, BGBl. 838/1992), which were in force at the time of the accession of the Republic of Austria to the European Union on 1 January 1995.

The actions in the main proceedings and the questions referred for a preliminary ruling

22 It is apparent from the order for reference that the applicants in the main proceedings are all third-country nationals who wish to live with their family members, who are European Union citizens resident in Austria and who are nationals of that Member State. It should also be noted that the Union citizens concerned have never exercised their right to free movement and that they are not maintained by the applicants in the main proceedings.

23 By contrast, it must be observed that the facts giving rise to the dispute differ as regards, inter alia, whether the entry into Austria of the applicants in the main proceedings was lawful or unlawful, their current place of residence as well as the nature of their family relationship with the Union citizen concerned and whether they are maintained by that Union citizen.

24 For instance, Mr Dereci, who is a Turkish national, entered Austria illegally and married an Austrian national by whom he had three children who are also Austrian nationals and who are still minors. Mr Dereci currently resides with his family in Austria. Mr Maduike, a Nigerian national, also entered Austria illegally and married an Austrian national with whom he currently resides in Austria.

25 By contrast, Mrs Heiml, a Sri Lankan national, married an Austrian national before entering Austria legally where she currently lives with her husband, despite the subsequent expiry of her residence permit.

26 Mr Kokollari, who entered Austria legally at the age of two with his parents who possessed Yugoslav nationality at the time, is 29 years old and states that he is maintained by his mother who is now an Austrian national. He currently resides in Austria. Mrs Stevic, a Serbian national, is 52 years old and has applied for family reunification with her father who has resided in Austria for many years and who obtained Austrian nationality in 2007. She has regularly received monthly support from her father and she claims that he would continue to support her if she resided in Austria. Mrs Stevic currently resides in Serbia with her husband and their three adult children.

27 All of the applicants in the main proceedings had their applications for residence permits in Austria rejected. In addition, Mrs Heiml, Mr Dereci, Mr Kokollaria and Mr Maduike have all been subject to expulsion orders and individual removal orders from Austria.

28 The applications were rejected by the Bundesministerium für Inneres, inter alia, on one or more of the following grounds: the existence of procedural defects in the application; failure to comply with the obligation to remain abroad whilst awaiting the decision on the application on account of either irregular entry into Austria or regular entry followed by an extended stay beyond that which was originally permitted; lack of sufficient resources; or a breach of public policy.

29 In all of the disputes in the main proceedings, the Bundesministerium für Inneres refused to apply, in respect of the applicants in the main proceedings, a similar regime to that provided for in Directive 2004/38 for the family members of a Union citizen, on the ground that the Union citizen concerned has not exercised his right of free movement. Similarly, that authority refused to grant the applicants a right of residence pursuant to Article 8 of the ECHR on the ground, in particular, that their residence status in Austria had to be considered to be uncertain from the start of their private and family life.

30 The referring court has before it the rejection of the appeals brought by the applicants in the main proceedings against the decisions of the Bundesministerium für Inneres. The referring court considers that the question arises whether the indications given by the Court in its judgment of 8 March 2011 in *Ruiz Zambrano* (C-34/09 *Ruiz Zambrano* [2011] ECR I-0000) may be applied to one or more of the disputes in the main proceedings.

31 In that regard, the referring court notes that, as in the circumstances at issue in *Ruiz Zambrano*, the third-country nationals and their family members who are Union citizens who possess Austrian nationality and who have not exercised their right of free movement wish, primarily, to live together.

32 However, unlike the situation in *Ruiz Zambrano*, there is no risk here that the Union citizens concerned may be deprived of their means of subsistence.

33 The referring court therefore asks whether the refusal of the Bundesministerium für Inneres to grant the applicants in the main proceedings a right of residence may be interpreted as leading, for their family members who are Union citizens, to a denial of the genuine enjoyment of the substance of the rights conferred on them by virtue of their status as citizens of the Union.

34 In the event that that question is answered in the negative, the referring court points out that Mr Dereci is contemplating not only reunification with his family in Austria but also the pursuit of employed or self-employed activities. In so far as the provisions of the 1997 Law were more favourable than those of the NAG, the referring court asks whether Article 13 of Decision No 1/80 and Article 41 of the Additional Protocol must be interpreted as meaning that, in a situation such as that of Mr Dereci, the more favourable provisions of the 1997 Law are applicable.

35 In those circumstances the Verwaltungsgerichtshof decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1)

(a) Is Article 20 TFEU to be interpreted as precluding a Member State from refusing to grant to a national of a non-member country – whose spouse and minor children are Union citizens – residence in the Member State of residence of the spouse and children, who are nationals of that Member State, even in the case where those Union citizens are not dependent on the national of a non-member country for their subsistence? (*Dereci* case)

(b) Is Article 20 TFEU to be interpreted as precluding a Member State from refusing to grant to a national of a non-member country – whose spouse is a Union citizen – residence in the Member State of residence of that spouse, who is a national of that Member State, even in the case where that Union citizen is not dependent on the national of a non-member country for his or her subsistence? (*Heiml* and *Maduike* cases)

(c) Is Article 20 TFEU to be interpreted as precluding a Member State from refusing to grant to a national of a non-member country – who has reached the age of majority and whose mother is a Union citizen – residence in the Member State of residence of the mother, who is a national of that Member State, even in the case where it is not the Union citizen who is dependent on the national of a non-member country for her subsistence but rather that national of a non-member country who is dependent on the Union citizen for his subsistence? (*Kokollari* case)

(d) Is Article 20 TFEU to be interpreted as precluding a Member State from refusing to grant to a national of a non-member country – who has reached the age of majority and whose father is a Union citizen – residence in the Member State of residence of the father, who is a national of that Member State, even in the case where it is not the Union citizen who is dependent on the national of a non-member country for his subsistence but rather the national of a non-member country who receives subsistence support from the Union citizen? (*Stevic* case)

(2) If any of the questions under 1 is to be answered in the affirmative:

Does the obligation on the Member States under Article 20 TFEU to grant residence to nationals of non-member countries relate to a right of residence which follows directly from European Union law, or is it sufficient that the Member State grants the right of residence to the national of a non-member country on the basis of its law establishing such a right?

(3)

(a) If, according to the answer to Question 2, a right of residence exists by virtue of European Union law:

Under what conditions, exceptionally, does the right of residence which follows from European Union law not exist, or under what conditions may the national of a non-member country be deprived of the right of residence?

(b) If, according to the answer to Question 2, it should be sufficient for the national of a non-member country to be granted the right of residence on the basis of the law of the Member State concerned which establishes such a right:

Under what conditions may the national of a non-member country be denied the right of residence, notwithstanding an obligation in principle on the Member State to enable that person to acquire residence?

(4) In the event that Article 20 TFEU does not prevent a national of a non-member country, as in the situation of Mr Dereci, from being denied residence in the Member State:

Does Article 13 of Decision No 1/80 of 19 September 1980 …, or Article 41 of the Additional Protocol…, which, according to Article 62 thereof, forms an integral part of the [Association] Agreement …, preclude, in a case such as that of Mr Dereci, the subjection of the initial entry of a Turkish national to stricter national rules than those which previously applied to the initial entry of Turkish nationals, even though those national provisions which had facilitated the initial entry did not enter into force until after the date on which the aforementioned provisions concerning the association with Turkey entered into force in the Member State in question?'

36 By order of the President of the Court of 9 September 2011, the accelerated procedure is to be applied to this reference for a preliminary ruling pursuant to under Article 23a of the Statute of the Court of Justice of the European Union and the first paragraph of Article 104a of the Rules of Procedure of the Court.

Consideration of the questions referred

The first question

37 The first question must be understood as seeking to determine, in essence, whether European Union law and, in particular, the provisions concerning citizenship of the Union, must be interpreted as precluding a Member State from refusing to grant residence within its territory to a third country national, although that third country national wishes to reside with a family member who is a European Union citizen, resident in that Member State and a national of that Member State,

who has never exercised his right to free movement and who is not maintained by that third country national.

Observations submitted to the Court

38 The Austrian, Danish, German, Irish, Netherlands, Polish and United Kingdom Governments and the European Commission consider that the provisions of European Union law concerning citizenship of the Union do not preclude a Member State from refusing to grant a right of residence to a third country national in situations such as those in the main proceedings.

39 According to those governments and to the Commission, firstly, Directive 2004/38 does not apply to the disputes in the main proceedings, given that the Union citizens concerned have not exercised their right to free movement and, secondly, the provisions of the TFEU concerning citizenship of the Union do not apply either in so far as the disputes concern purely internal situations that possess no connecting factors to European Union law.

40 In essence, they consider that the principles laid down in *Ruiz Zambrano* apply to very exceptional situations in which the application of a national measure would lead to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of the status of citizen of the Union. In this case, the events which gave rise to the disputes in the main proceedings differ substantially from those which gave rise to the aforementioned judgment in so far as the Union citizens concerned were not at risk of having to leave the territory of the Union and thus of being denied the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. Similarly, according to the Commission, neither is there a barrier to the exercise of the right conferred on Union citizens to freedom of movement and residence within the territory of the Member States.

41 Mr Dereci, on the other hand, considers that European Union law must be interpreted as precluding a Member State from refusing to grant residence within its territory to a third country national, although that national wishes to reside with his wife and three children who are European Union citizens resident in that Member State and who are nationals of that Member State.

42 According to Mr Dereci, the question whether there is a cross-border situation or not is irrelevant. In that regard, Article 20 TFEU should be interpreted as meaning that the question to be taken into consideration is whether the Union citizen is denied the genuine enjoyment of the substance of the rights conferred by virtue of his status. This is the case for Mr Dereci's children in so far as they are maintained by him, and the effectiveness of that maintenance is likely to be compromised if they were subject to expulsion from Austria.

43 Lastly, the Greek Government considers that developments in the case-law of the Court impose an obligation to be guided, by analogy, by the provisions of European Union law, in particular by the provisions of Directive 2004/38, and therefore to grant residence to the applicants in the main proceedings, provided the following conditions are satisfied. First of all, the situation of the Union citizens who have not exercised their right to free movement should be similar to that of those who have exercised that same right, which would mean, in this case, that a national and his family members must satisfy the conditions laid down by that directive. Second, the national measures should entail a significant infringement of the right of free movement and residence. Third, national law should not provide at least equivalent protection to the party concerned.

The Court's reply

– Applicability of Directives 2003/86 and 2004/38

44 It should be noted at the outset that the applicants in the main proceedings are all third country nationals who have applied for the right of residence in a Member State in order to live with their family members who are European Union citizens and who have not exercised their right to free movement within the territory of the Member States.

45 In order to answer the first question, as reformulated by the Court, it is necessary to analyse at the outset whether Directives 2003/86 and 2004/38 are applicable to the applicants in the main proceedings.

46 So far as concerns, first of all, Directive 2003/86, it must be stated that, under Article 1, its purpose is to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States.

47 However, in accordance with Article 3(3) of Directive 2003/86, that directive is not to apply to members of the family of a Union citizen.

48 In so far as the disputes in the main proceedings concern Union citizens who reside in a Member State and their family members who are third country nationals who wish to enter and to reside in that Member State for the purposes of

living as a family with those citizens, it must be held that Directive 2006/38 is not applicable to the applicants in the main proceedings.

49 Furthermore, as the Commission has correctly observed, although the proposal for a Council Directive on the right to family reunification ((2000/C 116 E/15), COM(1999)638 final - 1999/0258 (CNS)), submitted by the Commission on 11 January 2000 (OJ C 116 E, p. 66), included within its scope Union citizens who have not exercised their right to free movement, that inclusion was deleted in the course of the legislative process leading to Directive 2003/86.

50 Second, the Court has already had occasion to point out that Directive 2004/38 aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by the Treaty and that it aims in particular to strengthen that right (see Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraphs 82 and 59, and Case C-434/09 *McCarthy* [2011] ECR I-0000, paragraph 28).

51 As is apparent from paragraphs 24 to 26 of the present judgment, Mrs Heiml, Mr Dereci and Mr Maduike, as spouses of Union citizens, fall within the definition of 'family member' in point 2 of Article 2 of Directive 2004/38. Similarly, Mr Kokollari and Mrs Stevic, as direct descendants over the age of 21 of Union citizens, are covered by that definition provided that the requirement of being dependent on those citizens is satisfied, pursuant to point 2(c) of Article 2 of that Directive.

52 However, as the referring court observed, Directive 2004/38 does not apply in situations such as those at issue in the main proceedings.

53 Indeed, as provided for in Article 3(1) of Directive 2004/38, that directive applies to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 of the directive who accompany them or join them in that Member State (see *Ruiz Zambrano*, paragraph 39).

54 The Court has already had occasion to state that, in accordance with a literal, teleological and contextual interpretation of that provision, a Union citizen, who has never exercised his right of free movement and has always resided in a Member State of which he is a national, is not covered by the concept of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, so that that directive is not applicable to him (*McCarthy*, paragraphs 31 and 39).

55 Similarly, it has been held that, in so far as a Union citizen is not covered by the concept of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, their family member is not covered by that concept either, given that the rights conferred by that directive on the family members of a beneficiary of that directive are not autonomous rights of those family members, but derived rights, acquired through their status as members of the beneficiary's family (see, so far as concerns spouses, *McCarthy*, paragraph 42, and the case-law cited).

56 Indeed, not all third country nationals derive rights of entry into and residence in a Member State from Directive 2004/38, but only those who are family members, within the meaning of point 2 of Article 2 of that directive, of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national (*Metock and Others*, paragraph 73).

57 In the present case, as the Union citizens concerned have never exercised their right to free movement and have always resided in a Member State of which they are nationals, it must be held that they are not covered by the concept 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, so that that directive is neither applicable to them nor to their family members.

58 It follows that Directives 2003/86 and 2004/38 are not applicable to third country nationals who apply for the right of residence in order to join their European Union citizen family members who have never exercised their right to free movement and who have always resided in the Member State of which they are nationals.

– Applicability of the Treaty provisions concerning citizenship of the Union

59 Notwithstanding the inapplicability to the disputes in the main proceedings of Directives 2003/86 and 2004/38, it is necessary to consider whether the Union citizens concerned by those disputes may rely on the provisions of the Treaty concerning citizenship of the Union.

60 In that regard, it must be borne in mind that the Treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to situations which have no factor linking them with any of the situations governed by European Union law and which are confined in all relevant respects within a single Member State (see, to that effect, Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, paragraph 33; *Metock and Others*, paragraph 77 and, *McCarthy*, paragraph 45).

61 However, the situation of a Union citizen who, like each of the citizens who are family members of the applicants in the main proceedings, has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation (see Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 22, and *McCarthy*, paragraph 46).

62 Indeed, the Court has stated several times that citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see *Ruiz Zambrano*, paragraph 41, and the case-law cited).

63 As nationals of a Member State, family members of the applicants in the main proceedings enjoy the status of Union citizens under Article 20(1) TFEU and may therefore rely on the rights pertaining to that status, including against their Member State of origin (see *McCarthy*, paragraph 48).

64 On this basis, the Court has held that Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status (see *Ruiz Zambrano*, paragraph 42).

65 Indeed, in the case leading to that judgment, the question arose as to whether a refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside and a refusal to grant such a person a work permit have such an effect. The Court considered in particular that such a refusal would lead to a situation where those children, who are citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union (see *Ruiz Zambrano*, paragraphs 43 and 44).

66 It follows that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.

67 That criterion is specific in character inasmuch as it relates to situations in which, although subordinate legislation on the right of residence of third country nationals is not applicable, a right of residence may not, exceptionally, be refused to a third country national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined.

68 Consequently, the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.

69 That finding is, admittedly, without prejudice to the question whether, on the basis of other criteria, inter alia, by virtue of the right to the protection of family life, a right of residence cannot be refused. However, that question must be tackled in the framework of the provisions on the protection of fundamental rights which are applicable in each case.

– The right to respect for private and family life

70 As a preliminary point, it must be observed that in so far as Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'), concerning respect for private and family life, contains rights which correspond to rights guaranteed by Article 8(1) of the ECHR, the meaning and scope of Article 7 of the Charter are to be the same as those laid down by Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights (Case C-400/10 PPU *McB*. [2010] ECR I-0000, paragraph 53).

71 However, it must be borne in mind that the provisions of the Charter are, according to Article 51(1) thereof, addressed to the Member States only when they are implementing European Union law. Under Article 51(2), the Charter does not extend the field of application of European Union law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Accordingly, the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it (*McB.*, paragraph 51, see also Joined Cases C-483/09 and C-1/10 *Gueye and Salmerón Sánchez* [2011] ECR I-0000, paragraph 69).

72 Thus, in the present case, if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must

undertake that examination in the light of Article 8(1) of the ECHR.

73 All the Member States are, after all, parties to the ECHR which enshrines the right to respect for private and family life in Article 8.

74 In the light of the foregoing observations the answer to the first question is that European Union law and, in particular, its provisions on citizenship of the Union, must be interpreted as meaning that it does not preclude a Member State from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the Member State of which he has nationality, who has never exercised his right to freedom of movement, provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union, which is a matter for the referring court to verify.

The second and third questions

75 Since the second and third questions were raised only in the event of the first question being answered in the negative, there is no need to provide an answer.

The fourth question

76 By its fourth question, the referring court is asking, essentially, whether Article 13 of Decision No 1/80 or Article 41(1) of the Additional Protocol must be interpreted as meaning that they preclude a Member State from subjecting the initial entry of a Turkish national to stricter national rules than those which previously applied to such entry, even though those previous national rules, which had relaxed the initial entry regime, did not enter into force until after those articles were given effect in the Member State in question, following its accession to the Union.

Observations submitted to the Court

77 The Austrian, German and United Kingdom Governments consider that neither Article 13 of Decision No 1/80 nor Article 41(1) of the Additional Protocol preclude stricter national rules than those which existed on the entry into force of those provisions from being applied to Turkish nationals wishing to pursue employed or self-employed activities in a Member State, given that those provisions apply only to Turkish nationals whose position was lawful in the host Member State and do not cover situations such as that of Mr Dereci, who entered and has always resided unlawfully in Austria.

78 On the other hand, the Netherlands Government and the Commission consider that such provisions preclude the introduction into the national legislation of the Member States of any new restriction on the exercise of freedom of movement for workers and freedom of establishment, including those relating to the conditions of substance or procedure as regards the initial entry into the territory of the Member States.

79 Mr Dereci observes that he entered Austria on the basis of an application for asylum and that he had withdrawn that application because of his marriage to an Austrian national. That marriage, under the law in force at the time, gave him a right of establishment. Moreover, from 1 July 2002 to 30 June 2003, he worked as a salaried employee and, subsequently, from 1 October 2003 to 31 August 2008, he was self-employed, having taken over his brother's hairdressing salon.

Reply of the Court

80 As a preliminary point, it must be observed that the fourth question relates to Article 13 of Decision No 1/80 and to Article 41(1) of the Additional Protocol without making any distinction between them.

81 Although those two provisions have the same meaning, each of them has been given a very specific scope, with the result that they cannot be applied concurrently (Joined Cases C-317/01 and C-369/01 *Abatay and Others* [2003] ECR I-12301, paragraph 86).

82 In that connection, it must be observed that, according to the referring court, Mr Dereci married an Austrian national on 24 July 2003 and subsequently, on 24 June 2004, submitted an initial application for a residence authorisation under the 1997 law. Moreover, Mr Dereci states that it was at that time that he took over his brother's hairdressing salon.

83 It follows that Mr Dereci's situation concerns freedom of establishment and is thus covered by Article 41(1) of the Additional Protocol.

84 Moreover, it must be borne in mind that the Law on Residence and the Law on Aliens, mentioned in paragraph 21 of the present judgment, were the provisions applicable to the conditions for the exercise of freedom of establishment of Turkish nationals in Austria, at the time of the accession of that Member State to the European Union on 1 January 1995

and, therefore, of the entry into force of the Additional Protocol in that Member State.

85 Although the 1997 Law repealed those laws, it was in turn repealed by the NAG as of 1 January 2006, and the latter legislation constituted, according to the referring court, a stricter approach compared with the 1997 Law, as regards the conditions for the exercise of freedom of establishment by Turkish nationals.

86 Accordingly, the fourth question must be understood as seeking to know whether Article 41(1) of the Additional Protocol must be interpreted as meaning that the enactment of new legislation more restrictive than the previous legislation, which, for its part, had relaxed earlier legislation concerning the conditions for the exercise of the freedom of establishment of Turkish nationals at the time of the entry into force of that protocol in the Member State concerned must be considered to be a 'new restriction' within the meaning of that provision.

87 In that regard, it must be recalled that Article 41(1) of the Additional Protocol has direct effect in the Member States, so that the rights which it confers on the Turkish nationals to whom it applies may be relied on before the national courts to prevent the application of inconsistent rules of national law. That provision lays down, in terms which are clear, precise and unconditional, an unequivocal 'standstill' clause, which contains an obligation entered into by the contracting parties which amounts in law to a duty not to act (see Case C-16/05 *Tum and Dari* [2007] ECR I-7415, paragraph 46, and the case-aw cited).

88 According to consistent case-law, even if the 'standstill' clause set out in Article 41(1) of the Additional Protocol is not, in itself, capable of conferring on Turkish nationals – on the basis of European Union legislation alone – a right of establishment or, as a corollary, a right of residence, nor a right to freedom to provide services or to enter the territory of a Member State, the fact remains that such a clause prohibits generally the introduction of any new measures having the object or effect of making the exercise by a Turkish national of those economic freedoms on the territory of that Member State subject to stricter conditions than those which applied to him at the time when the Additional Protocol entered into force with regard to the Member State concerned (see Case C-228/06 *Soysal and Savatli* [2009] ECR I-1031, paragraph 47, and the case-law cited).

89 A standstill clause, such as that embodied in Article 41(1) of the Additional Protocol, does not operate in the same way as a substantive rule by rendering inapplicable the relevant substantive law which it replaces, but as a quasi-procedural rule which specifies, *ratione temporis*, the provisions of a Member State's legislation that must be referred to for the purposes of assessing the position of a Turkish national who wishes to exercise freedom of establishment in a Member State (*Tum and Dari*, paragraph 55, and Case C-186/10 *Oguz* [2011] ECR I-0000, paragraph 28).

90 In that regard, Article 41(1) of the Additional Protocol is intended to create conditions conducive to the progressive establishment of freedom of establishment by way of an absolute prohibition on national authorities from creating any new obstacle to the exercise of that freedom by making more stringent the conditions which exist at a given time, so as not to render more difficult the gradual securing of that freedom between the Member States and the Republic of Turkey. That provision thus appears to be the necessary corollary to Article 13 of the Association Agreement, and constitutes the indispensable precondition for achieving the progressive abolition of national restrictions on freedom of establishment (*Tum and Dari*, paragraph 61, and the case-law cited).

91 Accordingly, even if, initially, with a view to the progressive implementation of that freedom, existing national restrictions as regards establishment may be retained, it is important to ensure that no new obstacle is introduced in order not to further obstruct the gradual implementation of such freedom of establishment (*Tum and Dari*, paragraph 61, and the case-law cited).

92 The Court has already had occasion to find, as regards a national provision concerning the granting of a residence permit to Turkish nationals that it is necessary to ensure that the Member States do not depart from the objective pursued by reversing measures which they have adopted in favour of the free movement of Turkish workers subsequent to the entry into force of Decision No 1/80 within their territory (Joined Cases C-300/09 and C-301/09 *Toprak and Oguz* [2010] ECR I-0000, paragraph 55).

93 Moreover, the Court has held that Article 13 of Decision No 1/80 must be interpreted as meaning that a tightening of a provision which provided for a relaxation of the provision applicable to the conditions for the exercise of the freedom of movement of Turkish workers at the time of the entry into force of Decision No 1/80 in the Member State concerned, constitutes a 'new restriction', even where that tightening does not make those conditions more stringent than those under the provision applicable at the time of the entry into force of Decision No 1/80 in that Member State (see, to that effect, *Toprak and Oguz*, paragraph 62).

94 Having regard to the convergence in the interpretation of both Article 41(1) of the Additional Protocol and Article 13 of Decision No 1/80 as regards the objective pursued, it must be held that the scope of the standstill obligation in Article 13 extends by analogy to any new obstacle to the exercise of freedom of establishment, freedom to provide services or freedom of movement for workers which makes more stringent the conditions which exist at a given time (see, to that effect, *Toprak and Oguz*, paragraph 54), so that it is necessary to ensure that the Member States do not depart from the objective pursued by the standstill clauses by reversing measures which they have adopted in favour of the free movement of Turkish workers subsequent to the entry into force of Decision No 1/80 or the Additional Protocol within their territory.

95 In the present case, it is not disputed that, with the entry into force of the NAG on 1 January 2006, the conditions for the exercise of freedom of establishment for Turkish nationals in Mr Dereci's position worsened.

96 According to Paragraph 21 of the NAG, third country nationals, including Turkish nationals in Mr Dereci's position, must, as a general rule, submit their application for residence from outside Austrian territory and are required to remain outside that territory until a decision has been made on their application.

97 On the other hand, pursuant to Paragraph 49 of the 1997 Law, Turkish nationals in Mr Dereci's position, as family members of Austrian nationals, enjoyed freedom of establishment and could submit an application for an initial establishment permit in Austria.

98 In those circumstances, it must be held that, by worsening the conditions for the exercise of freedom of establishment by Turkish nationals compared with the conditions applicable to them previously under the provisions adopted since the entry into force of the Additional Protocol, the NAG constitutes a 'new restriction' within the meaning of Article 41(1) of that protocol.

99 Finally, as regards the argument relied on by the Austrian, German and United Kingdom Governments, according to which Mr Dereci was in an 'unlawful position' and could not therefore benefit from the application of Article 41(1) of the Additional Protocol, suffice it to note that, according to the order for reference, while it is true that Mr Dereci entered Austrian territory illegally in November 2001, the fact remains that, at the time he lodged his application for establishment, he had, under the national legislation in force at the time, a right of establishment by reason of his marriage to an Austrian national, and he was entitled to submit an application to that effect in Austria, which, moreover, he did. According to the referring court, it was only the entry into force of the NAG which caused his initially lawful residence to become subsequently unlawful, which led to the rejection of his application for a residence authorisation.

100 It follows that his position cannot be classed as unlawful, given that that unlawfulness arose following the application of the provision which constitutes a new restriction.

101 In the light of the foregoing observations, the answer to the fourth question is that Article 41(1) of the Additional Protocol must be interpreted as meaning that the enactment of new legislation more restrictive than the previous legislation, which, for its part, relaxed earlier legislation concerning the conditions for the exercise of the freedom of establishment of Turkish nationals at the time of the entry into force of that protocol in the Member State concerned must be considered to be a 'new restriction' within the meaning of that provision.

Costs

102 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. European Union law and, in particular, its provisions on citizenship of the Union, must be interpreted as meaning that it does not preclude a Member State from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the Member State of which he has nationality, who has never exercised his right to freedom of movement, provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union, which is a matter for the referring court to verify.

2. Article 41(1) of the Additional Protocol, signed in Brussels on 23 November 1970 and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972, must be interpreted as meaning that the enactment of new legislation more restrictive that the previous legislation, which,

for its part, relaxed earlier legislation concerning the conditions for the exercise of the freedom of establishment of Turkish nationals at the time of the entry into force of that protocol in the Member State concerned must be considered to be a 'new restriction' within the meaning of that provision.

E. JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS
(Chronologically ordered and edited)

Berrehab v. The Netherlands

(Application no. 10730/84)

JUDGMENT

STRASBOURG

21 June 1988

In the Berrehab case[1],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges: Mr. R. Ryssdal, President, Mr. Thór Vilhjálmsson, Mr. G. Lagergren, Mr. C. Russo, Mr. A. Spielmann, Mr. J. De Meyer, Mr. S.K. Martens, ad hoc judge, and also of Mr. M.-A. Eissen, Registrar, and Mr. H. Petzold, Deputy Registrar,

Having deliberated in private on 26 February and 28 May 1988,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Netherlands Government ("the Government") on 13 March and 10 April 1987 respectively, within the three-month period laid down in Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 10730/84) against the Kingdom of the Netherlands lodged with the Commission under Article 25 (art. 25) by a Moroccan national, Abdellah Berrehab, a Netherlands national, Sonja Koster, and their daughter Rebecca Berrehab, likewise of Netherlands nationality, on 14 November 1983. "The applicants" hereinafter means only Abdellah and Rebecca Berrehab, as the Commission declared Sonja Koster's complaints inadmissible (see paragraph 18 below).

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Netherlands Government recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48). Both sought a decision from the Court as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 3 and 8 (art. 3, art. 8).

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings pending before the Court and designated the lawyer who would represent them (Rule 30).

3. The Chamber of seven judges to be constituted included ex officio Mr. A.M. Donner, the elected judge of Netherlands nationality (Article 43 of the Convention) (art. 43), and Mr. R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 23 May 1987, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr. Thór Vilhjálmsson, Mr. G. Lagergren, Mr. C. Russo, Mr. A. Spielmann and Mr. J. De Meyer (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43). In December 1987, as Mr. Donner was unable to attend, the Government appointed Mr. S.K. Martens, Vice-President of the Netherlands Court of Cassation (Hoge Raad), to sit as an ad hoc judge (Rules 23 § 1 and 24 § 1).

4. Mr. Ryssdal assumed the office of President of the Chamber (Rule 21 § 5) and consulted - through the Registrar - the Agent of the Government, the Delegate of the Commission and the lawyer for the applicants on the need for a written procedure (Rule 37 § 1). In accordance with the order made in consequence on 31 July 1987, the registry received:

(a) on 3 November, the memorials of the Government and of the applicants;

(b) on 26 October, the applicants' claims for just satisfaction (Article 50 of the Convention) (art. 50), which they supplemented in January 1988.

In a letter of 23 November, the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. Having consulted - through the Registrar - the persons due to appear before the Court, the President directed on 24 November that the oral proceedings should commence on 23 February 1988 (Rule 38).

6. The hearing was held in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

(a) for the Government

Miss D.S. Van Heukelom, Assistant Legal Adviser, Ministry for Foreign Affairs, Agent,

Mr. J.L. De Wijkerslooth de Weerdesteijn, Landsadvocaat, Counsel;

(b) for the Commission

Mr. H. Schermers, Delegate;

(c) for the applicants

Mr. C.N.A.M. Claassen, advocaat, Counsel.

The Court heard addresses by Mr. De Wijkerslooth de Weerdesteijn for the Government, Mr. Schermers for the Commission and Mr. Claassen for the applicants, as well as their replies to its questions.

At the hearing the Commission produced various documents at the Registrar's request on the President's instructions. By a letter of 19 April 1988, the Government supplemented their reply to a question posed by the Court.

AS TO THE FACTS

I. The circumstances of the case

7. Mr. Berrehab, a Moroccan citizen born in Morocco in 1952, was permanently resident in Amsterdam at the time when he applied to the Commission.

His daughter Rebecca, who was born in Amsterdam on 22 August 1979, has Netherlands nationality. She is represented by her guardian, viz. her mother, Mrs. Koster, who is likewise a Netherlands national.

8. After marrying Mrs. Koster on 7 October 1977, Mr. Berrehab sought permission to stay in the Netherlands where he had been for some time already. The Ministry of Justice granted him permission on 25 January 1978 "for the sole purpose of enabling him to live with his Dutch wife", and then renewed it until 8 December 1979.

From November 1977 Mr. Berrehab worked for a self-service shop. On 9 March 1978, a work permit was issued to him under the Aliens (Work Permits) Act 1964 (replaced since 1 November 1979 by the Employment of Aliens Act). This permit was renewed on 18 October 1979. From April 1981 to April 1983 Mr. Berrehab was employed by a cleaning firm.

9. On 8 February 1979, his wife sued for divorce. The Amsterdam Regional Court (Arrondissementsrechtbank) granted the divorce on 9 May 1979 on the ground of the irretrievable breakdown of the marriage, which was dissolved by registration of the decision in the Civil Registry of Amsterdam on 15 August 1979. By an order of 26 November 1979, the Amsterdam Regional Court appointed Mrs. Koster guardian of her daughter, Rebecca, who had been born in the meantime, and appointed the girl's father as an auxiliary guardian (toeziende voogd). On 5 February 1980, it ordered the latter to pay the Child Welfare Council 140 guilders a month as a contribution to the cost of maintaining and educating his daughter.

When Rebecca was born, her father and Mrs. Koster agreed to ensure that the child had frequent, regular contacts with her father. On 27 February 1984, they had a notary legalise an agreement between them as to arrangements for these contacts and certify that over the previous two years Mr. Berrehab had seen his daughter four times a week for several hours each time.

10. On 7 December 1979, Mr. Berrehab made an application for renewal of his residence permit. The head of the Amsterdam police refused the application on the same day, stating that it would be contrary to the public interest to renew the permit, regard being had to the fact that Mr. Berrehab had been allowed to remain in the Netherlands for the sole purpose of living with his Dutch wife, which condition was no longer fulfilled on account of the divorce.

By letter of 26 December 1979, Mr. Berrehab asked the Minister of Justice to review this decision. He pointed out among other things that he needed an "independent" residence permit in order to fulfil his moral and legal obligations as a father. He said he had sufficient means of subsistence and that he was in a position to bear part of the costs of Rebecca's upbringing

and education.

11. The Minister did not reply within the statutory period of three months, which under Netherlands law constituted an implied rejection of the request.

Mr. Berrehab consequently appealed, on 23 April 1980, to the Litigation Division (Afdeling Rechtspraak) of the Raad van State. He stated that he could not see how the grant to him of a residence permit could be prejudicial to the national interest, particularly since he was under various legal obligations as a father and he had been able to support himself since 1977 by working. At the hearing on 14 March 1983, he claimed that the impugned decision infringed Article 8 § 1 (art. 8-1) of the Convention on the ground that it prevented him from remaining in contact with his daughter whom he saw regularly four times a week.

The Raad van State dismissed his appeal on 9 May 1983. It recalled in the first place that, under section 11(5) of the Aliens Act of 13 January 1965 (Vreemdelingenwet - "the 1965 Act"), renewal of a residence permit could be refused in the public interest. As the Minister of State for Justice had pointed out, Mr. Berrehab no longer satisfied the condition upon which the grant of his residence permit depended; consequently, the refusal appealed against could be justified under section 11(5). As for Mr. Berrehab's obligations to his daughter, the Raad van State held that the fulfilment thereof did not serve any vital national interest and that those obligations subsisted independently of his place of residence. It added that four meetings a week were not sufficient to constitute family life within the meaning of Article 8 (art. 8) of the Convention and that the impugned decision would, moreover, not necessarily entail a break in relations between the child and her father, as the latter could remain in contact with his daughter by agreement with his ex-wife.

12. On 30 March 1983, Mr. Berrehab was dismissed by his employer with effect from 15 April. He was, furthermore, arrested on 28 December 1983 for the purpose of his deportation. He made an urgent application (kort geding) to the presiding judge of the Amsterdam Regional Court, but withdrew it shortly after the execution of the impugned deportation order on 5 January 1984; on 18 January, the presiding judge accordingly held that there was no ground on which to give a decision.

In 1984, Rebecca and her mother spent two months with Mr. Berrehab and his family in Morocco. On 28 August 1984, Mr. Berrehab applied to the Netherlands Embassy in Rabat for a three-month residence permit. After an initial refusal he obtained a visa valid for one month, for the purpose of enabling him to exercise his rights of access. Accordingly, he went to the Netherlands on 27 May 1985 where he requested an extension of his visa until the following 27 August. His request having been turned down on 6 June, he lodged an appeal with the Raad van State, accompanied by an urgent application. Hearing the latter application, the President of the Litigation Division decided, on 20 June, that the applicant should be treated - subject to a condition which is not relevant to this judgment - as if he had been granted a visa valid until 27 August.

13. On 14 August 1985, Mr. Berrehab remarried Mrs. Koster in Amsterdam. On 9 December 1985, the Ministry of Justice granted him permission (which he had sought on 29 August) to reside in the Netherlands "for the purpose of living with his Dutch wife and working during that time".

II. The relevant legislation, practice and case-law

A. The general context of Netherlands immigration policy

14. The Netherlands authorities pursue a restrictive immigration policy. The authorities, however, permit exceptions prompted, inter alia, by the wish to honour the obligations flowing from the Convention, by the country's economic well-being and by humanitarian considerations, including the reuniting of families.

The entry requirements and the grounds on which aliens may be expelled are laid down primarily in the 1965 Act and its implementing regulations. In addition to these legal provisions, there is the "Circular on Aliens" (Vreemdelingencirculaire), which is a body of directives drawn up and published by the Ministry of Justice.

The right to stay is therefore governed in principle by sections 8-11 of the Act. A prolonged stay requires the authorisation of the Minister of Justice or a body acting under his control. A refusal to grant an authorisation must be accompanied by a statement of the reasons on which it is based. An appeal lies to the Minister of Justice and then, if need be, to the Raad van State. An application is usually granted - normally for one year - only if the individual's presence serves an essential national interest or if there are compelling humanitarian grounds.

Foreigners married to a Netherlands national fall into the latter category; they may obtain a residence permit "in order to live with their spouse" in the Netherlands and, if appropriate, "in order to work there during that time".

B. Changes in this policy

15. This policy, however, has changed over the years. Foreigners coming to live with their husbands or their wives were initially granted resident status and a conditional residence permit. That status was forfeited if the marriage in respect of which it was granted was dissolved, in which case the foreigner had to leave the country.

In order to enhance the position of foreigners lawfully established in the Netherlands, the Minister of State for Justice felt it necessary to soften the line followed in this respect. Under the terms of the "Vreemdelingencirculaire" (Chapter B 19, paragraph 4.3), foreigners who had been married for more than three years and had lived with their spouses in the Netherlands for at least three years prior to the dissolution of their marriage were enabled to apply for an "independent" residence permit; the underlying idea was that after that length of time they would have forged sufficient links with the country for it to be unnecessary to make their status subject to conditions.

It was subsequently thought advisable to make further changes in the regulations in favour of this category of foreigner. The requirement of three years' marriage was retained but the requisite period of residence was reduced to one year. The purpose of this relaxation was to improve the often precarious position of divorced women, particularly those of Mediterranean origin; it was felt that they ought to be permitted to stay in the Netherlands with a status independent of that of their former husbands.

This policy was later refined still further, when it was decided that even where the aforementioned conditions were not met, overriding humanitarian considerations might justify the grant to a foreigner of authorisation to remain on Netherlands territory on an independent residence permit, for example if he had close links with the Netherlands or with a person resident there. According to the Government, this was an exceptional measure that was rarely applied.

C. Case-law

16. As far as the Netherlands case-law on aliens is concerned, a distinction must be drawn between the courts hearing urgent applications - the civil courts up to and including the Court of Cassation at last instance - and the court conducting a full examination of the merits of the case, namely the Litigation Division of the Raad van State.

While the Court of Cassation in its decisions in other fields, such as the right of access, had already favoured a fairly broad conception of "family life" (see in particular the leading case decided on 22 February 1985, in Nederlandse Jurisprudentie, 1986, no. 3), the Litigation Division of the Raad van State had tended to take a narrower view. Its decision in the instant case is fully in line with that tradition. Several of its most recent decisions, however, suggest that it is going to adopt the principle laid down in a Court of Cassation judgment of 12 December 1986 concerning aliens, from which it emerges that cohabitation is not a sine qua non of "family life" for the purposes of Article 8 (art. 8) of the Convention (Nederlandse Jurisprudentie, 1988, no. 188).

The Court of Cassation recently had before it a case similar to the present one. A court of appeal, hearing an urgent application, had held that where a foreigner threatened with expulsion pleads the right to respect for his own and his child's family life, the onus is on him to show that the minor's interest is sufficiently important to outweigh the State's interest. On appeal, the Court of Cassation quashed the decision on 18 December 1987 (Rechtspraak van de Week, 1988, no. 9). It fell to be decided whether "family life" existed between the alien and his child, and the Court of Cassation began by emphasising that the child was a legitimate one. It went on:

"For the duration of the marriage, there existed between Garti and his son a relationship that amounted to family life within the meaning of Article 8 (art. 8) of the... Convention.... Neither the cessation of cohabitation nor the divorce ended that relationship. It must also be noted that, as Garti claimed and as the Court of Appeal apparently regarded as having been established, Garti and his son remained in close touch after the cessation of cohabitation."

The decision was quashed on the ground, inter alia, that the appeal court had lost sight of the fact that:

"if, in such a case, the expulsion of a foreigner must be regarded as an interference with his right to respect for family life within the meaning of Article 8 (art. 8)..., the sole means of determining whether that interference is justified or may be justified is to weigh, in the light of the facts of the case and the policy directives (beleidsregels) in force, the seriousness of the interference with the right of the foreigner concerned and his minor child to respect for their family life against the interests served by those policy directives, and in so doing one may, in order to assess the seriousness of the interference, have regard notably to the length of time during which those concerned have lived together, to the nature and degree of intensity of the contacts maintained after cohabitation came to an end and to whether it is the parent or the child who is threatened with expulsion".

PROCEEDINGS BEFORE THE COMMISSION

17. In their application of 14 November 1983 to the Commission (no. 10730/84), Mr. Berrehab and his ex-wife Mrs. Koster, the latter acting in her own name and as guardian of their under-age daughter Rebecca, alleged that Mr. Berrehab's deportation amounted - in respect of each of them, and more particularly for the daughter - to treatment that was inhuman and therefore contrary to Article 3 (art. 3) of the Convention. In their submission, the deportation was also an unjustified infringement of the right to respect for their private and family life, as guaranteed in Article 8 (art. 8).

18. On 8 March 1985, the Commission declared Mrs. Koster's complaints inadmissible, but Mr. Berrehab's and Rebecca's complaints were declared admissible.

In its report of 7 October 1986 (made under Article 31) (art. 31), the Commission concluded that there had been a violation of Article 8 (art. 8) (by eleven votes to two) but not of Article 3 (art. 3) (unanimously). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 (art. 8)

19. In the applicants' submission, the refusal to grant a new residence permit after the divorce and the resulting expulsion order infringed Article 8 (art. 8) of the Convention, which provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Government disputed this submission but the Commission accepted it.

A. Applicability of Article 8 (art. 8)

20. The applicants asserted that the applicability of Article 8 (art. 8) in respect of the words "right to respect for... private and family life" did not presuppose permanent cohabitation. The exercise of a father's right of access to his child and his contributing to the cost of education were also factors sufficient to constitute family life.

The Government challenged that analysis, whereas the Commission agreed with it.

21. The Court likewise does not see cohabitation as a sine qua non of family life between parents and minor children. It has held that the relationship created between the spouses by a lawful and genuine marriage - such as that contracted by Mr. and Mrs. Berrehab - has to be regarded as "family life" (see the Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, p. 32, § 62). It follows from the concept of family on which Article 8 (art. 8) is based that a child born of such a union is ipso jure part of that relationship; hence, from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to "family life", even if the parents are not then living together.

Subsequent events, of course, may break that tie, but this was not so in the instant case. Certainly Mr. Berrehab and Mrs. Koster, who had divorced, were no longer living together at the time of Rebecca's birth and did not resume cohabitation afterwards. That does not alter the fact that, until his expulsion from the Netherlands, Mr. Berrehab saw his daughter four times a week for several hours at a time; the frequency and regularity of his meetings with her (see paragraph 9 in fine above) prove that he valued them very greatly. It cannot therefore be maintained that the ties of "family life" between them had been broken.

B. Compliance with Article 8 (art. 8)

1. Paragraph 1 of Article 8 (art. 8-1)

22. In the applicants' submission, the refusal to grant Mr. Berrehab a new residence permit after the divorce and his resulting expulsion amounted to interferences with the right to respect for their family life, given the distance between the Netherlands and Morocco and the financial problems entailed by Mr. Berrehab's enforced return to his home country.

The Government replied that nothing prevented Mr. Berrehab from exercising his right of access by travelling from Morocco to the Netherlands on a temporary visa.

23. Like the Commission, the Court recognises that this possibility was a somewhat theoretical one in the circumstances of the case; moreover, Mr. Berrehab was given such a visa only after an initial refusal (see paragraph 12 above). The two

disputed measures thus in practice prevented the applicants from maintaining regular contacts with each other, although such contacts were essential as the child was very young. The measures accordingly amounted to interferences with the exercise of a right secured in paragraph 1 of Article 8 (art. 8-1) and fall to be considered under paragraph 2 (art. 8-2).

2. Paragraph 2 of Article 8 (art. 8-2)

(a) "In accordance with the law"

24. The Court finds that, as was submitted by the Government and the Commission, the measures in question were based on the 1965 Act; and indeed, the applicants did not dispute that.

(b) Legitimate aim

25. In the applicants' submission, the impugned interferences did not pursue any of the legitimate aims listed in Article 8 § 2 (art. 8-2); in particular, they did not promote the "economic well-being of the country", because they prevented Mr. Berrehab from continuing to contribute to the costs of maintaining and educating his daughter.

The Government considered that Mr. Berrehab's expulsion was necessary in the interests of public order, and they claimed that a balance had been very substantially achieved between the various interests involved.

The Commission noted that the disputed decisions were consistent with Dutch immigration-control policy and could therefore be regarded as having been taken for legitimate purposes such as the prevention of disorder and the protection of the rights and freedoms of others.

26. The Court has reached the same conclusion. It points out, however, that the legitimate aim pursued was the preservation of the country's economic well-being within the meaning of paragraph 2 of Article 8 (art. 8-2) rather than the prevention of disorder: the Government were in fact concerned, because of the population density, to regulate the labour market.

(c) "Necessary in a democratic society"

27. The applicants claimed that the impugned measures could not be considered "necessary in a democratic society".

The Government rejected this argument, but the Commission accepted it, being of the view that the interferences complained of were disproportionate as the authorities had not achieved a proper balance between the applicants' interest in maintaining their contacts and the general interest calling for the prevention of disorder.

28. In determining whether an interference was "necessary in a democratic society", the Court makes allowance for the margin of appreciation that is left to the Contracting States (see in particular the W v. the United Kingdom judgment of 8 July 1987, Series A no. 121-A, p. 27, § 60 (b) and (d), and the Olsson judgment of 24 March 1988, Series A no. 130, pp. 31-32, § 67).

In this connection, it accepts that the Convention does not in principle prohibit the Contracting States from regulating the entry and length of stay of aliens. According to the Court's established case-law (see, inter alia, the judgments previously cited), however, "necessity" implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.

29. Having to ascertain whether this latter condition was satisfied in the instant case, the Court observes, firstly, that its function is not to pass judgment on the Netherlands' immigration and residence policy as such. It has only to examine the interferences complained of, and it must do this not solely from the point of view of immigration and residence, but also with regard to the applicants' mutual interest in continuing their relations. As the Netherlands Court of Cassation also noted (see paragraph 16 above), the legitimate aim pursued has to be weighed against the seriousness of the interference with the applicants' right to respect for their family life.

As to the aim pursued, it must be emphasised that the instant case did not concern an alien seeking admission to the Netherlands for the first time but a person who had already lawfully lived there for several years, who had a home and a job there, and against whom the Government did not claim to have any complaint. Furthermore, Mr. Berrehab already had real family ties there - he had married a Dutch woman, and a child had been born of the marriage.

As to the extent of the interference, it is to be noted that there had been very close ties between Mr. Berrehab and his daughter for several years (see paragraphs 9 and 21 above) and that the refusal of an independent residence permit and the ensuing expulsion threatened to break those ties. That effect of the interferences in issue was the more serious as Rebecca needed to remain in contact with her father, seeing especially that she was very young.

Having regard to these particular circumstances, the Court considers that a proper balance was not achieved between the interests involved and that there was therefore a disproportion between the means employed and the legitimate aim pursued. That being so, the Court cannot consider the disputed measures as being necessary in a democratic society. It thus concludes that there was a violation of Article 8 (art. 8).

II. ALLEGED VIOLATION OF ARTICLE 3 (art. 3)

30. The applicants maintained that the refusal to grant Mr. Berrehab a new residence permit after the divorce and his resulting deportation infringed Article 3 (art. 3), which provides:

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

In the Government's submission, the applicants' complaints disclosed no problem under this provision.

In the Commission's view, the facts of the case did not show that either of the applicants underwent suffering of a degree corresponding to the concepts of "inhuman" or "degrading" treatment.

31. The Court shares this view and finds that there has been no violation of Article 3 (art. 3).

III. APPLICATION OF ARTICLE 50 (art. 50)

32. By Article 50 (art. 50) of the Convention,

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

The applicants, who had legal aid for the proceedings before the Commission and the Court, did not seek reimbursement of costs and expenses. They did, on the other hand, claim financial compensation for twofold pecuniary damage: loss of earnings (31,429.56 guilders) allegedly suffered by Mr. Berrehab from April 1983 to May 1985 by reason both of the dismissal from his job following the refusal to issue him with a new residence permit and of the impossibility of finding work in his home country; and the cost (4,700 guilders) of the journey made by Rebecca Berrehab and her mother to Morocco in July 1984 and by Mr. Berrehab to the Netherlands in May 1985 (see paragraph 12 above). The applicants also sought an unspecified amount of compensation for the mental suffering caused by their separation.

33. In the Government's submission, no causal link had been established between the disputed measures and the alleged pecuniary damage. The Commission accepted that argument with respect to the loss of earnings, but considered that partial compensation for the travel expenses was justified. It also recognised that Mr. Berrehab and Rebecca had sustained non-pecuniary damage; the Government did not express any view on that point.

34. The Court shares the view of the Commission. Taking its decision on an equitable basis, as required by Article 50 (art. 50), it awards the applicants the sum of 20,000 guilders.

FOR THESE REASONS, THE COURT

1. Holds by six votes to one that there has been a violation of Article 8 (art. 8);

2. Holds unanimously that there has been no violation of Article 3 (art. 3);

3. Holds unanimously that the Netherlands is to pay to the applicants 20,000 (twenty thousand) Dutch guilders by way of just satisfaction;

4. Rejects unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 21 June 1988.

Signed: Rolv RYSSDAL President

Signed: Marc-André EISSEN Registrar

In accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 52 § 2 of the Rules of Court, the dissenting opinion of Mr. Thór Vilhjálmsson is annexed to this judgment.

Initialled: R.R.

Initialled: M.-A.E.

DISSENTING OPINION OF JUDGE THÓR VILHJÁLMSSON

To my regret, I have not been able to agree with my colleagues who have found a violation of Article 8 (art. 8) of the Convention in this case. I can agree with the judgment with the sole exception of paragraph 29. It is therefore not necessary for me to elaborate on the issues where I share the opinion of the majority of the Court, namely that there was family life between the applicants, that the first applicant, Mr. Abdellah Berrehab, was treated in accordance with the Aliens Act 1965 and other applicable rules and that the legislation pursues a legitimate aim. There remains the question of whether the interference complained of was "necessary in a democratic society". As already indicated, I have no comments to make on what is stated on this point in paragraph 28 of the judgment. As to the final assessment of whether or not there was a violation of Article 8 (art. 8), I would make the following observations.

The policy of the Netherlands in the field at issue here is set out in detailed rules found in or based on the 1965 Act, as amended. The amendments have been made in the light of experience and there has been a tendency to enable persons of foreign nationality who have certain family ties with Netherlands citizens to take up residence in the Netherlands. As already indicated, the rules pursue a legitimate aim. It may be added that the problem of immigration and residence of foreigners is a very important issue and there is no doubt that restrictions are unavoidable. Generally speaking, in this field the Government must have a wide margin of appreciation when formulating their policy and the necessary legal rules.

Against this have to be weighed the rights embodied in the first paragraph of Article 8 (art. 8-1). There are two applicants, the father and his daughter. It was the father who had to leave the Netherlands and who had dealings with that country's authorities. As stated in the judgment, he and the mother of his daughter had been married to each other, but they had been divorced by the time their child was born. They did not live together. The mother and the first applicant agreed that he should see his daughter frequently and regularly and it must be assumed that he did so during the relevant period. He was also formally appointed an auxiliary guardian of his daughter. Notwithstanding their contacts, which constituted family life, I nevertheless find, taking into account the circumstances that the applicants did not live in the same home and that the parents of the child were not married to each other at the relevant time, that on balance the first applicant's rights did not outweigh the respondent State's interests recognised in paragraph 2 of Article 8 (art. 8-2). This conclusion is supported by the fact that the contacts between the two applicants were not completely terminated after the first applicant left the Netherlands.

As to the rights of the second applicant, the daughter, it seems that they were not considered by the Netherlands authorities who dealt with the first applicant's case. That in itself did not, in my opinion, give rise to a violation of Article 8 (art. 8). I take the view that the Court must assess the competing rights and interests independently. It should be noted that the second applicant was a young girl when her father had to leave the Netherlands. The family life she had enjoyed with him was limited to what he had agreed with the mother. The child had hardly any voice on the scope of her contacts with her father and the respondent State could not alter that situation by any positive action on its part. Thus, her situation was very precarious. In my opinion, this is an argument in favour of the respondent State's position in this case. Taking into account the family situation already described, I have come to the conclusion that neither the rights of the second applicant, taken alone, or the combined rights of the two applicants can lead to a finding of a breach of Article 8 (art. 8).

It should be mentioned that I have, in accordance with the practice in this Court, voted on the question of Article 50 (art. 50) on the basis that there was a violation of Article 8 (art. 8) as decided by the majority.

Társaság a Szabadságjogokért v. Hungary (ECtHR 2009)

(Application no. 37374/05)

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Françoise Tulkens, *President,*
Ireneu Cabral Barreto,
Vladimiro Zagrebelsky,
Danutė Jočienė,
Dragoljub Popović,
András Sajó,
Nona Tsotsoria, *judges,*
and Sally Dollé, *Section Registrar*,

Having deliberated in private on 13 November 2008 and 24 March 2009,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 37374/05) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an association registered in Hungary, the Hungarian Civil Liberties Union (*Társaság a Szabadságjogokért*) ("the applicant"), on 11 October 2005.

2. The applicant was represented by Mr L. Baltay, a lawyer practising in Gyál. The Hungarian Government ("the Government") were represented by Mr L. Höltzl, Agent, Ministry of Justice and Law Enforcement.

3. The applicant alleged that the decisions of the Hungarian courts denying it access to the details of a parliamentarian's complaint pending before the Constitutional Court had amounted to a breach of its right to have access to information of public interest.

4. By a decision of 13 November 2008 the Court declared the application admissible.

5. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant is an association founded in 1994, with its seat in Budapest.

7. In March 2004 a Member of Parliament ("the MP") and other individuals lodged a complaint for abstract review with the Constitutional Court. The complaint requested the constitutional scrutiny of some recent amendments to the Criminal Code which concerned certain drug-related offences.

8. In July 2004 the MP gave a press interview concerning the complaint.

9. On 14 September 2004 the applicant – a non-governmental organisation whose declared aim is to promote fundamental rights as well as to strengthen civil society and the rule of law in Hungary and which is active in the field of drug policy – requested the Constitutional Court to grant them access to the complaint pending before it, in accordance with section 19 of Act no. 63 of 1992 on the Protection of Personal Data and the Public Nature of Data of Public Interest ("the Data Act 1992").

10. On 12 October 2004 the Constitutional Court denied the request without having consulted the MP, explaining that a complaint pending before it could not be made available to outsiders without the approval of its author.

11. On 10 November 2004 the applicant brought an action against the Constitutional Court. It requested the Budapest Regional Court to oblige the respondent to give it access to the complaint, in accordance with section 21(7) of the Data Act 1992.

12. On 13 December 2004 the Constitutional Court adopted a decision on the constitutionality of the impugned amendments to the Criminal Code. It contained a summary of the complaint in question and was pronounced publicly.

13. Notwithstanding the fact that the Constitutional Court procedure had already been terminated, on 24 January 2005 the Regional Court dismissed the applicant's action. It held in essence that the complaint could not be regarded as "data" and

the lack of access to it could not be disputed under the Data Act 1992.

14. The applicant appealed, disputing the Regional Court's findings. Moreover, it requested that the complaint be made available to it after the deletion of any personal information contained therein.

15. On 5 May 2005 the Court of Appeal upheld the first-instance decision. It considered that the complaint contained some "data"; however, that data was "personal" and could not be accessed without the author's approval. Such protection of personal data could not be overridden by other lawful interests, including the accessibility of public information.

16. The applicant's secondary claim was rejected without any particular reasoning.

II. RELEVANT DOMESTIC LAW

1. The Constitution of the Republic of Hungary

Article 59

"(1) ... [E]veryone has the right to a good reputation, the privacy of his home and the protection of secrecy in private affairs and personal data."

Article 61

"(1) ... [E]veryone has the right to express freely his/her opinion and, furthermore, to access and distribute information of public interest."

2. Act no. 32 of 1989 on the Constitutional Court

Section 1

"The competence of the Constitutional Court includes:

(b) posterior review of the constitutionality of statutes..."

Section 21

"(2) The procedure under section 1 (b) may be initiated by anyone."

3. The Data Act 1992

Section 2 (as in force at the material time)

"(4) *Public information*: data, other than personal data, which relates to the activities of, or is processed by, a body or a person carrying out State or municipal tasks or other public duties defined by the law."

Section 3

"(1) (a) Personal data may be processed if the person concerned consents to it...."

Section 4

"Unless exception is made under the law, the right to protection of personal data and the personality rights of the person concerned must not be violated by ... interests related to data management, including the public nature (section 19) of data of general interest."

Section 19

"(1) The organs or persons charged with exercising State ... functions shall, within the scope of their competence ..., promote and secure the right of the public to be informed accurately and speedily.

(2) The organs mentioned in subsection 1 hereof shall regularly publish or otherwise make accessible the most important data ... concerning their activities. ...

(3) Those mentioned in subsection 1 hereof shall ensure that anyone is able to access any data of public interest which they may handle, unless the data has been lawfully declared State or service secrets by a competent authority ... or the law restricts the right of public access to data of public interest, specifying the types of data concerned, regard being had to:

(a) the interests of national defence;

(b) the interests of national security;

(c) the interests of the prevention or prosecution of crime;

(d) the interests of central finances or foreign exchange policy;

(e) foreign relations or relations with international organisations;

(f) a pending court procedure. ...”

Section 21

“(1) If an applicant's request for data of public interest is denied, he or she shall have access to a court.

(2) The burden of proof concerning the lawfulness and well-foundedness of the refusal shall lie with the organ handling the data.

(3) The action shall be brought within 30 days from the notification of the refusal against the organ which has denied the information sought. ...

(6) The court shall give priority to these cases.

(7) If the court accepts the applicant's claim, it shall issue a decision ordering the organ handling the data to communicate the information of public interest which has been sought.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

17. The applicant submitted that the Hungarian court decisions in the present case had constituted an infringement of its right to receive information of public interest. In its view, this was in breach of Article 10 of the Convention, of which the relevant part reads as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ... for the protection of the reputation or rights of others, [or] for preventing the disclosure of information received in confidence, ...”

A. The Government's arguments

18. The Government did not contest that there had been an interference with the applicant's rights under Article 10 of the Convention. However, they emphasised that paragraph 2 of that provision allowed the Contracting States to restrict this right in certain circumstances. According to the Court's case-law, States have a certain margin of appreciation in determining whether or not a restriction on the rights protected by Article 10 is necessary.

19. They submitted that the Constitution recognised the rights to freedom of expression and access to information of public interest, and ensured their exercise by regulation under separate laws. The possibility to interfere with these rights was therefore prescribed by law. The Data Act 1992 regulated the functioning of the fundamental rights enshrined in Articles 59 (1) and 61(1) of the Constitution. Its definition of public information, which had been in force until an amendment on 1 June 2005, had excluded personal data, whilst ensuring access to other types of data. In the instant case, the second-instance court had established that the data sought to be accessed had been personal, because it had contained the MP's personal details and opinions, which would enable conclusions to be drawn about his personality. The mere fact that the MP had decided to lodge a constitutional complaint could not be regarded as consent to disclosure, since the Constitutional Court deliberated *in camera* and its decisions, although pronounced publicly, did not contain personal information about those having applied. Consequently, constitutional applicants did not have to take into account the possibility that their personal details would be disclosed.

20. The Government endorsed the courts' finding that the handling of public data was governed by the rule defining its public nature, whilst that of personal data by the rule of self-determination. Hence, access to data of a public nature could be restricted on the ground that it contained information the preservation of which was essential to protect personal data. Should the legislature make constitutional complaints and the personal data contained therein accessible to anyone by characterising the complaints as public information, this would discourage citizens from instituting such proceedings. Therefore, in the Government's view, the domestic courts in the present case had acted lawfully and in conformity with the Convention when they had denied access to the MP's constitutional complaint.

21. Within the framework of the Data Act 1992, the right of access to data of public interest was restricted by the right to the protection of personal data. The Government maintained that this restriction met the requirements laid down in the Convention, in that it was prescribed by law, it was applied in order to protect the rights of others and it was necessary in a democratic society.

B. The applicant's arguments

22. The applicant submitted at the outset that to receive and impart information is a precondition of freedom of expression, since one could not form or hold a well-founded opinion without knowing the relevant and accurate facts. Since it is actively engaged in Hungarian drug policy, the denial of access to the complaint in question had made it impossible for it to accomplish its mission and enter into the public debate about the issue. It claimed to play a press-like role in this connection, since its work allowed the public to discover, and form an opinion about, the ideas and attitudes of political leaders concerning drug policy. The Constitutional Court had thwarted its attempt to start a public debate at the preparatory stage.

23. The applicant further maintained that States have positive obligations under Article 10 of the Convention. Since, in the present case, the Hungarian authorities had not needed to collect the impugned information, because it had been ready and available, their only obligation would have been not to bar access to it. The disclosure of public information on request in fact falls within the notion of the right "to receive", as understood by Article 10 § 1. This provision protects not only those who wish to inform others but also those who seek to receive such information. To hold otherwise would mean that freedom of expression is no more than the absence of censorship, which would be incompatible with the above-mentioned positive obligations.

24. The applicant also submitted that the private sphere of politicians was narrower than that of other citizens, since they exposed themselves to criticism. Therefore, access to their personal data might be necessary if it concerned their public performance, as in the present case. If one accepted the Government's arguments, all data would be considered personal and excluded from public scrutiny – which would render the notion of public information meaningless. In any event, no details of the protected private sphere of the MP would have been made public in connection with his complaint.

25. Moreover, the applicant disputed the existence of a legitimate aim. The Constitutional Court had never asked the MP whether he would permit the disclosure of his personal data contained in his constitutional complaint. Therefore it could not be said that the restriction had served the protection of his rights. The Constitutional Court's real aim had been to prevent a public debate on the question. For the applicant, the secrecy of such complaints was alarming, since it prevented the public from assessing the Constitutional Court's practice. However, even assuming the existence of a legitimate aim, the restriction had not been necessary in a democratic society. Wide access to public information is in line with recent development of human rights' protection, as well as with Resolution No. 1087 (1996) of the Council of Europe's Parliamentary Assembly.

C. The Court's assessment

1. Whether there has been an interference

26. The Court has consistently recognised that the public has a right to receive information of general interest. Its case-law in this field has been developed in relation to press freedom which serves to impart information and ideas on such matters (see Observer *and* Guardian *v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216, and *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 63, Series A no. 239). In this connection, the most careful scrutiny on the part of the Court is called for when the measures taken by the national authority are capable of discouraging the participation of the press, one of society's "watchdogs", in the public debate on matters of legitimate public concern (see Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 64, ECHR 1999 III, and *Jersild v. Denmark*, 23 September 1994, § 35, Series A no. 298), even measures which merely make access to information more cumbersome.

27. In view of the interest protected by Article 10, the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information. For example, the latter activity is an essential preparatory step in journalism and is an inherent, protected part of press freedom (see *Dammann v. Switzerland* (no. 77551/01, § 52, 25 April 2006). The function of the press includes the creation of forums for public debate. However, the realisation of this function is not limited to the media or professional journalists. In the present case, the preparation of the forum of public debate was conducted by a non-governmental organisation. The purpose of the applicant's activities can therefore be said to have been an essential element of informed public debate. The Court has repeatedly recognised civil society's important contribution to the discussion of public affairs (see, for example, *Steel and Morris v. the United Kingdom* (no. 68416/01, § 89, ECHR 2005 II). The applicant is an association involved in human rights litigation with various objectives, including the protection of freedom of information. It may therefore be characterised, like the press, as a social "watchdog" (see *Riolo v. Italy*, no. 42211/07, § 63, 17 July 2008; *Vides Aizsardzības Klubs v. Latvia*,

no. 57829/00, § 42, 27 May 2004). In these circumstances, the Court is satisfied that its activities warrant similar Convention protection to that afforded to the press.

28. The subject matter of the instant dispute was the constitutionality of criminal legislation concerning drug-related offences. In the Court's view, the submission of an application for an *a posteriori* abstract review of this legislation, especially by a Member of Parliament, undoubtedly constituted a matter of public interest. Consequently, the Court finds that the applicant was involved in the legitimate gathering of information on a matter of public importance. It observes that the authorities interfered in the preparatory stage of this process by creating an administrative obstacle. The Constitutional Court's monopoly of information thus amounted to a form of censorship. Furthermore, given that the applicant's intention was to impart to the public the information gathered from the constitutional complaint in question, and thereby to contribute to the public debate concerning legislation on drug-related offences, its right to impart information was clearly impaired.

29. There has therefore been an interference with the applicant's rights enshrined in Article 10 § 1 of the Convention.

2. Whether the interference was justified

30. The Court reiterates that an interference with an applicant's rights under Article 10 § 1 will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 10. It should therefore be determined whether it was "prescribed by law", whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was "necessary in a democratic society" in order to achieve those aims.

a. "Prescribed by law"

31. The applicant requested the information, relying on the Data Protection Act which guarantees access to data of public interest. The Government argued that the relevant legislation provided a sufficient legal basis for the interference with the applicant's right to freedom of expression, the treatment of 'personal data' overriding the element of public interest.

32. The Court is satisfied that the interference was "prescribed by law", within the meaning of Article 10 § 2 of the Convention.

b. Legitimate aim

33. The applicant argued that the restriction could not be said to have served the protection of the MP's rights, since the Constitutional Court had never asked his permission for the disclosure of his personal data. The Government argued that the interference served to protect the rights of others.

34. The Court considers that the interference in question can be seen as having pursued the legitimate aim of the protection of the rights of others, within the meaning of Article 10 § 2 of the Convention.

c. Necessary in a democratic society

35. The Court recalls at the outset that "Article 10 does not ... confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual" (*Leander v. Sweden*, 26 March 1987, § 74 *in fine*, Series A no. 116) and that "it is difficult to derive from the Convention a general right of access to administrative data and documents" (*Loiseau v. France* (dec.), no. 46809/99, ECHR 2003-XII (extracts)). Nevertheless, the Court has recently advanced towards a broader interpretation of the notion of "freedom to receive information" (see *Sdružení Jihočeské Matky c. la République tchèque* (dec.), no. 19101/03, 10 July 2006) and thereby towards the recognition of a right of access to information.

36. In any event, the Court notes that "the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him" (*Leander*, *op. cit.*, § 74). It considers that the present case essentially concerns an interference – by virtue of the censorial power of an information monopoly – with the exercise of the functions of a social watchdog, like the press, rather than a denial of a general right of access to official documents. In this connection, a comparison can be drawn with the Court's previous concerns that preliminary obstacles created by the authorities in the way of press functions call for the most careful scrutiny (see *Chauvy and Others v. France*, no. 64915/01, § 66, ECHR 2004 VI). Moreover, the State's obligations in matters of freedom of the press include the elimination of barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities. The Court notes at this juncture that the information sought by the applicant in the present case was ready and available (see, *a contrario*, *Guerra and Others v. Italy*, 19 February 1998, § 53 *in fine*, *Reports of Judgments and Decisions* 1998-I) and did not require the collection of any data by the Government. Therefore, the Court considers that the State had an obligation not to impede the flow of information sought by the applicant.

37. The Court observes that the applicant had requested information about the constitutional complaint eventually without the personal data of its author. Moreover, the Court finds it quite implausible that any reference to the private life of the MP, hence to a protected private sphere, could be discerned from his constitutional complaint. It is true that he had informed the press that he had lodged the complaint, and therefore his opinion on this public matter could, in principle, be identified with his person. However, the Court considers that it would be fatal for freedom of expression in the sphere of politics if public figures could censor the press and public debate in the name of their personality rights, alleging that their opinions on public matters are related to their person and therefore constitute private data which cannot be disclosed without consent. These considerations cannot justify, in the Court's view, the interference of which complaint is made in the present case.

38. The Court considers that obstacles created in order to hinder access to information of public interest may discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their vital role as "public watchdogs" and their ability to provide accurate and reliable information may be adversely affected (see, *mutatis mutandis*, *Goodwin v. the United Kingdom*, judgment of 27 March 1996, *Reports* 1996-II, p. 500, § 39).

39. The foregoing considerations lead the Court to conclude that the interference with the applicant's freedom of expression in the present case cannot be regarded as having been necessary in a democratic society. It follows that there has been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

41. The applicant claimed 5,000 euros (EUR) for non-pecuniary damage suffered on account of the fact that, because of the restriction complained of, it had been unable to generate, and contribute to, an open and well-informed public debate on drug policy.

42. The Government contested this claim.

43. The Court considers that the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary damage which the applicant may have suffered.

B. Costs and expenses

44. The applicant claimed EUR 5,594 in respect of legal fees incurred before the Court (this amount, which includes VAT at 20%, would correspond to altogether 44 hours of work by its lawyer) and EUR 80 in respect of clerical costs.

45. The Government contested this claim.

46. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant EUR 3,000 for costs and expenses under all heads.

C. Default interest

47. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 10 of the Convention;

2. *Holds* that the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary damage which the applicant may have suffered;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into Hungarian forints at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 14 April 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé Françoise Tulkens
Registrar President

GRAND CHAMBER
CASE OF M.S.S. v. BELGIUM AND GREECE
(Application no. 30696/09)

JUDGMENT
STRASBOURG
21 January 2011

In the case of M.S.S. v. Belgium and Greece,

The European Court of Human Rights, sitting as a Grand Chamber composed of:
Jean-Paul Costa, President,
Christos Rozakis,
Nicolas Bratza,
Peer Lorenzen,
Françoise Tulkens,
Josep Casadevall,
Ireneu Cabral Barreto,
Elisabet Fura,
Khanlar Hajiyev,
Danutė Jočienė,
Dragoljub Popović,
Mark Villiger,
András Sajó,
Ledi Bianku,
Ann Power,
Işıl Karakaş,
Nebojša Vučinić, Judges,
and Michael O'Boyle, Deputy Registrar,

Having deliberated in private on 1 September and 15 December 2010,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 30696/09) against the Kingdom of Belgium and the Hellenic Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Afghan national, Mr M.S.S. ("the applicant"), on 11 June 2009. The President of the Chamber to which the case had been assigned acceded to the applicant's request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant was represented by Mr Z. Chihaoui, a lawyer practising in Brussels. The Belgian Government were represented by their Agent, Mr M. Tysebaert and their co-Agent, Mrs I. Niedlispacher. The Greek Government were represented by Mrs M. Germani, Legal Assistant at the State Legal Council.

3. The applicant alleged in particular that his expulsion by the Belgian authorities had violated Articles 2 and 3 of the Convention and that he had been subjected in Greece to treatment prohibited by Article 3; he also complained of the lack of a remedy under Article 13 of the Convention that would enable him to have his complaints examined.

.....8. A hearing took place in public in the Human Rights Building, Strasbourg, on 1 September 2010 (Rule 59 § 3).

FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Entry into the European Union

9. The applicant left Kabul early in 2008 and, travelling via Iran and Turkey, entered the European Union through Greece, where his fingerprints were taken on 7 December 2008 in Mytilene.

10. He was detained for a week and, when released, was issued with an order to leave the country. He did not apply for asylum in Greece.

B. Asylum procedure and expulsion procedure in Belgium

11. On 10 February 2009, after transiting through France, the applicant arrived in Belgium, where he presented himself to the Aliens Office with no identity documents and applied for asylum.

12. The examination and comparison of the applicant's fingerprints generated a Eurodac “hit” report on 10 February 2009 revealing that the applicant had been registered in Greece.

13. The applicant was placed initially in the Lanaken open reception centre for asylum seekers.

14. On 18 March 2009, by virtue of Article 10 § 1 of Regulation no. 343/2003/EC (the Dublin Regulation, see paragraphs 65-82 below), the Aliens Office submitted a request for the Greek authorities to take charge of the asylum application. When the Greek authorities failed to respond within the two-month period provided for in Article 18 § 1 of the Regulation, the Aliens Office considered this to be a tacit acceptance of the request to take charge of the application, pursuant to paragraph 7 of that provision.

15. During his interview under the Dublin Regulation on 18 March 2009 the applicant told the Aliens Office that he had fled Afghanistan with the help of a smuggler he had paid 12,000 dollars and who had taken his identity papers. He said he had chosen Belgium after meeting some Belgian North Atlantic Treaty Organisation (NATO) soldiers who had seemed very friendly. He also requested that the Belgian authorities examine his fears. He told them he had a sister in the Netherlands with whom he had lost contact. He also mentioned that he had had hepatitis B and had been treated for eight months.

16. On 2 April 2009, the UNHCR sent a letter to the Belgian Minister for Migration and Asylum Policy criticising the deficiencies in the asylum procedure and the conditions of reception of asylum seekers in Greece and recommending the suspension of transfers to Greece (see paragraphs 194 and 195, below). A copy was sent to the Aliens Office.

17. On 19 May 2009, in application of section 51/5 of the Act of 15 December 1980 on the entry, residence, settlement and expulsion of aliens (“the Aliens Act”), the Aliens Office decided not to allow the applicant to stay and issued an order directing him to leave the country. The reasons given for the order were that, according to the Dublin Regulation, Belgium was not responsible for examining the asylum application; Greece was responsible and there was no reason to suspect that the Greek authorities would fail to honour their obligations in asylum matters under Community law and the 1951 Geneva Convention relating to the Status of Refugees. That being so, the applicant had the guarantee that he would be able, as soon as he arrived in Greece, to submit an application for asylum, which would be examined in conformity with the relevant rules and regulations. The Belgian authorities were under no obligation to apply the derogation clause provided for in Article 3 § 2 of the Regulation. Lastly, the applicant suffered from no health problem that might prevent his transfer and had no relatives in Belgium.

18. On the same day the applicant was taken into custody with a view to the enforcement of that decision and placed in closed facility 127 bis for illegal aliens, in Steenokkerzeel.

19. On 26 May 2009 the Belgian Committee for Aid to Refugees, the UNHCR's operational partner in Belgium, was apprised of the contact details of the lawyer assigned to the applicant.

20. On 27 May 2009 the Aliens Office scheduled his departure for 29 May 2009.

21. At 10.25 a.m. on the appointed day, in Tongres, the applicant's initial counsel lodged an appeal by fax with the Aliens Appeals Board to have the order to leave the country set aside, together with a request for a stay of execution under the extremely urgent procedure. The reasons given, based in particular on Article 3 of the Convention, referred to a risk of arbitrary detention in Greece in appalling conditions, including a risk of ill-treatment. The applicant also relied on the deficiencies in the asylum procedure in Greece, the lack of effective access to judicial proceedings and his fear of being sent back to Afghanistan without any examination of his reasons for having fled that country.

22. The hearing was scheduled for the same day, at 11.30 a.m., at the seat of the Aliens Appeals Board in Brussels. The applicant's counsel did not attend the hearing and the application for a stay of execution was rejected on the same day, for failure to attend.

23. The applicant refused to board the aircraft on 29 May 2009 and his renewed detention was ordered under section 27, paragraph 1, of the Aliens Act.

24. On 4 June 2009 the Greek authorities sent a standard document confirming that it was their responsibility under Articles 18 § 7 and 10 § 1 of the Dublin Regulation to examine the applicant's asylum request. The document ended with the following sentence: “Please note that if he so wishes this person may submit an application [for asylum] when he arrives in Greece.”

25. On 9 June 2009 the applicant's detention was upheld by order of the chambre du conseil of the Brussels Court of First Instance.

26. On appeal on 10 June, the Indictments Chamber of the Brussels Court of Appeal scheduled a hearing for 22 June 2009.

27. Notified on 11 June 2009 that his departure was scheduled for 15 June, the applicant lodged a second request, through his current lawyer, with the Aliens Appeals Board to set aside the order to leave the territory. He relied on the risks he would face in Afghanistan and those he would face if transferred to Greece because of the slim chances of his application for asylum being properly examined and the appalling conditions of detention and reception of asylum seekers in Greece.

28. A second transfer was arranged on 15 June 2009, this time under escort.

29. By two judgments of 3 and 10 September 2009, the Aliens Appeals Board rejected the applications for the order to leave the country to be set aside – the first because the applicant had not filed a request for the proceedings to be continued within the requisite fifteen days of service of the judgment rejecting the request for a stay of execution lodged under the extremely urgent procedure, and the second on the ground that the applicant had not filed a memorial in reply.

30. No administrative appeal on points of law was lodged with the Conseil d'Etat.

C. Request for interim measures against Belgium

31. In the meantime, on 11 June 2009, the applicant applied to the Court, through his counsel, to have his transfer to Greece suspended. In addition to the risks he faced in Greece, he claimed that he had fled Afghanistan after escaping a murder attempt by the Taliban in reprisal for his having worked as an interpreter for the international air force troops stationed in Kabul. In support of his assertions, he produced certificates confirming that he had worked as an interpreter.

32. On 12 June 2009 the Court refused to apply Rule 39 but informed the Greek Government that its decision was based on its confidence that Greece would honour its obligations under the Convention and comply with EU legislation on asylum. The letter sent to the Greek Government read as follows:

“That decision was based on the express understanding that Greece, as a Contracting State, would abide by its obligations under Articles 3, 13 and 34 of the Convention. The Section also expressed its confidence that your Government would comply with their obligations under the following:

- the Dublin Regulation referred to above;

- Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status; and

- Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

I should be grateful therefore if your Government would undertake to inform the Court of the progress of any asylum claim made by the applicant in Greece as well as the place of detention, if he is detained on arrival in Greece.”

D. Indication of interim measures against Greece

33. On 15 June 2009 the applicant was transferred to Greece. On arriving at Athens international airport he gave his name as that used in the agreement to take responsibility issued by the Greek authorities on 4 June 2009.

34. On 19 June 2009 the applicant's lawyer received a first text message (sms), in respect of which he informed the Court. It stated that upon arrival the applicant had immediately been placed in detention in a building next to the airport, where he was locked up in a small space with 20 other detainees, had access to the toilets only at the discretion of the guards, was not allowed out into the open air, was given very little to eat and had to sleep on a dirty mattress or on the bare floor.

35. When released on 18 June 2009, he was given an asylum seeker's card (“pink card”, see paragraph 89 below). At the

same time the police issued him with the following notification (translation provided by the Greek Government):

“In Spata, on 18.06.2009 at 12.58 p.m., I, the undersigned police officer [...], notified the Afghan national [...], born on [...], of no registered address, that he must report within two days to the Aliens Directorate of the Attica Police Asylum Department to declare his home address in Greece so that he can be informed of progress with his asylum application.”

36. The applicant did not report to the Attica police headquarters on Petrou Ralli Avenue in Athens (hereafter “the Attica police headquarters”).

37. Having no means of subsistence, the applicant went to live in a park in central Athens where other Afghan asylum seekers had assembled.

38. Having been informed of the situation on 22 June 2009, the Registrar of the Second Section sent a further letter to the Greek Government which read as follows:

“I should be obliged if your Government would inform the Court of the current situation of the applicant, especially concerning his possibilities to make an effective request for asylum. Further, the Court should be informed about the measures your Government intend to take regarding:

a) the applicant's deportation;

b) the means to be put at the applicant's disposal for his subsistence.”

39. The Greek authorities were given until 29 June 2009 to provide this information, it being specified that: “Should you not reply to our letter within the deadline, the Court will seriously consider applying Rule 39 against Greece.”

40. On 2 July 2009, having regard to the growing insecurity in Afghanistan, the plausibility of the applicant's story concerning the risks he had faced and would still face if he were sent back to that country and the lack of any reaction on the part of the Greek authorities, the Court decided to apply Rule 39 and indicate to the Greek Government, in the parties' interest and that of the smooth conduct of the proceedings, not to have the applicant deported pending the outcome of the proceedings before the Court.

41. On 23 July 2009 the Greek Government informed the Court, in reply to its letter of 22 June 2009, that on arriving at Athens airport on 15 June 2009 the applicant had applied for asylum and the asylum procedure had been set in motion. The Government added that the applicant had then failed to go to the Attica police headquarters within the two-day time-limit to fill in the asylum application and give them his address.

42. In the meantime the applicant's counsel kept the Court informed of his exchanges with the applicant. He confirmed that he had applied for asylum at the airport and had been told to go to the Attica police headquarters to give them his address for correspondence in the proceedings. He had not gone, however, as he had no address to give them.

E. Subsequent events

43. On 1 August 2009, as he was attempting to leave Greece, the applicant was arrested at the airport in possession of a false Bulgarian identity card.

44. He was placed in detention for seven days in the same building next to the airport where he had been detained previously. In a text message to his counsel he described his conditions of detention, alleging that he had been beaten by the police officers in charge of the centre, and said that he wanted to get out of Greece at any cost so as not to have to live in such difficult conditions.

45. On 3 August 2009 he was sentenced by the Athens Criminal Court to two months' imprisonment, suspended for three years, for attempting to leave the country with false papers.

46. On 4 August 2009, the Ministry of Public Order (now the Ministry of Civil Protection) adopted an order stipulating that in application of section 76 of Law no. 3386/2005 on the entry, residence and social integration of third-country nationals in Greece, the applicant was the subject of an administrative expulsion procedure. It further stipulated that the applicant could be released as he was not suspected of intending to abscond and was not a threat to public order.

47. On 18 December 2009 the applicant went to the Attica police headquarters, where they renewed his pink card for six months. In a letter on the same day the police took note in writing that the applicant had informed them that he had nowhere to live, and asked the Ministry of Health and Social Solidarity to help find him a home.

48. On 20 January 2010 the decision to expel the applicant was automatically revoked by the Greek authorities because the

applicant had made an application for asylum prior to his arrest.

49. In a letter dated 26 January 2010 the Ministry of Health and Social Solidarity informed the State Legal Council that, because of strong demand, the search for accommodation for the applicant had been delayed, but that something had been found; in the absence of an address where he could be contacted, however, it had not been possible to inform the applicant.

50. On 18 June 2010 the applicant went to the Attica police headquarters, where his pink card was renewed for six months.

51. On 21 June 2010 the applicant received a notice in Greek, which he signed in the presence of an interpreter, inviting him to an interview at the Attica police headquarters on 2 July 2010. The applicant did not attend the interview.

52. Contacted by his counsel after the hearing before the Court, the applicant informed him that the notice had been handed to him in Greek when his pink card had been renewed and that the interpreter had made no mention of any date for an interview.

53. In a text message to his counsel dated 1 September 2010 the applicant informed him that he had once again attempted to leave Greece for Italy, where he had heard reception conditions were more decent and he would not have to live on the street. He was stopped by the police in Patras and taken to Salonika, then to the Turkish border for expulsion there. At the last moment, the Greek olice decided not to expel him, according to the applicant because of the presence of the Turkish police.

II. RELEVANT INTERNATIONAL AND EUROPEAN LAW

A. The 1951 Geneva Convention relating to the Status of Refugees

54. Belgium and Greece have ratified the 1951 Geneva Convention relating to the Status of Refugees (“the Geneva Convention”), which defines the circumstances in which a State must grant refugee status to those who request it, as well as the rights and duties of such persons.

55. In the present case, the central Article is Article 33 § 1 of the Geneva Convention, which reads as follows:

“1. No Contracting State shall expel or return (" refouler ") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

56. In its note of 13 September 2001 on international protection (A/AC.96/951, § 16), the UNHCR, whose task it is to oversee how the States Parties apply the Geneva Convention, stated that the principle of “non-refoulement” was: “a cardinal protection principle enshrined in the Convention, to which no reservations are permitted. In many ways, the principle is the logical complement to the right to seek asylum recognized in the Universal Declaration of Human Rights. It has come to be considered a rule of customary international law binding on all States. In addition, international human rights law has established non-refoulement as a fundamental component of the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment. The duty not to refoule is also recognized as applying to refugees irrespective of their formal recognition, thus obviously including asylum-seekers whose status has not yet been determined. It encompasses any measure attributable to a State which could have the effect of returning an asylum-seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she would risk persecution. This includes rejection at the frontier, interception and indirect refoulement, whether of an individual seeking asylum or in situations of mass influx.”

B. Community law

1. The Treaty on European Union (as amended by the Treaty of Lisbon, which entered into force on 1 December 2009)

57. Fundamental rights, as guaranteed by the Convention, are part of European Union law and are recognised in these terms:

Article 2

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities...”

Article 6

“1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European

Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

...

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

2. The Treaty on the Functioning of the European Union (as amended by the Treaty of Lisbon, which entered into force on 1 December 2009)

58. The issues of particular relevance to the present judgment are covered by Title V – Area of Freedom, Security and Justice – of Part Three of the Treaty on the Functioning of the European Union on Union Policies and internal action of the Union. In Chapter 1 of this Title, Article 67 stipulates:

"1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

2. It ... shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. ..."

59. The second chapter of Title V concerns "policies on border checks, asylum and immigration".

Article 78 § 1 stipulates:

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

60. Article 78 § 2 provides, inter alia, for the Union's legislative bodies to adopt a uniform status of asylum and subsidiary protection, as well as criteria and mechanisms for determining which Member State is responsible for considering an application for asylum.

3. The Charter of Fundamental Rights of the European Union

61. The Charter of Fundamental Rights, which has been part of the primary law of the European Union since the entry into force of the Treaty of Lisbon, contains an express provision guaranteeing the right to asylum, as follows:

Article 18 – 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 establishing the European Community."

4. The "Dublin" asylum system

62. Since the European Council of Tampere in 1999, the European Union has organised the implementation of a common European asylum system.

63. The first phase (1999-2004) saw the adoption of several legal instruments setting minimum common standards in the fields of the reception of asylum seekers, asylum procedures and the conditions to be met in order to be recognised as being in need of international protection, as well as rules for determining which Member State is responsible for examining an application for asylum ("the Dublin system").

64. The second phase is currently under way. The aim is to further harmonise and improve protection standards with a view to introducing a common European asylum system by 2012. The Commission announced certain proposals in its policy plan on asylum of 17 June 2008 (COM(2008) 360).

(a) The Dublin Regulation and the Eurodac Regulation 65. Council Regulation No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national ("the Dublin Regulation") applies to the Member States of the European Union and to Norway, Iceland and Switzerland.

66. The Regulation replaces the provisions of the Dublin Convention for determining the State responsible for examining

applications for asylum lodged in one of the Member States of the European Communities, signed on 15 June 1990.

67. An additional regulation, Regulation no. 1560/2003 of 2 September 2003, lays down rules for the application of the Dublin Regulation.

68. The first recital of the Dublin Regulation states that it is part of a common policy on asylum aimed at progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.

69. The second recital affirms that the Regulation is based on the presumption that the member States respect the principle of non-refoulement enshrined in the Geneva Convention and are considered as safe countries.

70. Under the Regulation, the Member States must determine, based on a hierarchy of objective criteria (Articles 5 to 14), which Member State bears responsibility for examining an asylum application lodged on their territory. The aim is to avoid multiple applications and to guarantee that each asylum seeker's case is dealt with by a single Member State.

71. Where it is established that an asylum seeker has irregularly crossed the border into a Member State having come from a third country, the Member State thus entered is responsible for examining the application for asylum (Article 10 § 1). This responsibility ceases twelve months after the date on which the irregular border crossing took place.

72. Where the criteria in the regulation indicate that another Member State is responsible, that State is requested to take charge of the asylum seeker and examine the application for asylum. The requested State must answer the request within two months from the date of receipt of that request. Failure to reply within two months is stipulated to mean that the request to take charge of the person has been accepted (Articles 17 and 18 §§ 1 and 7).

73. Where the requested Member State accepts that it should take charge of an applicant, the Member State in which the application for asylum was lodged must notify the applicant of the decision to transfer him or her, stating the reasons. The transfer must be carried out at the latest within six months of acceptance of the request to take charge. Where the transfer does not take place within that time-limit, responsibility for processing the application lies with the Member State in which the application for asylum was lodged (Article 19).

74. By way of derogation from the general rule, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in the Regulation (Article 3 § 2). This is called the “sovereignty” clause. In such cases the State concerned becomes the Member State responsible and assumes the obligations associated with that responsibility.

75. Furthermore, any Member State, even where it is not responsible under the criteria set out in the Regulation, may bring together family members, as well as other dependent relatives, on humanitarian grounds based in particular on family or cultural considerations (Article 15 § 1). This is known as the “humanitarian” clause. In this case that Member State will, at the request of another Member State, examine the application for asylum of the person concerned. The persons concerned must consent.

76. Another Council Regulation, no. 2725/2000 of 11 December 2000, provides for the establishment of the Eurodac system for the comparison of fingerprints (“the Eurodac Regulation”). It requires the States to register asylum seekers' fingerprints. The data is transmitted to Eurodac's central unit, run by the European Commission, which stores it in its central database and compares it with the data already stored there.

77. On 6 June 2007 the European Commission transmitted a report to the European Parliament and the Council on the evaluation of the Dublin system (COM(2007)299 final). On 3 December 2008 it made public its proposal for a recasting of the Dublin Regulation (COM(2008) 820 final/2). The purpose of the reform is to improve the efficiency of the system and ensure that all the needs of persons seeking international protection are covered by the procedure for determining responsibility.

78. The proposal aims to set in place a mechanism for suspending transfers under the Dublin system, so that, on the one hand, member States whose asylum systems are already under particularly heavy pressure are not placed under even more pressure by such transfers and, on the other hand, asylum seekers are not transferred to Member States which cannot offer them a sufficient level of protection, particularly in terms of reception conditions and access to the asylum procedure (Article 31 of the proposal). The State concerned must apply to the European Commission for a decision. The transfers may be suspended for up to six months. The Commission may extend the suspension for a further six months at its own initiative or at the request of the State concerned.

79. The proposal, examined under the codecision procedure, was adopted by the European Parliament at first reading on 7

May 2009 and submitted to the Commission and the Council.

80. At the Informal Justice and Home Affairs Council meeting in Brussels on 15 and 16 July 2010, the Belgian Presidency of the Council of the European Union placed on the agenda an exchange of views on the means of arriving at a single asylum procedure and a uniform standard of international protection by 2012. Discussion focused in particular on what priority the Council should give to negotiations on the recasting of the Dublin Regulation and on whether the ministers would back the inclusion of the temporary suspension clause.

81. The Court of Justice of the European Communities (CJEC), which became the Court of Justice of the European Union (CJEU) upon the entry into force of the Treaty of Lisbon, has delivered one judgment concerning the Dublin Regulation. In the Petrosian case (C-19/08, judgment of 29 January 2009) it was asked to clarify the interpretation of Article 20 §§ 1 and 2 concerning the taking of responsibility for an asylum application and the calculation of the deadline for making the transfer when the legislation of the requesting Member State provided for appeals to have suspensive effect. The CJEU found that time started to run from the time of the decision on the merits of the request.

82. The CJEU has recently received a request from the Court of Appeal (United Kingdom) for a preliminary ruling on the interpretation to be given to the sovereignty clause in the Dublin Regulation (case of N.S., C-411/10). (b) The European Union's directives on asylum matters

83. Three other European texts supplement the Dublin Regulation.

84. Directive 2003/9 of 27 January 2003, laying down minimum standards for the reception of asylum seekers in the Member States ("the Reception Directive"), entered into force on the day of its publication in the Official Journal (OJ L 31 of 6.2.2003). It requires the States to guarantee asylum seekers: - certain material reception conditions, including accommodation; food and clothing, in kind or in the form of monetary allowances; the allowances must be sufficient to protect the asylum seeker from extreme need; - arrangements to protect family unity; - medical and psychological care; - access for minors to education, and to language classes when necessary for them to undergo normal schooling. In 2007 the European Commission asked the CJEC (now the CJEU) to examine whether Greece was fulfilling its obligations concerning the reception of refugees. In a judgment of 19 April 2007 (case C-72/06), the CJEC found that Greece had failed to fulfil its obligations under the Reception Directive. The Greek authorities subsequently transposed the Reception Directive. On 3 November 2009 the European Commission sent a letter to Greece announcing that it was bringing new proceedings against it.

85. Directive 2005/85 of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status in the Member States (the "Procedures Directive"), which entered into force on the day of its publication in the Official Journal (OJ L 326/13 of 13.12.2005), guarantees the following rights: - an application for asylum cannot be rejected on the sole ground that it has not been made as soon as possible. In addition, applications must be examined individually, objectively and impartially; - asylum applicants have the right to remain in the Member State pending the examination of their applications; - the Member States are required to ensure that decisions on applications for asylum are given in writing and that, where an application is rejected, the reasons are stated in the decision and information on how to challenge a negative decision is given in writing; - asylum seekers must be informed of the procedure to be followed, of their rights and obligations, and of the result of the decision taken by the determining authority; - asylum seekers must receive the services of an interpreter for submitting their case to the competent authorities whenever necessary; - asylum seekers must not be denied the opportunity to communicate with the UNHCR. More generally, the Member States must allow the UNHCR to have access to asylum applicants, including those in detention, as well as to information on asylum applications and procedures, and to present its views to any competent authority; - applicants for asylum must have the opportunity, at their own cost, to consult a legal adviser in an effective manner. In the event of a negative decision by a determining authority, Member States must ensure that free legal assistance is granted on request. This right may be subject to restrictions (choice of counsel restricted to legal advisers specifically designated by national law, appeals limited to those likely to succeed, or free legal aid limited to applicants who lack sufficient resources). The European Commission initiated proceedings against Greece in February 2006 for failure to honour its obligations, because of the procedural deficiencies in the Greek asylum system, and brought the case before the CJEC (now the CJEU). Following the transposition of the Procedures Directive into Greek law in July 2008, the case was struck out of the list. On 24 June 2010 the European Commission brought proceedings against Belgium in the CJEU on the grounds that the Belgian authorities had not fully transposed the Procedures Directive – in particular, the minimum obligations concerning the holding of personal interviews. In its proposal for recasting the Procedures Directive, presented on 21 October 2009 (COM(2009) 554 final), the Commission contemplated strengthening the obligation to inform the applicant. It also provided for a full and ex nunc review of first-instance decisions by a court or tribunal and specified that the notion of effective remedy required a review of both

facts and points of law. It further introduced provisions to give appeals automatic suspensive effect. The proposed amendments were intended to improve consistency with the evolving case-law regarding such principles as the right to defence, equality of arms, and the right to effective judicial protection.

86. Directive 2004/83 of 29 April 2004 concerns minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Qualification Directive"). It entered into force 20 days after it was published in the Official Journal (OJ L 304 of 30.09.2004). This Directive contains a set of criteria for granting refugee or subsidiary protection status and laying down the rights attached to each status. It introduces a harmonised system of temporary protection for persons not covered by the Geneva Convention but who nevertheless need international protection, such as victims of widespread violence or civil war. The CJEC (now the CJEU) has delivered two judgments concerning the Qualification Directive: the Elgafaji (C-465/07) judgment of 17 February 2009 and the Salahadin Abdulla and Others judgment of 2 March 2010 (joined cases C- 175, 176, 178 and 179/08). C. Relevant texts of the Council of Europe Commissioner for Human Rights

87. In addition to the reports published following his visits to Greece (see paragraph 160 below), the Commissioner issued a recommendation "concerning the rights of aliens wishing to enter a Council of Europe member State and the enforcement of expulsion orders", dated 19 September 2001, which states, inter alia: "1. Everyone has the right, on arrival at the border of a member State, to be treated with respect for his or her human dignity rather than automatically considered to be a criminal or guilty of fraud. 2. On arrival, everyone whose right of entry is disputed must be given a hearing, where necessary with the help of an interpreter whose fees must be met by the country of arrival, in order to be able, where appropriate, to lodge a request for asylum. This must entail the right to open a file after having being duly informed, in a language which he or she understands, about the procedure to be followed. The practice of refoulement "at the arrival gate" thus becomes unacceptable. 3. As a rule there should be no restrictions on freedom of movement. Wherever possible, detention must be replaced by other supervisory measures, such as the provision of guarantees or surety or other similar measures. Should detention remain the only way of guaranteeing an alien's physical presence, it must not take place, systematically, at a police station or in a prison, unless there is no practical alternative, and in such case must last no longer than is strictly necessary for organising a transfer to a specialised centre. ... 9. On no account must holding centres be viewed as prisons. ... 11. It is essential that the right of judicial remedy within the meaning of Article 13 of the ECHR be not only guaranteed in law but also granted in practice when a person alleges that the competent authorities have contravened or are likely to contravene a right guaranteed by the ECHR. The right of effective remedy must be guaranteed to anyone wishing to challenge a refoulement or expulsion order. It must be capable of suspending enforcement of an expulsion order, at least where contravention of Articles 2 or 3 of the ECHR is alleged." III. RELEVANT LAW AND PRACTICE IN GREECE A. The conditions of reception of asylum seekers 1. Residence

88. The conditions of reception of asylum seekers in Greece are regulated primarily by Presidential Decree ("PD") no. 220/2007 transposing the Reception Directive. The provisions of this text applicable to the present judgment may be summarised as follows.

89. The authority responsible for receiving and examining the asylum application issues an asylum applicant's card free of charge immediately after the results of the fingerprint check become known and in any event no later than three days after the asylum application was lodged. This card, called the "pink card", permits the applicant to remain in Greece throughout the period during which his or her application is being examined. The card is valid for six months and renewable until the final decision is pronounced (Article 5 § 1).

90. Under Article 12 §§ 1 and 3 the competent authorities must take adequate steps to ensure that the material conditions of reception are made available to asylum seekers. They must be guaranteed a standard of living in keeping with their state of health and sufficient for their subsistence and to protect their fundamental rights. These measures may be subjected to the condition that the persons concerned are indigent.

91. An asylum seeker with no home and no means of paying for accommodation will be housed in a reception centre or another place upon application to the competent authorities (Article 6 § 2). According to information provided by the Greek Ministry of Health and Social Solidarity, in 2009 there were fourteen reception centres for asylum seekers in different parts of the country, with a total capacity of 935 places. Six of them were reserved for unaccompanied minors.

92. Asylum seekers who wish to work are issued with temporary work permits, in conformity with the conditions laid down in PD no. 189/1998 (Article 10 § 1 of PD no. 220/2007). Article 4 c) of PD 189/1998 requires the competent authority to issue the permit after making sure the job concerned does not interest "a Greek national, a citizen of the European Union, a person with refugee status, a person of Greek origin, and so on".

93. Asylum seekers have access to vocational training programmes under the same conditions as Greek nationals (Article 11).

94. If they are financially indigent and not insured in any way, asylum seekers are entitled to free medical care and hospital treatment. First aid is also free (Article 14 of PD no. 220/2007).

2. Detention

95. When the administrative expulsion of an alien is permitted under section 76(1) of Law no. 3386/2005 (see paragraph 119, below) and that alien is suspected of intending to abscond, considered to be a threat to public order or hinders the preparation of his or her departure or the expulsion procedure, provisional detention is possible until the adoption, within three days, of the expulsion decision (section 76(2)). Until Law 3772/2009 came into force, administrative detention was for three months. It is now six months and, in certain circumstances, may be extended by twelve months.

96. An appeal to the Supreme Administrative Court against an expulsion order does not suspend the detention (section 77 of Law no. 3386/2005).

97. Where section 76(1) is found to apply upon arrival at Athens international airport, the persons concerned are placed in the detention centre next to the airport. Elsewhere in the country, they are held either in detention centres for asylum seekers or in police stations.

98. Under Article 13 § 1 of PD no. 90/2008, lodging an application for asylum is not a criminal offence and cannot, therefore, justify the applicant's detention, even if he or she entered the country illegally.

....

. 4. Risk of refoulement

...192. The risk of refoulement of asylum seekers by the Greek authorities, be it indirectly, to Turkey, or directly to the country of origin, is a constant concern. The reports listed in paragraph 161 above, as well as the press, have regularly reported this practice, pointing out that the Greek authorities deport, sometimes collectively, both asylum seekers who have not yet applied for asylum and those whose applications have been registered and who have been issued with pink cards. Expulsions to Turkey are effected either at the unilateral initiative of the Greek authorities, at the border with Turkey, or in the framework of the readmission agreement between Greece and Turkey. It has been established that several of the people thus expelled were then sent back to Afghanistan by the Turkish authorities without their applications for asylum being considered.

193. Several reports highlight the serious risk of refoulement as soon as the decision is taken to reject the asylum application, because an appeal to the Supreme Administrative Court has no automatic suspensive effect. 5. Letter of the UNHCR of 2 April 2009

194. On 2 April 2009 the UNHCR sent a letter to the Belgian Minister of Migration and Asylum Policy criticising the deficiencies in the asylum procedure and the conditions of reception of asylum seekers in Greece and recommending the suspension of transfers to Greece. A copy was sent to the Aliens Office. The letter read as follows (extracts): “The UNHCR is aware that the Court, in its decision in K.R.S. v. the United Kingdom ... recently decided that the transfer of an asylum seeker to Greece did not present a risk of refoulement for the purposes of Article 3 of the Convention. However, the Court did not give judgment on compliance by Greece with its obligations under international law on refugees. In particular, the Court said nothing about whether the conditions of reception of asylum seekers were in conformity with regional and international standards of human rights protection, or whether asylum seekers had access to fair consideration of their asylum applications, or even whether refugees were effectively able to exercise their rights under the Geneva Convention. The UNHCR believes that this is still not the case.”

195. It concluded: “For the above reasons the UNHCR maintains its assessment of the Greek asylum system and the recommendations formulated in its position of April 2008, namely that Governments should refrain from transferring asylum seekers to Greece and take responsibility for examining the corresponding asylum applications themselves, in keeping with Article 3 § 2 of the Dublin Regulation.”

.....THE LAW

204. In the circumstances of the case the Court finds it appropriate to proceed by first examining the applicant's complaints against Greece and then his complaints against Belgium.

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION BY GREECE BECAUSE OF THE CONDITIONS OF THE APPLICANT'S DETENTION

205. The applicant alleged that the conditions of his detention at Athens international airport amounted to inhuman and degrading treatment within the meaning of Article 3 of the Convention, which reads: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

.....

III. ALLEGED VIOLATION BY GREECE OF ARTICLE 13 TAKEN IN CONJUNCTION WITH ARTICLES 2 AND 3 OF THE CONVENTION BECAUSE OF THE SHORTCOMINGS IN THE ASYLUM PROCEDURE 265.

265. The applicant complained that he had no effective remedy in Greek law in respect of his complaints under Articles 2 and 3, in violation of Article 13 of the Convention, which reads as follows: Article 13 “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

266. He alleged that the shortcomings in the asylum procedure in Greece were such that he faced the risk of refoulement to his country of origin without any real examination of the merits of his asylum application, in violation of Article 3, cited above, and of Article 2 of the Convention, which reads: Article 2 “1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. ...”

A. The parties' submissions

1. The applicant

267. The applicant submitted that he had fled Afghanistan after escaping an attempt on his life by the Taliban in reprisal for his having worked as an interpreter for the international air force troops based in Kabul. Since arriving in Europe he had had contacts with members of his family back in Afghanistan, who strongly advised him not to come home because the insecurity and the threat of reprisals had grown steadily worse.

268. The applicant wanted his fears to be examined and had applied for asylum in Greece for that purpose. He had no confidence in the functioning of the asylum procedure, however.

269. Firstly, he complained about the practical obstacles he had faced. For example, he alleged that he had never been given an information brochure about the asylum procedure at the airport but had merely been told that he had to go to the Attica police headquarters to register his address. He had not done so because he had had no address to register. He had been convinced that having an address was a condition for the procedure to be set in motion. He had subsequently presented himself, in vain, at the police headquarters on several occasions, where he had had to wait for hours, so far without any prospect of his situation being clarified.

270. Secondly, the applicant believed that he had escaped being sent back to his own country only because of the interim measure indicated by the Court to the Greek Government. Apart from that “protection”, he had no guarantee at this stage that his asylum procedure would follow its course. Even if it did, the procedure offered no guarantee that the merits of his fears would be seriously examined by the Greek authorities. He argued that he did not have the wherewithal to pay for a lawyer's services, that there was no provision for legal aid at this stage, that first-instance interviews were known to be superficial, that he would not have the opportunity to lodge an appeal with a body competent to examine the merits of his fears, that an appeal to the Supreme Administrative Court did not automatically have suspensive effect and that the procedure was a lengthy one. According to him, the almost non-existent record of cases where the Greek authorities had granted international protection of any kind whatsoever at first instance or on appeal showed how ineffective the procedure was.

....2. The Greek Government

271. The Government submitted that the applicant had not suffered the consequences of the alleged shortcomings in the asylum procedure and could therefore not be considered as a victim for the purposes of the Convention.

272. The applicant's attitude had to be taken into account: he had, in breach of the legislation, failed to cooperate with the authorities and had shown no interest in the smooth functioning of the procedure. By failing to report to the Attica police headquarters in June 2009 he had failed to comply with the formalities for initiating the procedure and had not taken the opportunity to inform the police that he had no address, so that they could notify him of any progress through another

channel. Furthermore, he had assumed different identities and attempted to leave Greece while hiding from the authorities the fact that he had applied for asylum there.

273. The Government considered that the Greek authorities had followed the statutory procedure in spite of the applicant's negligence and the errors of his ways. They argued in particular that this was illustrated by the fact that the applicant was still in Greece and had not been deported in spite of the situation he had brought upon himself by trying to leave the country in August 2009.

274. In the alternative, the Government alleged that the applicant's complaints were unfounded. They maintained that Greek legislation was in conformity with Community and international law on asylum, including the non-refoulement principle. Greek law provided for the examination of the merits of asylum applications with regard to Articles 2 and 3 of the Convention. Asylum seekers had access to the services of an interpreter at every step of the proceedings.

275. The Government confirmed that the applicant's application for asylum had not yet been examined by the Greek authorities but assured the Court that it would be, with due regard for the standards mentioned above.

276. In conformity with Article 13 of the Convention, unsuccessful asylum seekers could apply for judicial review to the Supreme Administrative Court. According to the Government, such an appeal was an effective safety net that offered the guarantees the Court had requested in its Bryan v. the United Kingdom judgment (22 November 1995, § 47, Series A no. 335-A). They produced various judgments in which the Supreme Administrative Court had set aside decisions rejecting asylum applications because the authorities had failed to take into account certain documents that referred, for example, to a risk of persecution. In any event, the Government pointed out that providing asylum seekers whose applications had been rejected at first instance with an appeal on the merits was not a requirement of the Convention.

277. According to the Government, complaints concerning possible malfunctions of the legal aid system should not be taken into account because Article 6 did not apply to asylum procedures. In the same manner, any procedural delays before the Supreme Administrative Court fell within the scope of Article 6 of the Convention and could therefore not be examined by the Court in the present case.

278. Moreover, as long as the asylum procedure had not been completed, asylum seekers ran no risk of being returned to their country of origin and could, if necessary, ask the Supreme Administrative Court to stay the execution of an expulsion order issued following a decision rejecting the asylum application, which would have the effect of suspending the enforcement of the measure. The Government provided several judgments in support of that affirmation.

279. The Government averred in their oral observations before the Grand Chamber that even in the present circumstances the applicant ran no risk of expulsion to Afghanistan at any time as the policy at the moment was not to send anyone back to that country by force. The forced returns by charter flight that had taken place in 2009 concerned Pakistani nationals who had not applied for asylum in Greece. The only Afghans who had been sent back to Afghanistan – 468 in 2009 and 296 in 2010 – had been sent back on a voluntary basis as part of the programme financed by the European Return Fund. Nor was there any danger of the applicant being sent to Turkey because, as he had been transferred to Greece by another European Union Member State, he did not fall within the scope of the readmission agreement concluded between Greece and Turkey.

280. In their oral observations before the Grand Chamber, the Government further relied on the fact that the applicant had not kept the appointment of 21 June 2010 for an initial interview on 2 July 2010, when that interview would have been an opportunity for him to explain his fears to the Greek authorities in the event of his return to Afghanistan. It followed, according to the Government, that not only had the applicant shown no interest in the asylum procedure, but he had not exhausted the remedies under Greek law regarding his fears of a violation of Articles 2 and 3 of the Convention.

B. Observations of the Council of Europe Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees, the Aire Centre, Amnesty International and the Greek Helsinki Monitor, intervening as third parties

281. The Commissioner, the UNHCR, the Aire Centre, Amnesty International and GHM were all of the opinion that the current legislation and practice in Greece in asylum matters were not in conformity with international and European human rights protection standards. They deplored the lack of adequate information, or indeed of any proper information at all about the asylum procedure, the lack of suitably trained staff to receive and process asylum applications, the poor quality of firstinstance decisions owing to structural weaknesses and the lack of procedural guarantees, in particular access to legal aid and an interpreter and the ineffectiveness as a remedy of an appeal to the Supreme Administrative Court because of the excessively long time it took, the fact that it had no automatic suspensive effect and the difficulty in obtaining legal aid. They emphasised that “Dublin” asylum seekers were faced with the same obstacles in practice as other asylum seekers.

282. The Commissioner and the UNHCR expressed serious concern about the continuing practice by the Greek authorities of forced returns to Turkey, be they collective or individual. The cases they had identified concerned both persons arriving for the first time and those already registered as asylum seekers.

C. The Court's assessment

1. Admissibility

283. The Greek Government submitted that the applicant was not a victim within the meaning of Article 34 of the Convention because he alone was to blame for the situation, at the origin of his complaint, in which he found himself and he had not suffered the consequences of any shortcomings in the procedure. The Government further argued that the applicant had not gone to the first interview at the Attica police headquarters on 2 July 2010 and had not given the Greek authorities a chance to examine the merits of his allegations. This meant that he had not exhausted the domestic remedies and the Government invited the Court to declare this part of the application inadmissible and reject it pursuant to Article 35 §§ 1 and 4 of the Convention.

284. The Court notes that the questions raised by the Government's preliminary objections are closely bound up with those it will have to consider when examining the complaints under Article 13 of the Convention taken in conjunction with Articles 2 and 3, because of the deficiencies of the asylum procedure in Greece. They should therefore be examined together with the merits of those complaints.

285. Moreover, the Court considers that this part of the application raises complex issues of law and fact which cannot be determined without an examination of the merits. It follows that it is not manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible. 2. Merits (a) Recapitulation of general principles

286. In cases concerning the expulsion of asylum seekers the Court has explained that it does not itself examine the actual asylum applications or verify how the States honour their obligations under the Geneva Convention. Its main concern is whether effective guarantees exist that protect the applicant against arbitrary refoulement, be it direct or indirect, to the country from which he or she has fled (see, among other authorities, T.I. v. the United Kingdom (dec. no. 43844/98, ECHR 2000-III), and Müslim, cited above, §§ 72 to 76).

287. By virtue of Article 1 (which provides: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”), the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Articles 13 and 35 § 1 of the Convention (see Kudła v. Poland [GC], no. 30210/96, § 152, ECHR 2000-XI).

288. As the Court has held on many occasions, Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be “effective” in practice as well as in law (see Kudla cited above, § 157).

289. The “effectiveness” of a “remedy” within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the “authority” referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see Gebremedhin [Gaberamadhien] v. France, no. 25389/05, § 53, ECHR 2007-V § 53).

290. In order to be effective, the remedy required by Article 13 must be available in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see Çakıcı v. Turkey [GC], no. 23657/94, § 112, ECHR 1999-IV).

291. Article 13 requires the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision (see Jabari v. Turkey, no. 40035/98, § 48, ECHR 2000-VIII).

292. Particular attention should be paid to the speediness of the remedial action itself, it not being excluded that the adequate nature of the remedy can be undermined by its excessive duration (see Doran v. Ireland, no. 50389/99, § 57, ECHR 2003-X).

293. Lastly, in view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the effectiveness of a remedy within the meaning of Article 13 imperatively requires close scrutiny by a national authority (see Shamayev and Others v. Georgia and Russia, no. 36378/02, § 448, ECHR 2005-III), independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (see Jabari, cited above, § 50), as well as a particularly prompt response (see Batı and Others v. Turkey, nos. 33097/96 and 57834/00, § 136, ECHR 2004-IV (extracts)); it also requires that the person concerned should have access to a remedy with automatic suspensive effect (see Conka v. Belgium, no. 51564/99, §§ 81-83, ECHR 2002-I, and Gebremedhin [Gaberamadhien], cited above, § 66). (b) Application in the present case

294. In order to determine whether Article 13 applies to the present case, the Court must ascertain whether the applicant can arguably assert that his removal to Afghanistan would infringe Article 2 or Article 3 of the Convention.

295. It notes that, when lodging his application the applicant produced, in support of his fears concerning Afghanistan, copies of certificates showing that he had worked as an interpreter (see paragraph 31 above). It also has access to general information about the current situation in Afghanistan and to the Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Afghanistan published by the UNHCR and regularly updated (see paragraphs 197-202 above).

296. For the Court, this information is prima facie evidence that the situation in Afghanistan has posed and continues to pose a widespread problem of insecurity and that the applicant belongs to a category of persons particularly exposed to reprisals at the hands of the anti-government forces because of the work he did as an interpreter for the international air forces. It further notes that the gravity of the situation in Afghanistan and the risks that exist there are not disputed by the parties. On the contrary, the Greek Government have stated that their current policy is not to send asylum seekers back to that country by force precisely because of the high-risk situation there.

297. The Court concludes from this that the applicant has an arguable claim under Article 2 or Article 3 of the Convention.

298. This does not mean that in the present case the Court must rule on whether there would be a violation of those provisions if the applicant were returned. It is in the first place for the Greek authorities, who have responsibility for asylum matters, themselves to examine the applicant's request and the documents produced by him and assess the risks to which he would be exposed in Afghanistan. The Court's primary concern is whether effective guarantees exist in the present case to protect the applicant against arbitrary removal directly or indirectly back to his country of origin.

299. The Court notes that Greek legislation, based on Community law standards in terms of asylum procedure, contains a number of guarantees designed to protect asylum seekers from removal back to the countries from which they have fled without any examination of the merits of their fears (see paragraphs 99-121 above). It notes the Government's assurances that the applicant's application for asylum will be examined in conformity with the law.

300. The Court observes, however, that for a number of years the UNHCR and the Council of Europe Commissioner for Human Rights as well as many international non-governmental organisations have revealed repeatedly and consistently that Greece's legislation is not being applied in practice and that the asylum procedure is marked by such major structural deficiencies that asylum seekers have very little chance of having their applications and their complaints under the Convention seriously examined by the Greek authorities, and that in the absence of an effective remedy, at the end of the day they are not protected against arbitrary removal back to their countries of origin (see paragraphs 160 and 173-195 above).

301. The Court notes, firstly, the shortcomings in access to the asylum procedure and in the examination of applications for asylum (see paragraphs 173-188 above): insufficient information for asylum seekers about the procedures to be followed, difficult access to the Attica police headquarters, no reliable system of communication between the authorities and the asylum seekers, shortage of interpreters and lack of training of the staff responsible for conducting the individual interviews, lack of legal aid effectively depriving the asylum seekers of legal counsel, and excessively lengthy delays in receiving a decision. These shortcomings affect asylum seekers arriving in Greece for the first time as well as those sent back there in application of the Dublin Regulation.

302. The Court is also concerned about the findings of the different surveys carried out by the UNHCR, which show that almost all first-instance decisions are negative and drafted in a stereotyped manner without any details of the reasons for the

decisions being given (see paragraph 184 above). In addition, the watchdog role played by the refugee advisory committees at second instance has been removed and the UNHCR no longer plays a part in the asylum procedure (see paragraphs 114 and 189 above).

303. The Government maintained that whatever deficiencies there might be in the asylum procedure, they had not affected the applicant's particular situation.

304. The Court notes in this connection that the applicant claims not to have received any information about the procedures to be followed. Without wishing to question the Government's good faith concerning the principle of an information brochure being made available at the airport, the Court attaches more weight to the applicant's version because it is corroborated by a very large number of accounts collected from other witnesses by the Commissioner, the UNHCR and various non-governmental organisations. In the Court's opinion, the lack of access to information concerning the procedures to be followed is clearly a major obstacle in accessing those procedures.

305. The Government also criticised the applicant for not setting the procedure in motion by going to the Attica police headquarters within the time-limit prescribed in the notification.

306. On this point the Court notes firstly that the three-day time-limit the applicant was given was a very short one considering how difficult it is to gain access to the police headquarters concerned.

307. Also, it must be said that the applicant was far from the only one to have misinterpreted the notice and that many asylum seekers do not go to the police headquarters because they have no address to declare.

308. Moreover, even if the applicant did receive the information brochure, the Court shares his view that the text is very ambiguous as to the purpose of the convocation (see paragraph 112 above), and that nowhere is it stated that asylum seekers can inform the Attica police headquarters that they have no address in Greece, so that information can be sent to them through another channel.

309. In such conditions the Court considers that the Government can scarcely rely on the applicant's failure to comply with this formality and that they should have proposed a reliable means of communicating with the applicant so that he could follow the procedure effectively.

310. Next, the Court notes that the parties agree that the applicant's asylum request has not yet been examined by the Greek authorities.

311. According to the Government, this situation is due at present to the fact that the applicant did not keep the appointment on 2 July 2010 to be interviewed by the refugee advisory committee. The Government have not explained the impact of that missed appointment on the progress of the domestic proceedings. Be that as it may, the applicant informed the Court, through his counsel, that the convocation had been given to him in Greek when he renewed his pink card, and that the interpreter had made no mention of any date for an interview. Although not in a position to verify the truth of the matter, the Court again attaches more weight to the applicant's version, which reflects the serious lack of information and communication affecting asylum seekers.

312. In such conditions the Court does not share the Government's view that the applicant, by his own actions, failed to give the domestic authorities an opportunity to examine the merits of his complaints and that he has not been affected by the deficiencies in the asylum procedure.

313. The Court concludes that to date the Greek authorities have not taken any steps to communicate with the applicant or reached any decision in his case, offering him no real and adequate opportunity to defend his application for asylum. What is more, the Court takes note of the extremely low rate of asylum or subsidiary protection granted by the Greek authorities compared with other European Union member States (see paragraphs 125-126 above). The importance to be attached to statistics varies, of course, according to the circumstances, but in the Court's view they tend here to strengthen the applicant's argument concerning his loss of faith in the asylum procedure.

314. The Court is not convinced by the Greek Government's explanations concerning the policy of returns to Afghanistan organised on a voluntary basis. It cannot ignore the fact that forced returns by Greece to high-risk countries have regularly been denounced by the third-party interveners and several of the reports consulted by the Court (see paragraphs 160, 192 and 282).

315. Of at least equal concern to the Court are the risks of refoulement the applicant faces in practice before any decision is taken on the merits of his case. The applicant did escape expulsion in August 2009, by application of PD no. 90/2008 (see paragraphs 43-48 and 120 above). However, he claimed that he had barely escaped a second attempt by the police to

deport him to Turkey. The fact that in both cases the applicant had been trying to leave Greece cannot be held against him when examining the conduct of the Greek authorities with regard to the Convention and when the applicant was attempting to find a solution to a situation the Court considers contrary to Article 3 (see paragraphs 263 and 264 above).

316. The Court must next examine whether, as the Government alleged, an application to the Supreme Administrative Court for judicial review of a possible rejection of the applicant's request for asylum may be considered as a safety net protecting him against arbitrary refoulement.

317. The Court begins by observing that, as the Government have alleged, although such an application for judicial review of a decision rejecting an asylum application has no automatic suspensive effect, lodging an appeal against an expulsion order issued following the rejection of an application for asylum does automatically suspend enforcement of the order.

318. However, the Court reiterates that the accessibility of a remedy in practice is decisive when assessing its effectiveness. The Court has already noted that the Greek authorities have taken no steps to ensure communication between the competent authorities and the applicant. That fact, combined with the malfunctions in the notification procedure in respect of "persons of no known address" reported by the Council of Europe Commissioner for Human Rights and the UNHCR (see paragraph 187 above), makes it very uncertain whether the applicant will be able to learn the outcome of his asylum application in time to react within the prescribed time-limit.

319. In addition, although the applicant clearly lacks the wherewithal to pay a lawyer, he has received no information concerning access to organisations which offer legal advice and guidance. Added to that is the shortage of lawyers on the list drawn up for the legal aid system (see paragraphs 191 and 281 above), which renders the system ineffective in practice. Contrary to the Government's submissions, the Court considers that this situation may also be an obstacle hindering access to the remedy and falls within the scope of Article 13, particularly where asylum seekers are concerned.

320. Lastly, the Court cannot consider, as the Government have suggested, that the length of the proceedings before the Supreme Administrative Court is irrelevant for the purposes of Article 13. The Court has already stressed the importance of swift action in cases concerning ill-treatment by State agents (see paragraph 293 above). In addition it considers that such swift action is all the more necessary where, as in the present case, the person concerned has lodged a complaint under Article 3 in the event of his deportation, has no procedural guarantee that the merits of his complaint will be given serious consideration at first instance, statistically has virtually no chance of being offered any form of protection and lives in a state of precariousness that the Court has found to be contrary to Article 3. It accordingly considers that the information supplied by the Council of Europe Commissioner for Human Rights concerning the length of proceedings (see paragraph 190 above), which the Government have not contradicted, is evidence that an appeal to the Supreme Administrative Court does not offset the lack of guarantees surrounding the examination of asylum applications on the merits. (c) Conclusion 321. In the light of the above, the preliminary objections raised by the Greek Government (see paragraph 283 above) cannot be accepted and the Court finds that there has been a violation of Article 13 of the Convention taken in conjunction with Article 3 because of the deficiencies in the Greek authorities' examination of the applicant's asylum request and the risk he faces of being returned directly or indirectly to his country of origin without any serious examination of the merits of his asylum application and without having access to an effective remedy.

322. In view of that finding and of the circumstances of the case, the Court considers that there is no need for it to examine the applicant's complaints lodged under Article 13 taken in conjunction with Article 2.

IV. ALLEGED VIOLATION OF ARTICLES 2 AND 3 OF THE CONVENTION BY BELGIUM FOR EXPOSING THE APPLICANT TO THE RISKS ARISING FROM THE DEFICIENCIES IN THE ASYLUM PROCEDURE IN GREECE

323. The applicant alleged that by sending him to Greece under the Dublin Regulation when they were aware of the deficiencies in the asylum procedure in Greece and had not assessed the risk he faced, the Belgian authorities had failed in their obligations under Articles 2 and 3 of the Convention, cited above. A. The parties' submissions

1. The applicant

324. The applicant submitted that at the time of his expulsion the Belgian authorities had known that the asylum procedure in Greece was so deficient that his application for asylum had little chance of being seriously examined by the Greek authorities and that there was a risk of him being sent back to his country of origin. In addition to the numerous international reports already published at the time of his expulsion, his lawyer had clearly explained the situation regarding the systematic violation of the fundamental rights of asylum seekers in Greece. He had done this in support of the appeal lodged with the Aliens Appeals Board on 29 May 2009 and also in the appeal lodged with the Indictments Chamber of the Brussels Court of Appeal on 10 June 2009. The applicant considered that the Belgian authorities' argument that he could not claim to have

been a victim of the deficiencies in the Greek asylum system before coming to Belgium was irrelevant. In addition to the fact that formal proof of this could not be adduced in abstracto and before the risk had materialised, the Belgian authorities should have taken the general situation into account and not taken the risk of sending him back.

325. In the applicant's opinion, in keeping with what had been learnt from the case of T.I. (dec., cited above) the application of the Dublin Regulation did not dispense the Belgian authorities from verifying whether sufficient guarantees against refoulement existed in Greece, with regard to the deficiencies in the procedure or the policy of direct or indirect refoulement to Afghanistan. Without such guarantees and in view of the evidence adduced by the applicant, the Belgian authorities themselves should have verified the risk the applicant faced in his country of origin, in accordance with Articles 2 and 3 of the Convention and with the Court's case-law (in particular the case of NA. v. the United Kingdom, no. 25904/07, 17 July 2008). In this case, however, the Belgian Government had taken no precautions before deporting him. On the contrary, the decision to deport him had been taken solely on the basis of the presumption – by virtue of the tacit acceptance provided for in the Dublin Regulation – that the Greek authorities would honour their obligations, without any individual guarantee concerning the applicant. The applicant saw this as a systematic practice of the Belgian authorities, who had always refused and continued to refuse to apply the sovereignty clause in the Dublin Regulation and not transfer people to Greece.

2. The Belgian Government

326. The Government submitted that in application of the Dublin Regulation Belgium was not responsible for examining the applicant's request for asylum, and it was therefore not their task to examine the applicant's fears for his life and his physical safety in Afghanistan. The Dublin Regulation had been drawn up with due regard for the principle of non-refoulement enshrined in the Geneva Convention, for fundamental rights and for the principle that the Member States were safe countries. Only in exceptional circumstances, on a case-by-case basis, did Belgium avail itself of the derogation from these principles provided for in Article 3 § 2 of the Regulation, and only where the person concerned showed convincingly that he was at risk of being subjected to torture or inhuman or degrading treatment within the meaning of Article 3. Indeed, that approach was consistent with the Court's case-law, which required there to be a link between the general situation complained of and the applicant's individual situation (as in the cases of Sultani, cited above, Thampibillai v. the Netherlands, no. 61350/00, 17 February 2004, and Y. v. Russia, no. 20113/07, 4 December 2008).

327. The Belgian Government did not know in exactly what circumstances the sovereignty clause was used, as no statistics were provided by the Aliens Office, and when use was made of it no reasons were given for the decisions. However, in order to show that they did apply the sovereignty clause when the situation so required, the Government produced ten cases where transfers to the country responsible had been suspended for reasons related, by deduction, to the sovereignty clause. In half of those cases Poland was the country responsible for the applications, in two cases it was Greece and in the other cases Hungary and France. In seven cases the reason given was the presence of a family member in Belgium; in two, the person's health problems; and the last case concerned a minor. In the applicant's case Belgium had had no reason to apply the clause and no information showing that he had personally been a victim in Greece of treatment prohibited by Article 3. On the contrary, he had not told the Aliens Office that he had abandoned his asylum application or informed it of his complaints against Greece. Indeed, the Court itself had not considered it necessary to indicate an interim measure to the Belgian Government to suspend the applicant's transfer.

328. However, the Government pointed out that the order to leave the country had been issued based on the assurance that the applicant would not be sent back to Afghanistan without the merits of his complaints having been examined by the Greek authorities. Concerning access to the asylum procedure and the course of that procedure, the Government relied on the assurances given by the Greek authorities that they had finally accepted responsibility, and on the general information contained in the summary document drawn up by the Greek authorities and in the observations Greece had submitted to the Court in other pending cases. The Belgian authorities had noted, based on that information, that if an alien went through with an asylum application in Greece, the merits of the application would be examined on an individual basis, the asylum seeker could be assisted by a lawyer and an interpreter would be present at every stage of the proceedings. Remedies also existed, including an appeal to the Supreme Administrative Court. Accordingly, although aware of the possible deficiencies of the asylum system in Greece, the Government submitted that they had been sufficiently convinced of the efforts Greece was making to comply with Community law and its obligations in terms of human rights, including its procedural obligations.

329. As to the risk of refoulement to Afghanistan, the Government had also taken into account the assurances Greece had given the Court in K.R.S. v. the United Kingdom (dec. cited above) and the possibility for the applicant, once in Greece, to lodge an application with the Court and, if necessary, a request for the application of Rule 39. On the strength of these assurances, the Government considered that the applicant's transfer had not been in violation of Article 3.

B. Observations of the Governments of the Netherlands and the United Kingdom, and of the Office of the United Nations High Commissioner for Refugees, the Aire Centre and Amnesty International and the Greek Helsinki Monitor, intervening as third parties

330. According to the Government of the Netherlands, it did not follow from the possible deficiencies in the Greek asylum system that the legal protection afforded to asylum seekers in Greece was generally illusory, much less that the Member States should refrain from transferring people to Greece because in so doing they would be violating Article 3 of the Convention. It was for the Commission and the Greek authorities, with the logistical support of the other Member States, and not for the Court, to work towards bringing the Greek system into line with Community standards. The Government of the Netherlands therefore considered that they were fully assuming their responsibilities by making sure, through an official at their embassy in Athens, that any asylum seekers transferred would be directed to the asylum services at the international airport. In keeping with the Court's decision in K.R.S. (cited above), it was to be assumed that Greece would honour its international obligations and that transferees would be able to appeal to the domestic courts and subsequently, if necessary, to the Court. To reason otherwise would be tantamount to denying the principle of inter-State confidence on which the Dublin system was based, blocking the application of the Regulation by interim measures, and questioning the balanced, nuanced approach the Court had adopted, for example in its judgment in the case of Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC] (no. 45036/98, ECHR 2005 VI), in assessing the responsibility of the States when they applied Community law.

331. The Government of the United Kingdom emphasised that the Dublin Regulation afforded a fundamental advantage in speeding up the examination of applications, so that the persons concerned did not have time to develop undue social and cultural ties in a State. That being so, it should be borne in mind that calling to account under Article 3 the State responsible for the asylum application prior to the transfer, as in the present case, was bound to slow down the whole process no end. The Government of the United Kingdom were convinced that such complaints, which were understandable in cases of expulsion to a State not bound by the Convention, should be avoided when the State responsible for handling the asylum application was a party to the Convention. In such cases, as the Court had found in K.R.S. decision (cited above), the normal interpretation of the Convention would mean the interested parties lodging their complaints with the courts in the State responsible for processing the asylum application and subsequently, perhaps, to the Court. According to the United Kingdom Government, this did not absolve the transferring States of their responsibility for potential violations of the Convention, but it meant that their responsibility could be engaged only in wholly exceptional circumstances where it was demonstrated that the persons concerned would not have access to the Court in the State responsible for dealing with the asylum application. No such circumstances were present in the instant case, however.

332. In the opinion of the UNHCR, as they had already stated in their report published in April 2008, asylum seekers should not be transferred when, as in the present case, there was evidence that the State responsible for processing the asylum application effected transfers to high-risk countries, that the persons concerned encountered obstacles in their access to asylum procedures, to the effective examination of their applications and to an effective remedy, and where the conditions of reception could result in a violation of Article 3 of the Convention. Not transferring asylum seekers in these conditions was provided for in the Dublin Regulation itself and was fully in conformity with Article 33 of the Geneva Convention and with the Convention. The UNHCR stressed that this was not a theoretical possibility and that, unlike in Belgium, the courts in certain States had suspended transfers to Greece for the above-mentioned reasons. In any event, as the Court had clearly stated in the case of T.I. (dec. cited above), each Contracting State remained responsible under the Convention for not exposing people to treatment contrary to Article 3 through the automatic application of the Dublin system.

333. The Aire Centre and Amnesty International considered that in its present form, without a clause on the suspension of transfers to countries unable to honour their international obligations in asylum matters, the Dublin Regulation exposed asylum seekers to a risk of refoulement in breach of the Convention and the Geneva Convention. They pointed out considerable disparities in the way European Union Member States applied the Regulation and the domestic courts assessed the lawfulness of the transfers when it came to evaluating the risk of violation of fundamental rights, in particular when the State responsible for dealing with the asylum application had not properly transposed the other Community measures relating to asylum. The Aire Centre and Amnesty International considered that States which transferred asylum seekers had their share of responsibility in the way the receiving States treated them, in so far as they could prevent human rights violations by availing themselves of the sovereignty clause in the Regulation. The possibility for the European Commission to take action against the receiving State for failure to honour its obligations was not, in their opinion, an effective remedy against the violation of the asylum seekers' fundamental rights. Nor were they convinced, as the CJEU had not pronounced itself on the lawfulness of Dublin transfers when they could lead to such violations, of the efficacy of the preliminary question procedure introduced by the Treaty of Lisbon.

334. GHM pointed out that at the time of the applicant's expulsion there had already been a substantial number of documents attesting to the deficiencies in the asylum procedure, the conditions in which asylum seekers were received and the risk of direct or indirect refoulement to Turkey. GHM considered that the Belgian authorities could not have been unaware of this, particularly as the same documents had been used in internal procedures to order the suspension of transfers to Greece. According to GHM, the documents concerned, particularly those of the UNHCR, should make it possible to reverse the Court's presumption in K.R.S. (dec. cited above) that Greece fulfilled its international obligations in asylum matters.

C. The Court's assessment

....

340. The Court concludes that, under the Regulation, the Belgian authorities could have refrained from transferring the applicant if they had considered that the receiving country, namely Greece, was not fulfilling its obligations under the Convention. Consequently, the Court considers that the impugned measure taken by the Belgian authorities did not strictly fall within Belgium's international legal obligations. Accordingly, the presumption of equivalent protection does not apply in this case.

3. Merits of the complaints under Articles 2 and 3 of the Convention

(a) The T.I. and K.R.S. decisions

341. In these two cases the Court had the opportunity to examine the effects of the Dublin Convention, then the Dublin Regulation with regard to the Convention.

342. The case of T.I. (dec., cited above) concerned a Sri Lankan national who had unsuccessfully sought asylum in Germany and had then submitted a similar application in the United Kingdom. In application of the Dublin Convention, the United Kingdom had ordered his transfer to Germany In its decision the Court considered that indirect removal to an intermediary country, which was also a Contracting Party, left the responsibility of the transferring State intact, and that State was required, in accordance with the well-established case-law, not to deport a person where substantial grounds had been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. Furthermore, the Court reiterated that where States cooperated in an area where there might be implications as to the protection of fundamental rights, it would be incompatible with the purpose and object of the Convention if they were absolved of all responsibility vis-à-vis the Convention in the area concerned (see, among other authorities, Waite and Kennedy v. Germany [GC], no. 26083/94, § 67, ECHR 1999-I). When they apply the Dublin Regulation, therefore, the States must make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention. Although in the T. I. case the Court rejected the argument that the fact that Germany was a party to the Convention absolved the United Kingdom from verifying the fate that awaited an asylum seeker it was about to transfer to that country, the fact that the asylum procedure in Germany apparently complied with the Convention, and in particular Article 3, enabled the Court to reject the allegation that the applicant's removal to Germany would make him run a real and serious risk of treatment contrary to that Article. The Court considered that there was no reason in that particular case to believe that Germany would have failed to honour its obligations under Article 3 of the Convention and protect the applicant from removal to Sri Lanka if he submitted credible arguments demonstrating that he risked ill-treatment in that country.

343. That approach was confirmed and developed in the K.R.S. decision (cited above). The case concerned the transfer by the United Kingdom authorities, in application of the Dublin Regulation, of an Iranian asylum seeker to Greece, through which country he had passed before arriving in the United Kingdom in 2006. Relying on Article 3 of the Convention, the applicant complained of the deficiencies in the asylum procedure in Greece and the risk of being sent back to Iran without the merits of his asylum application being examined, as well as the reception reserved for asylum seekers in Greece. After having confirmed the applicability of the T.I. case-law to the Dublin Regulation (see also on this point Stapleton v. Ireland (dec.), no. 56588/07, § 30, ECHR 2010-...), the Court considered that in the absence of proof to the contrary it must assume that Greece complied with the obligations imposed on it by the Community directives laying down minimum standards for asylum procedures and the reception of asylum seekers, which had been transposed into Greek law, and that it would comply with Article 3 of the Convention. In the Court's opinion, in view of the information available at the time to the United Kingdom Government and the Court, it was possible to assume that Greece was complying with its obligations and not sending anybody back to Iran, the applicant's country of origin. Nor was there any reason to believe that persons sent back to Greece under the Dublin Regulation, including those whose applications for asylum had been rejected by a final decision

of the Greek authorities, had been or could be prevented from applying to the Court for an interim measure under Rule 39 of the Rules of Court. (b) Application of these principles to the present case

344. The Court has already stated its opinion that the applicant could arguably claim that his removal to Afghanistan would violate Article 2 or Article 3 of the Convention (see paragraphs 296- 297 above).

345. The Court must therefore now consider whether the Belgian authorities should have regarded as rebutted the presumption that the Greek authorities would respect their international obligations in asylum matters, in spite of the K.R.S. case-law, which the Government claimed the administrative and judicial authorities had wanted to follow in the instant case.

346. The Court disagrees with the Belgian Government's argument that, because he failed to voice them at his interview, the Aliens Office had not been aware of the applicant's fears in the event of his transfer back to Greece at the time when it issued the order for him to leave the country.

347. The Court observes first of all that numerous reports and materials have been added to the information available to it when it adopted its K.R.S. decision in 2008. These reports and materials, based on field surveys, all agree as to the practical difficulties involved in the application of the Dublin system in Greece, the deficiencies of the asylum procedure and the practice of direct or indirect refoulement on an individual or a collective basis.

348. The authors of these documents are the UNHCR and the Council of Europe Commissioner for Human Rights, international non-governmental organisations like Amnesty International, Human Rights Watch, Pro-Asyl and the European Council on Refugees and Exiles, and non-governmental organisations present in Greece such as Greek Helsinki Monitor and the Greek National Commission for Human Rights (see paragraph 160 above). The Court observes that such documents have been published at regular intervals since 2006 and with greater frequency in 2008 and 2009, and that most of them had already been published when the expulsion order against the applicant was issued.

349. The Court also attaches critical importance to the letter sent by the UNHCR in April 2009 to the Belgian Minister in charge of immigration. The letter, which states that a copy was also being sent to the Aliens Office, contained an unequivocal plea for the suspension of transfers to Greece (see paragraphs 194 and 195 above).

350. Added to this is the fact that since December 2008 the European asylum system itself has entered a reform phase and that, in the light of the lessons learnt from the application of the texts adopted during the first phase, the European Commission has made proposals aimed at substantially strengthening the protection of the fundamental rights of asylum seekers and implementing a temporary suspension of transfers under the Dublin Regulation to avoid asylum seekers being sent back to Member States unable to offer them a sufficient level of protection of their fundamental rights (see paragraphs 77-79 above).

351. Furthermore, the Court notes that the procedure followed by the Aliens Office in application of the Dublin Regulation left no possibility for the applicant to state the reasons militating against his transfer to Greece. The form the Aliens Office filled in contains no section for such comments (see paragraph 130 above).

352. In these conditions the Court considers that the general situation was known to the Belgian authorities and that the applicant should not be expected to bear the entire burden of proof. On the contrary, it considers it established that in spite of the few examples of application of the sovereignty clause produced by the Government, which, incidentally, do not concern Greece, the Aliens Office systematically applied the Dublin Regulation to transfer people to Greece without so much as considering the possibility of making an exception.

353. The Belgian Government argued that in any event they had sought sufficient assurances from the Greek authorities that the applicant faced no risk of treatment contrary to the Convention in Greece. In that connection, the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention (see, mutatis mutandis, Saadi v. Italy [GC], no. 37201/06, § 147, ECHR 2008-...).

354. The Court is also of the opinion that the diplomatic assurances given by Greece to the Belgian authorities did not amount to a sufficient guarantee. It notes first of all that the agreement to take responsibility in application of the Dublin Regulation was sent by the Greek authorities after the order to leave the country had been issued, and that the expulsion order had therefore been issued solely on the basis of a tacit agreement by the Greek authorities. Secondly, it notes that the agreement document is worded in stereotyped terms (see paragraph 24 above) and contains no guarantee concerning the applicant in person. No more did the information document the Belgian Government mentioned, provided by the Greek authorities, contain any individual guarantee; it merely referred to the applicable legislation, with no relevant information

about the situation in practice.

355. The Court next rejects the Government's argument that the Court itself had not considered it necessary to indicate an interim measure under Rule 39 to suspend the applicant's transfer. It reiterates that in cases such as this, where the applicant's expulsion is imminent at the time when the matter is brought to the Court's attention, it must take an urgent decision. The measure indicated will be a protective measure which on no account prejudges the examination of the application under Article 34 of the Convention. At this stage, when an interim measure is indicated, it is not for the Court to analyse the case in depth – and indeed it will often not have all the information it needs to do so (see, mutatis mutandis, Paladi v. Moldova [GC], no. 39806/05, § 89, ECHR 2009-...). In the instant case, moreover, the letters sent by the Court clearly show that, fully aware of the situation in Greece, it asked the Greek Government to follow the applicant's case closely and to keep it informed (see paragraphs 32 and 39, above). #

356. The respondent Government, supported by the third-party intervening Governments, lastly submitted that asylum seekers should lodge applications with the Court only against Greece, after having exhausted the domestic remedies in that country, if necessary requesting interim measures.

357. While considering that this is in principle the most normal course of action under the Convention system, the Court deems that its analysis of the obstacles facing asylum seekers in Greece clearly shows that applications lodged there at this point in time are illusory. The Court notes that the applicant is represented before it by the lawyer who defended him in Belgium. Considering the number of asylum applications pending in Greece, no conclusions can be drawn from the fact that some asylum seekers have brought cases before the Court against Greece. In this connection it also takes into account the very small number of Rule 39 requests for interim measures against Greece lodged by asylum seekers in that country, compared with the number lodged by asylum seekers in the other States.

358. In the light of the foregoing, the Court considers that at the time of the applicant's expulsion the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities. They also had the means of refusing to transfer him.

359. The Government argued that the applicant had not sufficiently individualised, before the Belgian authorities, the risk of having no access to the asylum procedure and being sent back by the Greek authorities. The Court considers, however, that it was in fact up to the Belgian authorities, faced with the situation described above, not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3. The fact that a large number of asylum seekers in Greece find themselves in the same situation as the applicant does not make the risk concerned any less individual where it is sufficiently real and probable (see, mutatis mutandis, Saadi, cited above, § 132).

(c) Conclusion

360. Having regard to the above considerations, the Court finds that the applicant's transfer by Belgium to Greece gave rise to a violation of Article 3 of the Convention. 361. Having regard to that conclusion and to the circumstances of the case, the Court finds that there is no need to examine the applicant's complaints under Article 2.

V. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION BY BELGIUM FOR EXPOSING THE APPLICANT TO CONDITIONS OF DETENTION AND LIVING CONDITIONS CONTRARY TO ARTICLE 3

362. The applicant alleged that because of the conditions of detention and existence to which asylum seekers were subjected in Greece, by returning him to that country in application of the Dublin Regulation the Belgian authorities had exposed him to treatment prohibited by Article 3 of the Convention, cited above.

....

365. On the merits, the Court reiterates that according to its well-established case-law the expulsion of an asylum seeker by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country (see Soering v. the United Kingdom, judgment of 7 July 1989, Series A no. 161, §§ 90-91; Vilvarajah and Others v. the United Kingdom, judgment of 30 October 1991, Series A no. 125, § 103; H.L.R. v. France, judgment of 29 April 1997, Reports 1997-III, § 34; Jabari cited above, § 38; Salah Sheekh v. the Netherlands, no. 1948/04, § 135, ECHR 2007-I (extracts), no. 1948/04; and Saadi, cited above, § 152). 366. In the instant case the Court has already found the applicant's conditions of detention and living conditions in Greece degrading

(see paragraphs 233, 234, 263 and 264 above). It notes that these facts were well known before the transfer of the applicant and were freely ascertainable from a wide number of sources (see paragraphs 162-164 above). It also wishes to emphasise that it cannot be held against the applicant that he did not inform the Belgian administrative authorities of the reasons why he did not wish to be transferred to Greece. It has established that the procedure before the Aliens Office made no provision for such explanations and that the Belgian authorities applied the Dublin Regulation systematically (see paragraph 352 above).

367. Based on these conclusions and on the obligations incumbent on the States under Article 3 of the Convention in terms of expulsion, the Court considers that by transferring the applicant to Greece the Belgian authorities knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment. 368. That being so, there has been a violation of Article 3 of the Convention. .....

FOR THESE REASONS, THE COURT

1. Joins to the merits, by sixteen votes to one, the preliminary objections raised by the Greek Government and rejects them;

2. Declares admissible, unanimously, the complaint under Article 3 of the Convention concerning the conditions of the applicant's detention in Greece;

3. Holds, unanimously, that there has been a violation by Greece of Article 3 of the Convention because of the applicant's conditions of detention;

4. Declares admissible, by a majority, the complaint under Article 3 of the Convention concerning the applicant's living conditions in Greece;

5. Holds, by sixteen votes to one, that there has been a violation by Greece of Article 3 of the Convention because of the applicant's living conditions in Greece;

6. Declares admissible, unanimously, the complaint against Greece under Article 13 taken in conjunction with Article 3 of the Convention;

7. Holds, unanimously, that there has been a violation by Greece of Article 13 taken in conjunction with Article 3 of the Convention because of the deficiencies in the asylum procedure followed in the applicant's case and the risk of his expulsion to Afghanistan without any serious examination of the merits of his asylum application and without any access to an effective remedy;

8. Holds, unanimously, that there is no need to examine the applicant's complaints under Article 13 taken in conjunction with Article 2 of the Convention;

9. Joins to the merits, unanimously, the preliminary objection raised by the Belgian Government, rejects it and declares admissible, unanimously, the complaints lodged against Belgium;

10. Holds, by sixteen votes to one, that there has been a violation by Belgium of Article 3 of the Convention because, by sending him back to Greece, the Belgian authorities exposed the applicant to risks linked to the deficiencies in the asylum procedure in that State;

11. Holds, unanimously, that there is no need to examine the applicant's complaints under Article 2 of the Convention;

12. Holds, by fifteen votes to two, that there has been a violation by Belgium of Article 3 of the Convention because, by sending him back to Greece, the Belgian authorities exposed the applicant to detention and living conditions in that State that were in breach of that Article;

13. Holds, unanimously, that there has been a violation by Belgium of Article 13 taken in conjunction with Article 3 of the Convention;

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 21 January 2011. Michael O'Boyle Jean-Paul Costa Deputy Registrar President In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment: (a) Concurring opinion of Judge Rozakis; (b) Concurring opinion of Judge Villiger; (c) Partly concurring and partly dissenting opinion of Judge Sajó; (d)

CONCURRING OPINION OF JUDGE ROZAKIS

I have voted, with the majority, to find a violation on all counts concerning Greece, and am fully in agreement with the reasoning leading to the violations. Still, I would like to further emphasise two points, already mentioned in the judgment, to which I attach particular importance. The first point concerns the Court's reference to the considerable difficulties that States forming the European external borders are currently experiencing “in coping with the increasing influx of migrants and asylum seekers”. This statement, which is analysed and elaborated further in paragraph 223 of the judgment, correctly describes the general situation which prevails in many northern Mediterranean coastal countries. However, in the case of Greece, with its extensive northern borders but also a considerable maritime front, the migratory phenomenon has acquired a truly dramatic dimension in recent years. Statistics clearly show that the great majority of foreign immigrants – mainly of Asian origin – attempt to enter Europe through Greece, and either settle there or move on to seek a new life in other European countries.

As it has alrealdy been stated, almost 88 % of the immigrants (and among them asylum seekers) entering the European Union today cross the Greek borders to land in our continent. In these circumstances it is clear that European Union immigration policy – including Dublin II – does not reflect the present realities, or do justice to the disproportionate burden that falls to the Greek immigration authorities. There is clearly an urgent need for a comprehensive reconsideration of the existing European legal regime, which should duly take into account the particular needs and constraints of Greece in this delicate domain of human rights protection.

The second point concerns the Court's reference to the applicant's living conditions while in Greece, and the finding of a violation of Article 3 of the Convention. In paragraph 249 of the judgment the Court considered it necessary “to point out that Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home. Nor does Article 3 entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living”. However, as the Court rightly points out, in the circumstances of the case “the obligation to provide accommodation and decent material conditions to impoverished asylum seekers has now entered into positive law and the Greek authorities are bound to comply with their own legislation, which transposes Community law” (paragraph 250).

What the Court meant by “positive law” is duly explained in paragraph 251, where it referred to the “existence of a broad consensus at the international and European level concerning [the need for special protection of asylum seekers as a particularly underprivileged and vulnerable population group], as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the European Union Reception Directive”. Indeed this last European document clearly requires that the European Union's members guarantee asylum seekers “certain material reception conditions, including accommodation, food and clothing, in kind or in the form of monetary allowances. The allowances must be sufficient to protect the asylum seekers from extreme need”.

The existence of those international obligations of Greece – and notably, vis-à-vis the European Union – to treat asylum seekers in conformity with these requirements weighed heavily in the Court's decision to find a violation of Article 3. The Court has held on numerous occasions that to fall within the scope of Article 3 ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative and it depends on all the circumstances of the case (such as the duration of the treatment, its physical and mental effects and, in some instances, the sex, age and state of health of the victim). In the circumstances of the present case the combination of the long duration of the applicant's treatment, coupled with Greece's international obligation to treat asylum seekers in accordance with what the judgment calls current positive law, justifies the distinction the Court makes between treatment endured by other categories of people – where Article 3 has not been found to be transgressed – and the treatment of an asylum seeker, who clearly enjoys a particularly advanced level of protection.

.....PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE SAJÓ

I welcome most of the expected consequences of this judgment, namely the hoped-for improvements in the management of asylum proceedings under the Dublin system. It is therefore to my sincere regret that I have to dissent on a number of points. My disagreements are partly of a technical nature.

While I agree with the finding that Article 13 was violated as no effective remedy was available in Greece against a potential violation of Article 3, I find that the applicant cannot be regarded a victim in the sense of Article 34 of the Convention as far as the conditions of his stay in Greece are concerned, and also in regard to the deficiencies in the asylum procedure there. I agree with the Court that there was a violation regarding the conditions of his detention, but on slightly different grounds. I dissent as to the finding that Belgium is in violation of Article 3 of the Convention for returning the applicant into detention in Greece.

.....III. ALLEGED VIOLATION BY GREECE OF ARTICLE 13 TAKEN IN CONJUNCTION WITH ARTICLES 2 AND 3 OF THE CONVENTION BECAUSE OF THE SHORTCOMINGS IN THE ASYLUM PROCEDURE AND THE SUBSEQUENT RISK OF REFOULEMENT

I found that the applicant lacked victim status regarding his stay in Greece during the asylum procedure. It therefore needs some explanation why I find that the applicant has standing regarding the risks of refoulement. Contrary to the Court, I do not find convincing the information that there is forced refoulement to Afghanistan (paragraph 314). At the material time (2009), referring to the Court's judgment in K.R.S. v. the United Kingdom, the UNCHR did not consider that the danger of refoulement existed in Greece (paragraph 195).7 However, the Government's policy may change in this regard. Only a system of proper review of an asylum request and/or deportation order with suspensive effect satisfies the needs of legal certainty and protection required in such matters. Because of the shortcomings of the procedure in Greece, as described in paragraph 320, the applicant remains without adequate protection, irrespective of his non-participation in the asylum procedure, irrespective of his contribution to the alleged humiliation due to the deficiencies of the asylum procedure, and irrespective of the present risk of refoulement. For this reason the measure required by Judge Villiger should apply.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION BY BELGIUM FOR EXPOSING THE APPLICANT TO CONDITIONS OF DETENTION AND LIVING CONDITIONS CONTRARY TO ARTICLE 3

For the Court, the expulsion of an asylum seeker by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country. I agree that Belgium had enough information to foresee that the Greek asylum procedure did not offer sufficient safeguards against the humiliation inherent in this inefficient procedure, which was the basis for the finding of a violation of Article 3 in that regard (paragraph 360). (Here again, I find the living-conditions-based considerations irrelevant.) I could not come to the same conclusion regarding the applicant's detention. It was not foreseeable that the applicant would be detained, or for how long. The detention of transferred asylum seekers is not mandatory and there is no evidence in the file that such a practice is followed systematically. Even if one could not rule out that at the beginning of the asylum process, in the event of illegal entry, some restriction of liberty might occur, the Belgian State could not have foreseen that the applicant would not be placed in a section of the Airport Detention Centre that might have been considered satisfactory, at least for a short stay, and was designed to handle people in a situation comparable to that of the applicant. The Belgian State could certainly not have foreseen that the applicant would attempt to leave Greece illegally, for which he was again detained in one of the sections of the Airport Detention Centre and sentenced to two months imprisonment. It is for this same reason that I found the sum Belgium was ordered to pay in respect of non-pecuniary damage excessive.

V. ALLEGED VIOLATION BY BELGIUM OF ARTICLE 13 TAKEN IN CONJUNCTION WITH ARTICLES 2 AND 3 OF THE CONVENTION BECAUSE OF THE LACK OF AN EFFECTIVE REMEDY AGAINST THE EXPULSION ORDER

The applicant was ordered to leave Belgium and detained on 19 May 2009, and on 27 May 2009 the departure date was set for 29 May. There was enough time to organise adequate representation (the lawyer made an application only after studying the file for 3 days) and to take proper legal action. (However, the Aliens Appeals Board dismissed his application, while his personal appearance was hindered by his detention.) Appeals could be lodged with the Aliens Appeals Board at any time, round the clock and with suspensive effect. The Court had confirmed the effectiveness of the procedure in the case of Quraishi v. Belgium (application no. 6130/08, decision of 12 May 2009). In the present case the Court evaluates only the impossibility for the applicant's lawyer to get to the hearing. For these reasons, I cannot follow the Court's conclusion in paragraph 392. Nevertheless, I agree with the Court that there is a systemic problem in the Belgian deportation procedure resulting in the violation of Article 13. While the effectiveness of a remedy does not depend on the certainty of a favourable outcome for the applicant, the lack of any prospect of obtaining adequate redress in Belgian courts (paragraph 394) is decisive under Article 13. This in itself is sufficient for the finding of a violation.

PARTLY DISSENTING OPINION OF JUDGE BRATZA

1. It is with regret that I find myself in disagreement with the other judges of the Grand Chamber in their conclusion that Belgium violated Article 3 of the Convention by returning the applicant to Greece in June 2009. I could readily accept that, if Belgium or any other Member State were, in the light of the Court's findings in the present judgment as to the risk of refoulement in Greece and the conditions of detention and living conditions of asylum seekers there, forcibly to return to Greece an individual from a “suspect” country of origin such as Afghanistan, it would violate Article 3 even in the absence of an interim measure being applied by the Court. What I cannot accept is the majority's conclusion that the situation in Greece and the risks posed to asylum seekers there were so clear some 18 months ago as to justify the serious finding that Belgium

violated Article 3, even though the Court itself had found insufficient grounds at that time to apply Rule 39 of the Rules of Court to prevent the return to Greece of the applicant and many others in a similar situation. The majority's conclusion appears to me to pay insufficient regard to the unanimous decision of the Court concerning the return of asylum seekers to Greece under the Dublin Regulation in the lead case of K.R.S. v. the United Kingdom, which was delivered in December 2008, less than 6 months prior to the return of the present applicant, and which has been relied on not only by national authorities but by the Court itself in rejecting numerous requests for interim measures.

2. As was noted in the K.R.S. decision itself, the Court had received, in the light of the UNHCR position paper of 15 April 2008, an increasing number of Rule 39 requests from applicants in the United Kingdom who were to be removed to Greece: between 14 May and 16 September 2008 the Acting President of the Section responsible had granted interim measures in a total of 80 cases. The Court's principal concern related to the risk that asylum seekers from "suspect" countries – in the K.R.S. case itself, Iran – would be removed from Greece to their country of origin without having had the opportunity to make an effective asylum claim to the domestic authorities or, should the need arise, an application to the Court under Rule 39. To this end, the Court sought and obtained certain assurances from the Greek authorities through the United Kingdom Government. These included assurances that no asylum seeker was returned by Greece to such countries as Afghanistan, Iraq, Iran, Somalia, Sudan or Eritrea even if his asylum application was rejected by the Greek authorities; that no asylum applicant was expelled from Greece unless all stages of the asylum procedure were completed and all the legal rights for review had been exhausted, according to the provisions of the Geneva Convention; and that an asylum seeker had a right to appeal against any expulsion decision made and to apply to the Court for a Rule 39 indication.

3. The Court in the K.R.S. decision also took express account of reports and other evidential material before it, including: (i) the judgment of the Court of Justice of the European Communities ("the ECJ") of 19 April 2007 in Commission v. Greece, in which the ECJ found that Greece had failed to implement Council Directive 2003/9/EC, laying down minimum standards for the reception of asylum seekers: the Directive was subsequently transposed into Greek law in November 2007; (ii) a report of the Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment ("the CPT") dated 8 February 2008 in which the CPT published its findings on a visit to Greece in February 2007. Having reviewed the conditions of detention for asylum seekers, the CPT made a series of recommendations concerning the detention and treatment of detainees, including a revision of occupancy rules so as to offer a minimum of 4 square metres of space per detainee, unimpeded access to toilet facilities and the provision of products and equipment for personal hygiene. The CPT also found the staffing arrangements in the detention facilities to be totally inadequate and directed that proper health care services be provided to detainees; (iii) a report of Amnesty International of 27 February 2008, entitled "No place for an asylum seeker in Greece", which described the poor conditions in which immigration detainees were held in that country and the lack of legal guarantees with regard to the examination of their asylum claims, particularly the conduct of interviews in the absence of an interpreter or lawyer. While noting that Greece did not return persons to Afghanistan, the report criticised Greece for failing to process their applications in a prompt, fair way, leaving them without legal status and therefore without legal rights; (iv) a report of 9 April 2008 of the Norwegian Organisation for Asylum Seekers, Norwegian Helsinki Committee and Greek Helsinki Monitor recording, inter alia, the keeping of asylum seekers in Greece in police custody; the very limited resources in the country for handling asylum applications; the lack of legal assistance for asylum seekers; the very small number of residence permits granted; the inadequate number of reception centre places; and the small number of police officers assigned to interview more than 20,000 asylum seekers arriving in Greece in the course of a year and the short and superficial nature of the asylum interviews; (v) the position paper of the UNHCR of 15 April 2008, advising Member States of the European Union to refrain from returning asylum seekers from Greece under the Dublin Regulation until further notice. The position paper criticised the reception procedures for "Dublin returnees" at Athens Airport and at the central Police Asylum Department responsible for registering asylum applications. The paper characterised the percentage of asylum seekers who were granted refugee status in Greece as "disturbingly low" and criticised the quality of asylum decisions. Concern was further expressed about the extremely limited reception facilities for asylum seekers and the lack of criteria for the provision of a daily financial allowance.

4. In its decision in K.R.S. the Court recalled its ruling in T.I. v. the United Kingdom to the effect that removal of an individual to an intermediary country which was also a Contracting State did not affect the responsibility of the returning State to ensure that the person concerned was not, as a result of the decision to expel, exposed to treatment contrary to Article 3 of the Convention. In this regard, the Court noted the concerns expressed by the UNHCR and shared by the various Non-Governmental Organisations and attached weight to the fact that, in recommending that parties to the Dublin Regulation should refrain from returning asylum seekers to Greece, the UNHCR believed that the prevalent situation in Greece called into question whether "Dublin returnees" would have access to an effective remedy as foreseen by Article 13 of the Convention.

5. Despite these concerns, the Court concluded that the removal of the applicant to Greece would not violate Article 3 of the Convention. In so finding, the Court placed reliance on a number of factors: (i) On the evidence before the Court, which included the findings of the English Court of Appeal in the case of R. (Nasseri) v. the Secretary of State for the Home Department, Greece did not remove individuals to Iran, Afghanistan, Iraq, Somalia or Sudan and there was accordingly no risk that the applicant would be removed to Iran on his arrival in Greece. (ii) The Dublin Regulation was one of a number of measures agreed in the field of asylum policy at European Union level and had to be considered alongside European Union Member States' additional obligations under the two Council Directives to adhere to minimum standards in asylum procedures and to provide minimum standards for the reception of asylum seekers. The presumption had to be that Greece would abide by its obligations under those Directives. In this connection, note had to be taken of the new legislative framework for asylum applications introduced in Greece and referred to in the letter provided to the Court by the Greek Government. (iii) There was nothing to suggest that those returned to Greece under the Dublin Regulation ran the risk of onward removal to a third country where they would face ill-treatment contrary to Article 3 without being afforded a real opportunity, on the territory of Greece, of applying to the Court for a Rule 39 measure to prevent such removal. Assurances had been obtained from the Greek Dublin Unit that asylum applicants in Greece had a right of appeal against any expulsion decision and to seek interim measures from the Court under Rule 39. There was nothing in the materials before the Court which would suggest that Dublin returnees had been or might be prevented from applying for interim measures on account of the timing of their onward removal or for any other reason. (iv) Greece, as a Contracting State, had undertaken to abide by its Convention obligations and to secure to everyone within its jurisdiction the rights and freedoms defined therein, including those guaranteed by Article 3: in concrete terms, Greece was required to make the right of any returnee to lodge an application with the Court under Article 34 of the Convention both practical and effective. In the absence of any proof to the contrary, it had to be presumed that Greece would comply with that obligation in respect of returnees, including the applicant. (v) While the objective information before the Court on conditions of detention in Greece was of serious concern, not least given Greece's obligations under Council Directive 2003/9/EC and Article 3 of the Convention, should any claim arise from these conditions, it could and should be pursued first with the Greek domestic authorities and thereafter in an application to the Court. In consequence of the Court's decision in K.R.S., the interim measures under Rule 39 which had been applied by the Court pending the decision in that case were lifted.

6. Whether or not, with the benefit of hindsight, the K.R.S. case should be regarded as correctly decided by the Court, Member States concerned with the removal of persons to Greece under the Dublin Regulation were, in my view, legitimately entitled to follow and apply the decision in the absence of any clear evidence of a change in the situation in Greece which had been the subject of examination by the Court or in the absence of special circumstances affecting the position of the particular applicant. It is apparent that the K.R.S. case was applied by national authorities as a recent and authoritative decision on the compatibility with the Convention of returns to Greece, more particularly by the House of Lords in the Nasseri case, in which judgment was delivered on 6 May 2009. The decision was also expressly relied on by the Aliens Office in Belgium in rejecting the present applicant's request for asylum.

7. The majority of the Grand Chamber take the view that, as a result of developments before and since the K.R.S. case, the presumption that the Greek authorities would respect their international obligations in asylum matters should have been treated as rebutted by the Belgian authorities in June 2009. It is noted in the judgment that numerous reports and materials have been added to the information which was available to the Court when it adopted its K.R.S. decision, which agree as to the practical difficulties involved in the application of the Dublin system in Greece, the deficiencies of the asylum procedures in that country and the practice of direct or indirect refoulement on an individual or collective basis. These reports, it is said, have been published at regular intervals since 2006 “and with greater frequency in 2008 and 2009 and ... most of them had already been published when the expulsion order against the applicant was issued” (paragraph 348). In this regard “critical importance” is attached in the judgment to the letter of 2 April 2009 addressed to the Belgian Immigration Minister which contained “an unequivocal plea for the suspension of transfers to Greece” (paragraph 349). Reliance is also placed on the fact that, since December 2008, the European asylum system has itself entered a “reform phase” aimed at strengthening the protection of asylum seekers and implementing a temporary suspension of transfers under the Dublin Regulation to avoid asylum seekers being sent back to Member States unable to offer them a sufficient level of protection of their fundamental rights.

8. I am unpersuaded that any of the developments relied on in the judgment decision should have led the Belgian authorities in June 2009 to treat the decision as no longer authoritative or to conclude that the return of the applicant would violate Article 3. As to the reports and other materials dating back to the years 2006, 2007 and 2008, while the material may be regarded as adding to the detail or weight of the information which had already been taken into account by the Court, it did not in my view change the substantive content of that information or otherwise affect the Court's reasoning in the K.R.S.

decision. Moreover, I have difficulty in seeing how it can be held against the Belgian authorities that they failed to take account of material which was already in the public domain at the time of the K.R.S. decision itself.

9. I have similar difficulty in seeing how, in June 2009, the presumption of Greek compliance which the Court had found to exist in December 2008 could be rebutted by the numerous reports and other information which became available in the second half of 2009 and in 2010. The graphic detail in those reports and in the powerful submissions to the Court by the Council of Europe Commissioner of Human Rights and the UNHCR as to the living conditions for asylum seekers in Greece, the grave deficiencies in the system of processing asylum applications in that country and the risk of onward return to Afghanistan, unquestionably provide a solid basis today on which to treat the presumption of compliance as rebutted. But this material post-dates the decision of the Belgian authorities to return the applicant and cannot in my view be prayed in aid as casting doubt on the validity of the K.R.S. decision at that time.

10. The same I consider applies to the majority's reliance on the proposal to modify the Dublin system by providing for a mechanism to suspend transfers, which proposal had not been adopted by the Commission or Council or implemented at the time of the applicant's return to Greece. The proposal has still not been adopted at the present day.

11. The letter of the UNHCR of April 2009 is clearly a document of some importance, coming as it did from an authority whose independence and objectivity are beyond doubt. The letter noted that, although the Court in K.R.S. had decided that the transfer of asylum seekers to Greece did not present a risk of refoulement under Article 3, the Court had not given judgment on compliance by Greece with its obligations under international law on refugees. The letter went on to express the belief of the UNHCR that it was still not the case that the reception of asylum seekers in Greece complied with human rights standards or that asylum seekers had access to fair consideration of their asylum applications or that refugees were effectively able to exercise their rights under the Geneva Convention. The UNHCR concluded the letter by maintaining its assessment of the Greek asylum system and the recommendation which had been formulated in its position paper in April 2008, which had been expressly taken into account by the Court in its K.R.S. decision. Significant as the letter may be, it provides to my mind too fragile a foundation for the conclusion that the Belgian authorities could no longer rely on the K.R.S. decision or that the return of the applicant to Greece would violate his rights under Article 3 of the Convention.

12. The diplomatic assurances given by Greece to the Belgian authorities are found in the judgment not to amount to a sufficient guarantee since the agreement of Greece to take responsibility for receiving the applicant under the Dublin Regulation was sent after the order to leave Belgium had been issued and since the agreement document was worded in stereotyped terms and contained no guarantee concerning the applicant in person. It is true that the assurances of the kind sought by the United Kingdom authorities in the K.R.S. case after interim measures had been applied and after specific questions had been put by the Court to the respondent Government, were not sought by the Belgian authorities in the present case. However, the assurances given in K.R.S. were similarly of a general nature and were not addressed to the individual circumstances of the applicant in the case. Moreover, there was no reason to believe in June 2009 that the general practice and procedures in Greece, which had been referred to in the assurances and summarised in the K.R.S. decision, had changed or were no longer applicable. In particular, there was not at that time any evidence that persons were being directly or indirectly returned by Greece to Afghanistan in disregard of the statements relied on by the Court in K.R.S. Such evidence did not become available until August 2009, when reports first emerged of persons having been forcibly returned from Greece to Afghanistan on a recent flight, leading the Court to reapply Rule 39 in the case of the return of Afghan asylum seekers to Greece.

13. It is indeed the Court's practice prior to August 2009 with regard to interim measures in the case of returns to Greece to which I attach particular importance in the present case. The majority of the Grand Chamber are dismissive of the respondent Government's argument that the Court itself had not considered it necessary to suspend the applicant's transfer to Greece by applying Rule 39. It is pointed out that interim measures do not prejudge the examination of an application under Article 34 of the Convention and that, at the stage when interim measures are applied for, the Court is required to take an urgent decision, often without the material with which to analyse the claim in depth.

14. I can accept that a State is not absolved from its responsibility under the Convention in returning an individual to a country where substantial grounds exist for believing that he faces a real risk of ill-treatment in breach of Article 3 by the mere fact that a Rule 39 application has not been granted by the Court. The role of the Court on any such application is not only different from that of national immigration authorities responsible for deciding on the return of the person concerned but is one which is frequently carried out under pressure of time and on the basis of inadequate information. Nevertheless, the refusal of the Rule 39 application in the present case is not, I consider, without importance. I note, in particular, that it is acknowledged in the judgment (paragraph 355) that, at the time of refusing the application, the Court was “fully aware of the situation in Greece”, as evidenced by its request to the Greek Government in its letter of 12 June 2009 to follow the

applicant's case closely and to keep it informed. I also note that in that letter it was explained that it had been decided not to apply Rule 39 against Belgium, "considering that the applicant's complaint was more properly made against Greece" and that the decision had been "based on the express understanding that Greece, as a Contracting State, would abide by its obligations under Articles 3, 13 and 34 of the Convention". However, of even greater significance in my view than the Court's refusal to apply Rule 39 in the present case, is the general practice followed by the Court at the material time in the light of its K.R.S. decision. Not only did the Court (in a decision of a Chamber or of the President of a Chamber) lift the interim measures in the numerous cases in which Rule 39 had been applied prior to that decision, but, in the period until August 2009, it consistently declined the grant of interim measures to restrain the return of Afghan asylum seekers to Greece in the absence of special circumstances affecting the individual applicant. In the period between 1 June and 12 August 2009 alone, interim measures were refused by the Court in 68 cases of the return of Afghan nationals to Greece from Austria, Belgium, Denmark, France, the Netherlands, Sweden and the United Kingdom. I find it quite impossible in these circumstances to accept that Belgium and other Member States should have known better at that time or that they were not justified in placing the same reliance on the Court's decision in K.R.S. as the Court itself.

15. For these reasons, I am unable to agree with the majority of the Grand Chamber that, by returning the applicant to Greece in June 2009, Belgium was in violation of Article 3 of the Convention, either on the grounds of his exposure to the risk of refoulement arising from deficiencies in the asylum procedures in Greece, or on the grounds of the conditions of detention or the living conditions of asylum seekers in that country.

16. Notwithstanding this view, the present case has thrown up a series of deficiencies in Belgium's own system of remedies in respect of expulsion orders which are arguably claimed to violate an applicant's rights under Articles 2 or 3 of the Convention. These deficiencies are, in my view, sufficiently serious to amount to a violation of Article 13 and, in this regard, I share the conclusion and reasoning in the Court's judgment. While this finding alone would justify an award of just satisfaction against Belgium, it would not in my view justify an award of the full sum claimed by the applicant, hence my vote against the award which is made against Belgium in the judgment.

1 It seems that in international humanitarian law "particularly vulnerable group" refers to priority treatment of certain categories of refugees.

2 Third party intervenors claimed that asylum seekers are deprived of the right to provide for their needs (paragraph 246). If this were corroborated and shown to be attributable to the State, e.g. if the practical difficulties of employment that were mentioned originated from restrictive regulation or official practice, I would find the State responsible under Article 3 for the misery of the asylum seekers. This point was, however, not fully substantiated.

3Laban, C.J., Dutch Study of Iraqi Asylum Seekers: Impact of a long asylum procedure on health and health related dimensions among Iraqi asylum seekers in the Netherlands; An epidemiological study. Doctoral dissertation, 2010. p. 151 http://dspace.ubvu.vu.nl/bitstream/1871/15947/2/part.pdf. (comparing Iraqi asylum seekers whose asylum procedure has taken at least two years with Iraqi asylum seekers who had just arrived in the Netherlands, with additional literature).

4 Once again, it is hard to accept that the typical asylum seeker or refugee has the same profile as the applicant, who had money and speaks English.

5 The Court's case-law required there to be a link between the general situation complained of and the applicant's individual situation (Thampibillai v. the Netherlands, no. 61350/00, 17 February 2004, and Y. v. Russia, no. 20113/07, 4 December 2008). Where there is a mandatory procedure the general situation will apply inevitably to the applicant, therefore the nexus is established, and Greece is responsible; likewise Belgium, as it was aware of this fact. But it was not inevitable that M.S.S. would be kept for three days at a detention centre, as this does not follow from Greek law and there is no evidence of a standard practice in this regard; Belgium cannot be held responsible for the degrading detention.

6 Certainly, Belgium could not foresee that he would make efforts to bypass the Greek (and European Union) system as he simply wished to leave Greece. I do not find convincing the argument that the applicant wanted to leave Greece because of his state of need (paragraph 239). He left Greece six weeks after he applied for asylum. However, this personal choice which showed disregard for the asylum procedure does not absolve Belgium of its responsibilities which existed at the moment of the applicant's transfer to Greece. The inhuman and degrading nature of the asylum procedure was a matter known to Belgium. This does not apply to the applicant's detention in Greece (see below).

7 The Court held this letter of the UNHCR of 2 April 2009 to be of critical importance (paragraph 349) when it came to the determination of Belgium's responsibility. Further, given the assurances of the Greek Government (paragraph 354) and the lack of conclusive proof of refoulement, there was nothing Belgium should have known in this regard; and Belgium has no responsibility in this respect.

F. ACADEMIC MATERIALS

Just a little sunshine in the rain: the 2010 case law of the European Court of Justice on access to documents

Paivi Leino*

Common Market Law Review

48: 1215–1252, 2011. 1215

1. Introduction

Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents1 – the EU's freedom of information or "sunshine" legislation – has now been in force for ten years. It has been the subject of a number of rulings by the General Court, and on appeal, the European Court of Justice. The case law has had some difficulty in finding its course. However, it is now established that while the purpose of the Regulation is to give the fullest possible effect to the right of public access to documents held by the institutions, the right is nonetheless subject to certain limitations. The Regulation provides for a number of exceptions which must be interpreted strictly and the application of which requires, as a rule, case-by-case assessment of the content of the documents covered by the application for access.The risk that the interest protected by each of those exceptions might be undermined cannot be purely hypothetical.**2**

During the ten years of application of the Regulation, the European Parliament has repeatedly called on the Commission to present a proposal to reform it.3 These calls were strengthened by the anticipation that the Treaty of Lisbon would enter into force, with its explicit aim to enhance transparency and citizen involvement in decision making. In the context of possible reform, it has also been discussed whether the Courts' case law would give reason to either incorporate some of the jurisprudence in the Regulation or, alternatively, to amend or clarify some of the relevant provisions. In 2007, the Commission finally initiated the reform process by issuing a Green Paper,4 followed in 2008 by a legislative proposal to "recast" the Regulation.5 Negotiations on the file have, however, been shelved since 2009. Member States are divided in the Council into those thinking reform ought to mean going forward towards increased openness, and those wishing to turn the clock back,6 while divergent national traditions and wishes of national parliaments to access EU-related information are also involved. The European Parliament again is mixed up in protecting its own institutional prerogatives and getting confused about whose rights it is to protect: those of the citizen or its own interest in gaining access to the Council's confidential files.7 The Commission's role in the review process seems to be mainly trying to avoid seeming too eager to limit the access rights of citizens.8

The three judgments by the Grand Chamber of the European Court of Justice in the summer of 2010, Case C-139/07 P, *Commission* v. *Technische Glaswerke Ilmenau*,9 Case C-28/08 P, *Commission* v. *Bavarian Lager*10 and Joined Cases C-514/07 P, 528/07 P & 532/07 P, *Sweden* v. *API and Commission*,11 concerned the interpretation of some of the core provisions of Regulation 1049/2001; key provisions that are also open for review in the context of the ongoing legislative process. All three cases were appeals against judgments by the General Court given before the 2008 Commission proposal, and with a transparency-friendly orientation. The Commission, which had lost all three cases, appealed to the ECJ, in one case joined by Sweden and the applicant. All three rulings of 2010 reversed or significantly altered the earlier judgments. The Commission has explained its reform agenda with reference to wishing to clarify certain matters without limiting citizen access, and its legislative proposal certainly includes both controversial and non-controversial parts.12 However, according to some,13 the outcome of its two parallel projects, one on the side of the legislature and the other in court, would seem to be exactly a reconsideration of the balance between openness and secrecy. The cases serve as a glorious reminder of the fact that there is little agreement on how fundamental rights – in this case the right of access to documents, as laid down in Article 42 of the EU Charter of Fundamental Rights – should be turned into political practice.

The three cases decided in 2010 were the first three transparency cases to reach the ECJ Grand Chamber after its 2008 landmark ruling in *Turco*,14 which concerned a request by Mr Turco for access to the documents appearing on a specific Council meeting agenda, including an opinion of the Council's legal service relating to a legislative file. The Council had refused the application, arguing that there were no specific reasons pointing to a particular overriding public interest in disclosure. The ECJ rejected the arguments of the Council. It found the Council's fear that disclosure of an opinion of its legal service relating to a legislative proposal could lead to doubts as to the lawfulness of the legislative act concerned to be unjustified:

"it is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view

to be openly debated. It is in fact rather a lack of informttion and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole" (para 59).

According to the Court,

"disclosure of documents containing the advice of an institution's legal service on legal questions arising when legislative initiatives are being debated increases the transparency and openness of the legislative process and strengthens the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act" (para 67).

These considerations led the Court to conclude that the Regulation "imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process" (para 68), even if there were exceptions to this general principle.15

In emphasizing wide access to legislative documents, the *Turco* ruling was greeted by some commentators as "spectacularly progressive"16 while others suggested the Court might have forgotten the need for "[j]udicial respect for the essential elements" of the political compromises embodied in the relevant legislation, which is "as important as openness to the legitimacy of the Union and its decision-making processes".17 As will be shown below, the Court's obvious interest in distinguishing the three 2010 rulings from the logic behind its *Turco* judgment two years earlier led it to suggest that in some situations the need for transparency might be more pressing than in others. In largely accepting the arguments relating to administrative burden and duties of secrecy put forward by the Commission in the three recent cases, the Court has caused a serious setback for those believing that the phrases in the Treaty on European Union on decisions being made "as openly as possible" might actually weigh heavier.

The purpose of the current analysis is to examine the state of openness after the Court's 2010 rulings and to place it in the context of the ongoing revision of the Regulation. In two of the cases, the Commission argued for general presumptions of secrecy, which would free it from the general duty of principle of examining each requested document individually in order to establish whether granting access to its contents would harm one of the protected interests – a foundational principle of the Regulation. *Technische Glaswerke Ilmenau* and *Sweden* v. *API and Commission*, significantly contributed, though in a negative way, to the discussion on whether general presumptions could, in exceptional cases, be allowed (section 2 below).

All three judgments concern applications for documents held by the Commission and are based on requests under Regulation 1049/2001; however, a number of other pieces of legislation were also relevant. In *Bavarian Lager*, the question concerned the relationship between Regulation 1049/2001 and the procedural guarantees provided by the data protection Regulation 45/200118 (section 3 below). In *Techn ische Glaswerke Ilmenau* (TGI), the question related to the relationship between Regulation 1049/2001 and the rights of interested parties – or rather lack of such rights – under the State aid rules19 (section 4). *Swede n* v. *API and Commission* (API) was about documents relating to Court proceedings but held by the Commission, access to which, in the view of the Commission, ought to be decided with reference to rules other than those contained in Regulation 1049/2001. Finally, *Turco* left open the extent to which the Court's argumentation was specific to legislative matters, or whether similar arguments could be used for other matters of similar importance. The rulings continued this discussion (section 6).

2. Legal background

Under old Article 255 EC, any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions laid down for reasons of public or private interest. The relevant principles and conditions are established by Regulation 1049/2001.20

The Treaty of Lisbon made some important openings relating to transparency, underlining in particular the principle of wide public access to legislative documents, and slightly amended the general provision on transparency and the legal basis of public access. Under Article 15 TFEU(1), "[i]n order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible," thus extending the obligation even to other than the three "main" institutions. As regards legislative matters, paragraph 2 establishes that the "European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act". The legal basis for more specific rules on public access is included in paragraph 3, which also makes reference to the institutions' own Rules of Procedure and lays down an obligation on the European Parliament and the Council to ensure publication of the documents relating to legislative

procedures under the terms laid down by the public access regulations. It is also specified that the Court of Justice, the European Central Bank and the European Investment Bank are subject to the access to documents rules only when exercising their administrative tasks; however, the general obligation to conduct their tasks as openly as possible in Article 15(1) TFEU still applies.

After the entry into force of the new Treaty, the question was naturally raised whether the Commission would update its 2008 recast proposal, given at a time when the fate of the Lisbon Treaty was still unclear, to reflect the new legal basis. The Commission considered the changes brought by the new Treaty to be of a limited nature and thus there was, in its view, no immediate need to present an amended proposal in order to align it to Article 15 TFEU.21 In March 2011, however, the Commission came forward with a new proposal amending Regulation 1049/2001, aiming at extending the institutional scope of the Regulation and without prejudice to its proposal of 2008.22 For the European Parliament, the differences between the new and old Treaty provisions have been so significant that they would necessitate giving a new proposal with even other substantive amendments included, especially as regards legislative documents.23 The *Turco* ruling, however, has certainly softened the transition from ex Article 255 EC to Article 15 TFEU, by emphasizing the great need to grant access to legislative files, anticipating the reforms to be brought by the new Treaty. Discussions between the institutions concerning the right way forward are still ongoing.

The current Regulation 1049/2001 aims at ensuring "widest possible access to documents".24 While all documents are in principle accessible "subject to the principles, conditions and limits defined in this Regulation",25 there are various interests to be protected by means of exceptions. Article 2(3) of the Regulation provides that the Regulation is to apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, "in all areas of activity of the European Union". Article 3(a) includes the definition of a "document" as "any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility". These seem like relatively clear-cut provisions: all documents held by the institution, with the concept of a "document" defined broadly. However, the rulings of 2010 demonstrate that seemingly simple provisions still leave room for divergent, and even opposite, interpretations.

Article 4 lays down the exceptions, three of which were also relevant for the recent Court rulings, even if the cases concerned more the application of certain core principles than the interpretation of individual exceptions. Article 4(1)(b) provides that the institutions shall refuse access to a document "where disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data". Unlike the exceptions provided by the first paragraph, the exceptions contained in paragraph 2 contain a "public interest test": the exception is to apply "unless there is an overriding public interest in disclosure", something that the institution is to examine. Under Article 4(2), protection is given to

– "commercial interests of a natural or legal person, including intellectual property,

– court proceedings and legal advice,

– the purpose of inspections, investigations and audits."

The last of these three is a core exception from the point of view of the Commission and an exception it tried to invoke in all three cases. Article 4(3) applies to documents drafted by the institutions for their internal use and protects their "space to think". Article 4(6) provides for partial access by establishing that "[i]f only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released". Paragraph 7 lays down a temporal limitation for the implementation of the exceptions: they are only to apply "for the period during which protection is justified on the basis of the content of the document".

Article 6 of the Regulation provides that "applications for access to a document shall be made … in a sufficiently precise manner to enable the institution to identify the document", and also that "the applicant is not obliged to state reasons for the application". The latter is a key principle of the Regulation. Furthermore, if an application is imprecise, the institution is under an obligation to both ask the applicant to clarify it and assist her in the process. If an application relates to "a very long document or to a very large number of documents", the institution is told to confer with the applicant "informally, with a view to finding a fair solution".

3. In dividual examination vs. general presumption

3.1. *Background*

The principle of examining each of the requested documents is a key element of Regulation 1049/2001. Individual

examination has been deemed necessary since the decision to grant or deny access is taken by balancing the benefit of access against the need to protect the interest by refusing access. Such balancing can only be done based on the substance of the document. Moreover, partial access and the temporal limitation of the exceptions under Article 4(6) and (7) also require evaluating the substance of the document. Both must be considered by the institution *ex officio* when deciding on access.26 However, the institutions, in particular the Commission, have experienced the principle of individual examination as burdensome, especially when the application has concerned a very large number of documents, and in particular if relating to a situation in which access would seldom be granted.

In 2005, the General Court showed some understanding for the Commission concerns when in *VKI* v. *Commission*27 it addressed a request to access a cartel file consisting of more than 47 000 pages. The General Court ruled that, in principle, an institution receiving an application for access to documents must carry out a concrete, individual assessment of the content of the documents referred to in the request in order to assess the extent to which an exception to the right of access is applicable and the possibility of partial access. However,

"such an examination may not be necessary where, due to the particular circumstances of the individual case, it is obvious that access must be refused or, on the contrary, granted. Such could be case, inter alia, if certain documents were either, first, manifestly covered in their entirety by an exception to the right of access or, conversely, manifestly accessible in their entirety, or, finally, had already been the subject of a concrete, individual assessment by the Commission in similar circumstances." (para 75)

The Court referred to the duty to confer with the applicant informally, and said that Regulation 1049/2001 "does not contain any provision expressly permitting the institution, in the absence of a fair solution reached together with the applicant, to limit the scope of the examination which it is normally required to carry out in response to a request for access" (para 96). A failure to examine documents one by one constituted, in principle, a "manifest breach of the principle of proportionality" (para 98). However, the Court continued, it was possible that a request for access was made for "a manifestly unreasonable number of documents, perhaps for trivial reasons, thus imposing a volume of work for processing of his request which could very substantially paralyse the proper working of the institution" (para 101). For this reason, the institution had in exceptional cases the possibility not to examine the documents individually, "only where the administrative burden entailed by a concrete, individual examination of the documents proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required" (para 112). The burden of proof is on the institution, and it is still under an obligation to try to consult with the applicant, aiming at a solution that is most favourable to the applicant's right of access (paras. 113–114). Thus, "It follows that the institution may avoid carrying out a concrete, individual examination only after it has genuinely investigated all other conceivable options and explained in detail in its decision the re*asons for which those various options also involve an unreasonable amount of work"* (para 115). There is no doubt about the General Court's message: the possibility of not examining all documents was to be invoked only in extremely rare cases.

Quite exceptionally for an important transparency ruling, the *VKI* judgment was not appealed to the ECJ. Even the coalition working for "government in the sunshine" and a public "right to know"28 could comprehend that 47 000 pages is indeed a considerable number of pages to browse through, and appreciated the strict criteria set by the Court as to when individual examination might not be necessary. But after the ruling, due to the significant admission of principle by the General Court, there now was "every possibility that the floodgates are opened to a development where the obligation to a concrete and individual assessment and, consequently, the right of partial access, are limited to an unacceptable degree".29 Of course, for the Commission at least, it proved very tempting to test the limits of the new exception and to explore in which other policy areas a similar admission might be approved. Since then, as could very well be anticipated, the existence of "exceptional circumstances" has been a matter of discussion resulting both in *TGI* and *API*, and a proposal by the Commission to amend the Regulation to abolish the duty of individual examination in relation to some groups of documents.

3.2. Documents relating to investigations

The *TGI* case was extremely relevant for this discussion, since it concerned an application to access certain large State aid files held by the Commission. There were two problems of principle: first, the number of documents applied for was again large, which raised questions about the need to assess them one by one in order to decide whether access could be granted. Second, there was an apparent clash between Regulation 1049/2001 and the relevant rules on State aid: while the former grants a universal right of access to files held by the Commission (i.e. when access is granted the documents are made publicly available on the internet), in the State aid procedure interested parties other than the Member State concerned have no right to consult the Commission file. The latter question will be addressed in section 4 below.

In March 2002, TGI applied, on the basis of Regulation 1049/2001, for access to all documents in the

Commission's files in all the aid cases concerning itself, and to all documents in the Commission's files concerning State aid for the undertaking Schott Glas, save for business secrets relating to other undertakings. The Commission rejected the application for access, arguing that the disclosure of those various documents would be likely to undermine the protection of the purpose of inspections and investigations and the commercial interests of Schott Glas. Partial access was impossible since the documents could not be divided into confidential and non-confidential parts. Furthermore, there was no overriding public interest justifying disclosure. In August 2002 TGI brought an action before the General Court. Sweden and Finland applied for leave to intervene in its support.

In its ruling,30 the General Court held that the examination which the institution must, in principle, undertake in order to apply an exception must be carried out in a concrete manner and must be apparent from the reasons for the decision (paras. 76 and 77). Only a concrete, individual examination could allow the assessment of the possibility of partial access and the temporal limitations (para 79). Such an assessment is an approach to be adopted as a matter of principle, and as such also applicable to cartels or the control of public subsidies (para 85). The Court then examined whether the criteria it had established in *VKI* for when an examination might not be necessary were fulfilled. For the Court, so general an assessment as the one now invoked by the Commission, applying to the entire administrative file relating to procedures for reviewing State aid granted to TGI, did not demonstrate the existence of "special circumstances of the individual case". In particular, it did not establish that those documents were manifestly covered in their entirety by an exception to the right of access (para 87–89). The General Court thus repeated the VKI principle, but found that the required "special circumstances" were not present, as shown by the scant justifications provided by the Commission for its rejection.

The Commission appealed the ruling. In addition to Finland and Sweden, also Denmark intervened in support of TGI. In her Opinion, Advocate General Kokott supported the General Court's reading: the principle of individual examination is consistent with the method of appraising the information in the document applied for and the effects of its possible dislosure on protected interests. Consequently, "it is incumbent on the Commission to establish in each case whether the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose" (para 82). Advocate General Kokott had some sympathy for the need for room of manoeuvre during ongoing infringement procedure, but found that unlimited freedom cannot be guaranteed, since "[c] ompliance with Community law by the Member States and its enforcement by the Commission are legitimate subjects of common interest" (para 112). In conclusion, Advocate General Kokott, proposed to dismiss the Commission appeal in its entirety.

The Court of Justice, however, chose a different path of interpretation. It began by pointing out that TGI's application concerned the whole of the administrative file regarding the State aid granted to it. While the documents applied for by TGI did indeed fall within an activity of "investigation", within the meaning of Article 4(2), this was not sufficient, but the institution concerned must also explain how access to the document could specifically and effectively undermine the interest protected by the exception. However, the Court stated, referring to its *Turco* ruling, it is in principle open to the Community institution to base its decisions in that regard on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature (paras. 53 and 54). In *Turco*, this finding continued with a very significant "however", which the Court decided not to repeat in *TGI*:

"However, it is incumbent on the Council to establish in each case whether the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose" (Turco, para 50).

The Court of Justice found that the General Court should have taken account of the lack of a right to consult the documents in the Commission's administrative file for interested parties other than the Member State concerned in the procedures for reviewing State aid, and, "therefore, have acknowledged the existence of a general presumption that disclosure of documents in the administrative file in principle undermines protection of the objectives of investigation activities" (para 61). That general presumption does not, however,

"exclude the right of those interested party to demonstrate that a given document disclosure of which has been requested is not covered by that presumption, or that there is a higher public interest justifying the disclosure of the document concerned by virtue of Article 4(2) of Regulation No 1049/2001" (para 62).

In terms of transparency, the *TGI* ruling is far weaker than both the *VKI* ruling of the General Court and the *Turco* ruling of the ECJ itself, not least because it leaves too many central questions open in a matter that is at the core of implementing the Regulation. The ECJ established that the Commission was able to refuse access to *all* the documents relating to procedures for the review of State aid covered by TGI's request for access. This could be done without first making a concrete, individual examination of *any* of the documents. As TGI had failed to argue for the

reversal of this "general presumption" – which nobody had heard of at the time TGI submitted its original application – no evidence existed to rebut the presumption and thus TGI could not claim that the Commission must carry out an individual examination.

If the *TGI* ruling is compared with *VKI*, it should be noted that the Court of Justice regrettably did not see a need to repeat the criteria relating to the request concerning a "manifestly unreasonable amount of documents" and the examination of them resulting in substantially paralysing the proper working of th e institution (cf. *VKI* para 112). While in *TGI* the application was wide, and assessing each document one-by-one would have caused a considerable administrative burden, also the justification offered by the Commission was by any standard too general, relating to the entire file. The Commission did not in any way even attempt to demonstrate that it had considered possible ways of dealing with the request other than blank refusal, as the General Court had earlier required in *VKI*. The challenged Commission decision included no indication that it had "genuinely investigated all other conceivable options", a requirement set in *VKI* (para 115), For example, the ECJ did not require any attempt to use administrative means to deal with this wide request, or wide requests in general, and did not evaluate the work load caused by this particular request in any concrete way so as to establish criteria for future cases. Therefore, following *TGI*, the criteria for invoking a "general presumption" are non-existent.

Moreover, unlike in *Turco*, the institution was not required to verify whether the general presumption invoked by it actually applied to the documents covered by the application. This is a serious omission by the Court of Justice, especially considering that the Regulation itself includes no mention of the possibility of invoking general presumptions and many of its provisions actually speak against them, as correctly noted by the General Court and Advocate General Kokott. The very wide presumption approved by the ECJ also makes it in practice impossible to evaluate whether partial access to the requested documents could have been granted, or whether a temporal limitation applies. The only positive aspects – from a transparency perspective – of the ECJ's ruling were that, first, the scope of the ruling was limited and concerned only a particular request by an interested party in a State aid procedure. Second, that the Court did not at least categorically deny the possibility to reverse the "general presumption", even if it did not specify what kind of a public interest could be invoked to reverse the presumption.

While the objective of the Commission in appealing *TGI* was similar to those aimed at by its recast proposal, they are fortunately now only partially achieved through the ECJ's ruling. In its legislative proposal of 2008, the Commission proposed to limit the scope of the Regulation altogether by adding a new Article 2(6):

"Without prejudice to specific rights of access for interested parties established by EC law, documents forming part of the administrative file of an investigation or of proceedings concerning an act of individual scope shall not be accessible to the public until the investigation has been closed or the act has become definitive. Documents containing information gathered or obtained from natural or legal persons by an institution in the framework of such investigations shall not be accessible to the public."

For the Commission, its proposal would relieve it of the duty of examining requests while an investigation is pending or until the final decision in the matter has been taken. The Commission proposes that when "the final decision can no longer be challenged in Court, requests for access to documents pertaining to the case file will be handled in accordance with the general rules on access, including an individual examination of each requested document. This provision merely clarifies the existing situation and codifies case law."31 It is questionable which case law the Commission is referring to, but the outcome of its proposal would be a temporary and a permanent32 block exception from the scope of the Regulation, and a subsequent limitation of the need to even consider releasing certain documents, irrespective of the harm that might be caused by granting access to them.

This proposed amendment by the Commission did not fly quite as smoothly as it had hoped, and in its first reading report the European Parliament proposed to delete it.33 In the Council, the reception was more mixed; while some proposed to delete the amendment altogether, others felt it ought to have been more specific in covering infringement proceedings as well.34 But, as could be guessed, there is already a case pending, *LPN* v. *Commission*,35 concerning the application of the "general presumption" to infringement proceedings. The applicant LPN argues that the Commission has relied "on a theoretical model that the exception related to inspections and audits prevails, without giving any additional, concrete reasons on a document by document basis, in order to adopt a decision refusing access to all of the documents requested by the LPN".36 Similarly, in the appeal in *Agrofert*,37 the Commission argues for a "general presumption of non-accessibility" in the application of the Merger Regulation. No doubt, these cases will be followed by others.

3.3. Access to Court submissions

Access to documents relating to ongoing State aid investigations was of course not the only area where the

existence of “particular circumstances” came to be tested. The *API* case concerned access to documents relating to Court proceedings. The justification offered by the Commission this time did not relate to the workload caused by the application, but that the documents should not come under the scope of the Regulation at all. Ex Article 255 EC did not establish specific obligations of access for the Court of Justice. There are no rules governing access to case files of the EU courts other than the Statute of the Court of Justice, the Rules of Procedure of the Courts and the Instructions to the Registrar of the General Court. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice, which also applies to the General Court, written submissions are only communicated to the other parties and to the institutions whose decisions are in dispute. However, clearly the other institutions are in possession of a number of documents relating to Court proceedings, a matter also raised by the Commission in the context of the revision of Regulation 1049/2001.

In August 2003, API – a non-profit-making organization of foreign journalists based in Belgium – applied to the Commission under Regulation 1049/2001 for access to the written pleadings lodged by the Commission before the General Court or the Court of Justice in proceedings relating to fifteen cases at different stages including the *Open Skies* cases.38 The Commission granted access only in respect of the pleadings lodged in two preliminary ruling cases. Access to two pleadings was refused essentially because the cases were pending. The same exception applied also to the pleadings of a closed case that was closely connected with another pending case. The *Open Skies* cases, again, were closed, but they concerned infringement proceedings and could thus, in the view of the Commission, be protected under the relevant exception. Finally, the Commission found that there was no overriding public interest in disclosure. To be fair, the reasoning offered by the Commission this time was better than that given in *TGI* and indicated that it had at least had a look at the requested documents to consider which exception might come into question.

In its ruling,39 the General Court had underlined that, in principle, documents should be examined individually, whatever the field to which those documents relate but acknowledged the *VKI* principle that an individual examination of each document is not required in all circumstances (para 58). The Court emphasized that the purpose of the exception for the protection of court proceedings is primarily to ensure observance of the right of every person to a fair hearing by an independent tribunal (paras. 59–61, 63). First, in relation to documents relating to pending cases, the General Court established that such documents are manifestly covered in their entirety by the exception relating to the protection of court proceedings and that remains the position until the proceedings in question have reached the hearing stage. This finding was not affected by the fact that disclosure of procedural documents is possible in a number of Member States and that it is also provided for, as regards documents lodged with the European Court of Human Rights, in the ECHR, since the Rules of Procedure of the EU Courts do not provide for a third-party right of access to procedural documents lodged at their registries by the parties (paras. 84 and 85). However, these rules, which provide that the pleadings of the parties are in principle confidential, cannot be relied on after the hearing, since the ECJ has made it clear that they do not prevent the parties from disclosing their own written submissions (paras. 86 to 89). Lastly, the General Court held that API had failed to raise overriding public interests capable of justifying disclosure of the documents in question (para 100). In the closed cases, the General Court held that the Commission’s refusal was not justified.

Both API, Sweden and the Commission all appealed the General Court’s ruling to the ECJ, on different grounds, and the Court decided to join the cases. Denmark and Finland intervened in support of Sweden and the UK in support of the Commission. The three cases concerned the questions whether the General Court had erred in finding that access should be granted to pleadings after the hearing stage in pending cases; access to pleadings in “closed” cases; whether the ex Article 226 EC procedure should still be found as ongoing once it had reached the ex Article 228 EC stage; the question of “general presumption” versus “individual examination” and the nature of the “public interest” that might require access to be granted even when an exception under Regulation 1049/2001 applied in principle (this last point will be considered separately in section 6).

In a relatively brief Opinion, Advocate General Maduro did not at any point offer his reading of the relevant provisions of Regulation 1049/2001 but rather concentrated on giving expression to how he felt the matter *should* be solved. He pointed out the fundamental problem with API’s request, namely that it had been made to the Commission and not to the Court. This is not because values of transparency did not apply to the judiciary, but because “the Court is master of the case” during litigation and thus “in a position to weigh the competing interests and to determine whether the release of documents would cause irreparable harm to either party or undermine the fairness of the judicial process” (paras. 13–14). For Advocate General Maduro, the “best conclusion” – reached without any analysis of the applicable provisions – “would be to find that all documents submitted by parties in pending cases fall outside the scope of Regulation No 1049/2001”. In cases that are closed, “it is reasonable to adopt a general principle favouring access” with a possibility that the Court decide to impose an “obligation of confidentiality” on the parties “

if it considers that it is fair and just to do so" (para 39).

The Court of Justice confirmed in its ruling that an institution may base its decisions on general presumptions which apply to certain categories of document, as considerations of a generally similar kind are likely to apply to applications for disclosure which relate to documents of the same nature (para 74). Again, there was no mention of the more specific *VKI* criteria – quite naturally so, since this time the justification for invoking a "general assumption" no longer related to the workload caused by the application but to the nature of the activity to which the documents related. Instead, it was to be determined whether general considerations supported a presumption that the disclosure of pleadings relating to direct actions that were pending would undermine the court proceedings and that the Commission was, thus, not under an obligation to carry out a specific assessment of the content of each of those documents (paras. 75–76). The reply was affirmative. For the Court,

"It is clear, both from the wording of the relevant provisions of the Treaties and from the broad logic of Regulation No 1049/2001 and the objectives of the relevant EU rules, that judicial activities are as such excluded from the scope, established by those rules, of the right of access to documents" (para 79).

For the Court, it was evident from the wording of ex Article 255 EC that the Court is not subject to the obligations of transparency laid down in that provision, clarified further by Article 15 TFEU, and justified by the nature of the judicial responsibilities which it is called upon to discharge under ex Article 220 EC. While the exclusion of the documents from the scope of public access was, in principle, acceptable, the Court remained unconvinced about the General Court's choice of oral hearing as the decisive point in time:

"the exclusion of judicial activities from the scope of the right of access to documents, without any distinction being drawn between the various procedural stages, is justified in the light of the need to ensure that, throughout the court proceedings, the exchange of argument by the parties and the deliberations of the Court in the case before it take place in an atmosphere of total serenity". (para 92)

For this reason, it judged it appropriate that there should be "a general presumption that disclosure of the pleadings lodged by one of the institutions in court proceedings would undermine the protection of those proceedings … while those proceedings remain pending" (para 94). In the Court's view, "disclosure would flout the special nature of that category of documents and would be tantamount to making a significant part of the court proceedings subject to the principle of transparency." Consequently, "the effectiveness of the exclusion of the Court of Justice from the institutions to which the principle of transparency applies ... would be largely frustrated" (para 95).

As regards pleadings that had been lodged in closed cases, the Court pointed out that once proceedings have been closed by a decision of the Court, there are no longer grounds for presuming that disclosure of the pleadings would undermine the judicial activities of the Court and the "general presumption" thus no longer applied. The Court then pointed out that the procedures provided for under Articles 226 and 228 EC (now 258 and 260 TFEU, as amended) constitute two distinct procedures, each with its own subject-matter. Accordingly, as the General Court had found, it could not be presumed that disclosure of pleadings lodged in a procedure which ultimately led to the delivery of a judgment under Article 226 EC undermines investigations which could lead to proceedings being brought under Article 228 EC (para 122).

As a matter of principle, the existence of yet another "general presumption" in the *API* case is of course again significant. From a more practical point of view, as the Commission confirmed in the oral hearing, there have been very few requests for documents relating to court proceedings during the existence of Regulation 1049/2001. The most serious objection to be raised in the present article relates to the Court's obvious mission in the case, since it seems to have trespassed on the side of the legislature in establishing the outcome of the case. The documents applied for clearly did fall within the scope of application of Regulation 1049/2001, in that they were documents either drawn up or received by the Commission and in its possession, and belonged to an area of activity of the European Union. The Court left this aspect completely without consideration. The difference between the new Article 15 TFEU and ex Article 255 is clear: Article 15 TFEU includes a specific rule on documents held by the Court. The relevance of this for API's application is however questionable, since the Treaty of Lisbon was not even near to entering into force at the time the contested decision by the Commission was adopted. Moreover, Article 15 TFEU does not exempt the Court from the general obligation to function as openly as possible – another significant point that the Court did not grant much importance. Overall, the Court seemed to engage in much the same exercise of legislating as Advocate General Maduro, but was less honest about its undertaking.

Moreover, if one compares *API* with *Turco*, it may be seen that in the latter the Court discussed and clearly dismissed concerns relating to public pressure in the context of access to legal opinions:

"As regards the possibility of pressure being applied for the purpose of influencing the content of opinions issued by

the Council's legal service, it need merely be pointed out that even if the members of that legal service were subjected to improper pressure to that end, it would be that pressure, and not the possibility of the disclosure of legal opinions, which would compromise that institution's interest in receiving frank, objective and comprehensive advice and it would clearly be incumbent on the Council to take the necessary measures to put a stop to it" (para 64).

In *API*, Advocate General Maduro considered whether the same conclusion would be valid in the context of access to Court proceedings, and argued that it was "no less valid in the context of improper pressure on the judiciary and the parties to judicial proceedings".40 Interestingly, the Court's conclusion in *API* was the opposite, since it deferred to the point about public pressure with reference to equality of arms: "if the content of the Commission's pleadings were to be open to public debate, there would be a danger that the criticism levelled against them, whatever its actual legal significance, might influence the position defended by the Commission before the EU Courts" (*API*, para 86). Moreover, not only the members of the Commission legal service would risk being affected by such pressure, but the Court proceedings themselves would be at risk:

"Disclosure of the pleadings in question would have the effect of exposing judicial activities to external pressure, albeit only in the perception of the public, and would disturb the serenity of the proceedings" (API, para 93).

The recast proposal currently on the legislature's table is inspired by *API* but not identical with it. With reference to the General Court's ruling, the Commission argued that written submissions to the Courts were manifestly covered by the exception aimed at protecting court proceedings before an oral hearing has taken place.41 It proposed adding a new paragraph to Article 2 clarifying that documents submitted to Courts by other parties than the institutions do not fall within the scope of the Regulation at all.42 The Commission argued that disclosure of written submissions to the Courts under Regulation 1049/2001 would circumvent the Courts' own rules and the Protocol on the Statute of the Court of Justice, which is an integral part of the Treaty.43 The European Parliament indicated that carving out such categories of documents from the scope of the Regulation is not the right way forward.44 The new Commission proposal from March 2011 aims at a more obedient transposition of Article 15 TFEU: while expanding the institutional scope to also cover the Court of Justice, its implementation would be limited to the administrative tasks of the Court only.45

On the whole, however, the *API* ruling was perhaps the least astonishing of the three: it is hardly surprising that the Court's interest in transparency was lacking when it came to its own documents. For the Court, the ruling it had handed down in *TGI* and the "general presumption" approved for the Commission in that ruling three months earlier came in very handy: it would indeed have been suspicious for the Court to acknowledge its first "general presumption" in relation to documents relating to Court proceedings. The *API* case was a case of mere institutional politics: the main question was about who should rule on access to documents relating to Court proceedings and not about the harm that granting access to the documents API had applied for might cause – even if assessing this harm ought to have been at the core of the case. As Advocate General Maduro noted in his Opinion, the practice of various international tribunals suggests that there is no reason to fear that disclosure of documents relating to judicial proceedings will undermine the judicial process: all submissions are public unless there are exceptional reasons for keeping them confidential.46 This approach would seem to coincide with the basic principle of Regulation 1049/2001. In this respect, Advocate General Maduro also notes the "tendency seems to be that the more remote the judicial body, the greater its concern with the transparency of its judicial proceedings" (para 26). This might not be a bad perspective to consider for the Court of a Union constantly struggling with challenges relating to a democratic deficit.

4. The difficult balance between openness and data protection

There are two main pieces of legislation that try to strike a balance between public information and the protection of privacy. Article 4(1)(b) of Regulation 1049/2001 is of course a key provision, establishing that an exception to public access is to apply "where disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data". In addition, Regulation 45/2001,47 adopted on the basis of ex Article 286 EC (now replaced, in substance, by Art. 16 TFEU), includes a number of provisions on the matter. The two regulations were negotiated simultaneously and acknowledge each other's existence.48 The attempt was thus made, in 2001, to create two separate pieces of legislation with one focusing on transparency and the other on the protection of personal data, that would still be compatible with each other. However, the two regulations have certain provisions that conflict: while Regulation 1049/2001 does not mention any requirement of consent by the data subject, grants universal access to the released information, and specifically denies any need to reason one's request, Regulation 45/2001 requires the consent of the data subject, grants access only to the applicant, and requires reasons for the application. The question has thus been how to apply

the provisions without granting priority to one at the expense of the other, and the balance has been difficult to find. The practice has been, for example, to blank out names and other personal data in documents to which public access has been granted; but, as the Commission notes in its legislative proposal, this has been "perceived as too restrictive, in particular where persons act in a public capacity".49 *Bavarian Lager* concerns this specific question.

The *Bavarian Lager* dispute is a long-standing one and pre-dates Regulation 1049/2001, since the first access request was made based on the earlier Code of Conduct concerning public access to Council and Commission documents.50 Before the entry into force of Regulation 1049/2001 the request had already resulted in a case before the General Court51 and the European Ombudsman.52 It concerned access to the names of persons acting in their professional capacity who had participated in a meeting organized by the Commission with an interest group and UK Government officials on 11 October 1996 in the context of infringement proceedings. The question was whether the process to be followed in granting such access was that of Regulation 1049/2001 – under which the request was made – or under the relevant data protection rules, since the requested documents included personal data, in particular the names of the persons attending the meeting. The Court cases concerned five names that had been blanked out from the minutes of the meeting, following two express refusals by persons to consent to the disclosure of their identity and the Commission's failure to contact the remaining three attendees. In the Commission's view, Bavarian Lager had not established an express and legitimate purpose or need for the disclosure. In any case, the Commission argued that it would need to refuse to disclose the other names so as not to compromise its ability to conduct inquiries.

The General Court annulled the Commission decision, establishing that Bavarian Lager's request was based on Regulation 1049/2001 and, under Article 6(1), a person requesting access to a document is not required to justify his request and thus does not have to demonstrate any interest in having access to the requested documents.53 The General Court thus treated the case as mainly focusing on the question of whether the disclosure of the names of those who attended the meeting of October 1996 would undermine protection of their privacy and integrity and answered this in the negative: there was no interference with the privacy of the individuals and thus the Commission had erred in refusing to disclose the names of the individuals. Examination as to whether a person's private life might be undermined was to be carried out in the light of Article 8 of the ECHR and the case law based thereon.

The Commission appealed the ruling and the UK and the Council intervened in its support. The case gathered wide interest: Finland and Sweden intervened in support of Bavarian Lager, and Denmark intervened in support of Bavarian Lager and the European Data Protection Supervisor (EDPS), which had already intervened in the first instance.

In her Opinion, Advocate General Sharpston adopted an alternative reading to the relationship between the two regulations.54 She argued for a "test" to consider whether the application for a document was in fact an application for a document with incidental mention of personal data or a document that essentially contained a large quantity of personal data. While the first group of documents should, in her view, be treated under the public access rules, the latter group belonged under the data protection rules (para 159 and 160). The first group of documents would in general be disclosed *erga omnes*, and partial access would be granted if part of the document was covered by the exception relating to the protection of privacy under Regulation 1049/2001. The second group of documents would be disclosed only on a case-by-case basis and only to the applicant who has provided due reasons for his application (para 166). According to the Advocate General, the General Court had wrongly established that the disclosure of the relevant names was not a potential interference with private life, but it constituted an interference fulfilling the criteria under Article 8(2) ECHR: first, the disclosure was according to law, second, "few things would appear to be more necessary in a democratic society than transparency and close involvement of citizens in the decision-making process", and third, the disclosure was fully proportionate (paras. 208–213). When analysed this way, disclosure would become "lawful" under Article 5(b) of Regulation 45/2001 and consequently the data subject's consent would no longer be needed. Advocate General Sharpston concluded by pointing out that the right to safeguard one's personal data is not an absolute right. Either way, the Commission should have opted for disclosure.

The Court of Justice adopted a completely different interpretation. The ECJ notes that the two regulations do not contain any provisions granting one regulation primacy over the other. In principle, "*their full application should be ensured* " (para 56, emphasis added). For the ECJ, however, the General Court had disregarded the wording of Article 4(1)(b) of Regulation 1049/2001, which is "an indivisible provision and requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with Regulation No 45/2001" (para 60).

In the view of the ECJ, "Article 4(1)(b) of Regulation No 1049/2001 establishes a specific and reinforced system of protection of a person whose personal data could, in certain cases, be communicated to the public" (para 60). When a request based on Regulation 1049/2001, in fact, "seeks to obtain access to documents including personal

data, the provisions of Regulation No 45/2001 become applicable in their entirety" (para 63). Basically, the contested ruling had failed to observe some of the essential provisions of Regulation 45/2001 and the system of protection it establishes (para 64) and thus failed to "correspond to the equilibrium which the Union legislature intended to establish between the two regulations in question" (para 65).

For the ECJ, it was enough that the names included in the relevant documents enabled the persons concerned to be identified. The Court pointed out that Bavarian Lager could have access to all the information concerning the meeting, including the opinions which those contributing expressed in their professional capacity, and that the Commission had sought the agreement of all the participants to the disclosure of their names. In the view of the Court, the Commission had been right to verify whether the data subjects had given their consent to the disclosure of personal data concerning them (para 75): "By releasing the expurgated version of the minutes of the meeting of 11 October 1996 with the names of five participants removed therefrom, the Commission did not infringe the provisions of Regulation No 1049/2001 and sufficiently complied with its duty of openness" *(*para 76). The ECJ also concluded that as Bavarian Lager had not provided "any express and legitimate justification or any convincing argument in order to demonstrate the necessity for those personal data to be transferred", the Commission had not been able to weigh up the various interests of the parties concerned. Nor was it able to verify whether there was any reason to assume that the data subjects' legitimate interests might be prejudiced, as required by Article 8(b) of Regulation No 45/2001" (para 78). Consequently, the Commission was right to reject the application for access to the full minutes of the meeting of 11 October 1996.

In many ways, the *Bavarian Lager* ruling left the relationship between the two regulations open in establishing that both were fully applicable. This is the sentence that the transparency-minded will carry close to their hearts. The rest of the ruling provides little comfort, since the Court also accepted the Commission argument that it could not release the names of the participants without their specifically expressed consent. If the ruling of the General Court was challenged because it relied heavily on Regulation 1049/2001 – on the basis of which the application had, after all, been made – the ruling of the ECJ does not seem to have paid much attention to this Regulation or to the Treaty provisions guaranteeing openness in the activities of the Union. As it seems that for the applicant the five names were of considerable interest, the Court's argument that the Commission had "sufficiently complied with its duty of openness" (para 76) seems odd: it is not the amount of information – however trivial – to which access is granted that counts, but granting access to the information that the applicant is interested in gaining.

From the perspective of Regulation 1049/2001, quite crucially, the Court does not give any consideration to whether granting access to the requested names was an infringement of privacy, as interpreted by the General Court The only necessary consideration for the ECJ seems to be that the name of a person constitutes personal data which should not be released to outsiders without weighty reasons. In this way, the Court seems to get mixed up with whether it in fact was private life or personal data – any personal data – it was supposed to be protecting. After all, everyone present at the famous meeting of 11 October 1996 was there in a public capacity, and one could assume that very little that could be characterized as "private" took place at the meeting. Another interesting characteristic of the case was that the ECJ found completely against the view of the European Data Protection Supervisor, who had consistently supported the applicant and the reading of the General Court and held that the Commission took too strict an approach. According to the EDPS, actual harm to privacy should always be a necessary threshold to justify refusal of access to documents containing personal details.55

While the Court's ruling in *Bavarian Lager* is perhaps the only one of the three that is understandable in light of the wording of the relevant exception under Regulation 1049/2001, it is the also the one that affects the greatest number of applications.56 After all, a great number of documents include some kind of personal data. And as the European Data Protection Supervisor has pointed out, the effects of the approach will be difficult to administer, since a name is seldom included in a document on its own, but is linked to other data, such as a contribution in a discussion. Thus it is doubtful whether particular data can be considered in isolation.57

What is currently being considered by the legislature in the context of the reform of Regulation 1049/2001 is a Commission proposal, partly inspired by the General Court's ruling in *Bavarian Lager*, to move Article 4(1)(b) to a new Article 4(5) and reformulate it in order to clarify the relationship between Regulations 1049/2001 and 45/2001:

"Names, titles and functions of public office holders, civil servants and interest representatives in relation with their professional activities shall be disclosed unless, given the particular circumstances, disclosure would adversely affect the persons concerned. Other personal data shall be disclosed in accordance with the conditions regarding lawful processing of such data laid down in EC legislation on the protection of individuals with regard to the processing of personal data."58

In terms of openness, the Commission proposal is of course more generous than the interpretation given to

current Article 4(1)(b) by the ECJ in *Bavarian Lager*, since it creates a presumption of openness to certain information relating to a person's public functions. In today's situation, with the interpretation of Article 4(1)(b) confirmed by the Court of Justice, the Commission proposal certainly has new charm to it. Prior to the ECJ's ruling, however, the proposal gathered criticism, among others by the European Data Protection Supervisor,59 who argued that the proposal did not do justice to the need for the right balance between the fundamental rights at stake. A simple reference to Regulation 45/2001 might, in the view of the EDPS, "respect the right to data protection, but does not respect the right to public access",60 especially since the EU legislation on data protection does not provide a clear answer as to when a decision on public access must be made. Instead, the EDPS argued for a "balanced approach", also emphasized in a number of documents dealing with the collision between those two rights61 and reflected in the way the General Court had approached the question of privacy in *Bavarian Lager*. The EDPS also argued that the Commission proposal suggestion that only names, titles and functions are disclosed ought to be reconsidered. The EDPS proposed his own wording for the new clause, which was endorsed by the European Parliament.62 The ECJ ruling also led the EDPS to declare that the review of the relationship between access to documents and data protection was now even more urgent.63 Fortunately, as well as Regulation 1049/2001, the EU data protection rules are also under review, and the relationship between the two sets of rules has already been placed on the reform agenda.64 Moreover, since even other cases on the application of the protection of privacy are already pending, the courts will receive a further opportunity to address the matter.65

5. On the relationship between access to one's own file and public access

All three cases decided in 2010 concerned, in one way or another, the relationship between access to documents by a participant in EU proceedings and the right of public access, a right that belongs equally to all EU citizens and legal persons. In practice, the General Court's interpretation, especially in *TGI* and *Bavarian Lager*,66 suggested that the applicants could get wider access to their own file – a right actually protected by Article 41 of the EU Charter of Fundamental Rights – based on the implementation of Regulation 1049/2001 as "any citizen of the Union" than they had been granted in their attempts to gain access to documents in a Commission file concerning themselves under other EU legislation. Both cases highlight insofar that if other rights of access are limited, the pressure to invoke the rules on public access to the file, often your own file, increases. Opinions diverge on whether this suggests a need to limit public access rules or provides an incentive to consider whether access rules in various other pieces of legislation ought to be revisited in order to make access in those areas genuinely privileged.

The *TGI* affair related to two separate investigations concerning Germany's notification to the Commission of various measures designed to consolidate TGI's financial position. Both procedures ended with a Commission decision finding the State aid measure incompatible with the common market. TGI had submitted its observations in respect of the second formal investigation procedure and requested the Commission to give it access to a non-confidential version of the file and the opportunity to submit, subsequently, further observations. The Commission had rejected the requests. TGI had also challenged the decisions in vain before the General Court. Even though the request considered by the ECJ in its recent ruling was made under Regulation 1049/2001, the rules on party access in the area of State aid came to be of more relevance than might have been anticipated.67 Under the relevant State aid procedure, interested parties may submit comments to the Commission, and will later receive a copy of its decision, but the rules make no provision for access to its files. The question thus was whether priority should be given to the public access rules of Regulation 1049/2001 or the specific rules on party access relating to State aid procedures.

The Commission argued that the absence of a right to consult the file for interested parties other than the Member State concerned in the State aid procedures must be recognized as a "particular circumstance of the individual case", justifying a "general presumption". Advocate General Kokott considered the Commission argument in her Opinion in *TGI*, but found the two procedures to be separate, and pointed out that other parties are not prohibited from access to the file (para 92). For Advocate General Kokott, public access to documents was "an independent right distinct from the procedure for reviewing State aid", which might sometimes lead to a *de facto* comparable situation with regard to information but not the same position in law (para 98). Consequently, "the fact that other parties interested in the aid procedure are precluded from gaining access to the file gives no grounds for an exception to the right of access to documents …." (para 102).

The Court of Justice was not convinced. In its view, the lack of a right for other interested parties than Member States to consult documents in the Commission file was a fact that had to be taken into account when interpreting the relevant exception under Regulation 1049/2001. If interested parties were able to consult the file on the basis of the rules on public access, the system for the review of State aid would be called into question, the Court argued (paras. 57–58). While the right to consult the administrative file in the context of a review procedure and the

right of access to documents are indeed legally distinct, as Advocate General Kokott had argued, they lead to a comparable situation from a practical point of view:

"Whatever the legal basis on which it is granted, access to the file enables the interested parties to obtain all the observations and documents submitted to the Commission, and, where appropriate, adopt a position on those matters in their own observations, which is likely to modify the nature of such a procedure." (para 59)

In conclusion, the Court established that the lack of party access under the relevant sectoral piece of legislation affected the interpretation given to the rules on public access so that a "general presumption" of no access could be approved. Also in *API*, the lack of third party access in the Statute of the Court of Justice and the Rules of Procedure of the EU Courts was a part of the logic that in the Court's view justified the "general presumption" of no access to documents relating to court proceedings. If third parties could use Regulation 1049/2001 to obtain access to those pleadings, the Court argued, the system of procedural rules would be called into question (paras. 96 et seq).

A slightly similar – though not identical – logic was behind the Commission legislative proposal to limit the scope of Regulation 1049/2001 in the area of investigations. The Commission justified its proposal for a new Article 2(6) by arguing that

"Access to documents related to the exercise of the investigative powers of an institution should be excluded until the relevant decision can no longer be challenged by an action for annulment or the investigation is closed. During this investigation phase, only the specific rules in this field will apply. The Regulations governing competition and trade defence (antidumping, anti-subsidy and safeguard) proceedings and proceedings under the Trade Barriers Regulations contain provisions regarding privileged rights of access for interested parties and provisions on publicity. These rules would be undermined if the public were to be granted wider access under Regulation (EC) No 1049/2001."68

This is problematic as a point of principle. If such a principle – similar to the "strategy of referral" proposed by the Commission for requests concerning documents containing personal data discussed above – were accepted, Regulation 1049/2001 would not be a "self-contained regime" but simply a strategy of referring a great number of applications to be settled with reference to other pieces of legislation. From a practical point of view, few applicants have such a good grasp of EU legislation that they would be aware of all possible pieces of legislation that might affect their rights of access. However, while in the Commission proposal the existence of special rules would automatically result in moving the relevant matters outside the scope of the Regulation altogether, the Court's approach is more moderate and requires taking them into account when interpreting the relevant exception under Regulation 1049/2001.

The three cases of 2010 follow the Court's earlier line of reluctance to use the rules on public access to compensate defects in other access regimes. In *Sison*, the Court underlined the purpose of Regulation 1049/2001 "to give the general public a right of access to documents of the institutions and not to lay down rules designed to protect the particular interest which a specific individual may have in gaining access to one of them".69 According to the Court, "the particular interest of an applicant in obtaining access to documents cannot be taken into account by the institution called upon to rule on the question whether the disclosure to the public of those documents would undermine the interests protected …." (para 47). At the same time, this declaration should not be taken as meaning that the particular interest that an individual has in gaining access would *always* automatically exclude the possibility of there also existing a public interest in access.

Consequently, the relationship between a public interest and a particular private interest is not completely clear. The matter is likely to be addressed also in *Agrofert*,70 w here the Commission argues that the earlier General Court ruling failed "to take into account the specific features of competition law procedures and guarantees offered by the Merger Regulation to the undertakings participating in the merger proceedings". The matter was touched upon in the General Court's ruling in *MyTravel*,71 in which an appeal is currently pending. The applicant MyTravel had referred to the need to obtain disclosure of certain documents with reference to the overriding interest in the sound administration of justice. The General Court remained unconvinced since in its view, the argument, while referring to a wider public interest, merely sought, "in substance, to assert that those documents would allow the applicant to argue its case better in the action for damages" (para 65). In the view of the General Court, this objective did not alone "constitute an overriding public interest in disclosure which is capable of prevailing over the protection of confidentiality". The Court argued that

"[T]hat interest must be objective and general in nature and must not be indistinguishable from individual or private interests, such as those relating to the pursuit of an action brought against the Community institutions, since such individual or private interests do not constitute an element which is relevant to the weighing up of interests "(para

65).

In its appeal in *MyTravel*, Sweden contends that the considerations put forward by MyTravel "could quite plausibly constitute such a public interest" and "cannot be dismissed without further examination solely with reference to the applicant's private interests" in the way the General Court had done. Sweden points out that the "applicant is under no obligation either to plead or to prove anything in that regard; rather, it is for the institutions to ascertain whether there is an overriding public interest".72 The appeal by Sweden will thus give the Court of Justice another possibility to examine the relationship between the private interest of the applicant and the public interest pursued by Regulation 1049/2001. The *MyTravel* appeal has again gathered wide interest: Sweden is being backed up by the usual suspects Denmark, Finland and the Netherlands, while the Commission is supported by Germany, France and the UK. In her Opinion, delivered on 3 March, Advocate General Kokott agrees with Sweden and criticizes the General Court for merely stressing the existence of personal interests of MyTravel: " Such explanations and possible personal interests cannot be relevant if the Commission does not even begin to consider an evident special public interest" (para 110).

It is certainly to be wished that the Court of Justice would follow this advice. However, so far it has been difficult to convince the Court that there might be a wider public interest relating to granting access to a document if a particular private interest of the applicant is also involved. On the whole, the mere existence of "special rules" would seem too light a justification to limit public access as well, unless harm would be caused by granting access. However, one should be cautious in generalizing the outcome in *TGI* too much. In its action, TGI – and quite understandably so, given that at the time the application was made, the idea of a general presumption of no access was unheard of – neither argued that part of the documents covered by its request were not covered by the general presumption, nor stated what higher public interest might justify their disclosure. The great miss by TGI was that while submitting a request under Regulation 1049/2001, it still relied merely on its interest as the beneficiary of the State aid concerned by review procedures instead of arguing more widely based on the principles behind Regulation 1049/2001. Had TGI argued differently the outcome might have been even the opposite.

It is certainly odd if rules on public access generally generate more generous outcomes than those relating to access rights for interested parties. But this does not suggest a fault in public access rules, but a need to revise rules of privileged access to take more careful consideration of the possible harm that might be caused by granting access. When there is no harm, then access should be granted.73 Or as Advocate General Kokott suggested in *TGI*, the "competent services must especially consider the extent to which their need for confidentiality can continue in the light of Regulation No 1049/2001", of course keeping in mind the principle of proportionality (paras. 66–67).

6. When transparency is "especially pressing"

The *Turco* ruling highlighted the position of documents relating to legislative procedures as a category that ought to enjoy particularly wide openness. The distinction between legislative and other matters is not completely without foundation since in current Regulation 1049/2001 the importance of granting access to legislative documents is also emphasized.74 However, under the Regulation, wide legislative transparency is not to suggest that other than legislative matters are excluded from the scope of transparency: "In principle, all documents of the institutions should be accessible to the public."75 Moreover, the Regulation also refers specifically to transparency in the Union administration: "Openness enables citizens to participate more closely in the decisionmaking process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system."76 This certainly means that openness is not just relevant for legislative matters, but for administrative matters as well.

While the ruling in *Turco* established openness as the main rule when legislation is concerned, all the three rulings of 2010 concerned matters that, for the Commission at least, appeared different in character: documents relat ing to State aid, court proceedings, and infringement proceedings. In *TGI*, Advocate General Kokott specifically considered the Commission argument that Regulation 1049/2001 is mainly aimed at legislative documents. She agreed with the Commission on the specific intention of the legislature to promote the accessibility of certain types of documents that are of a particular interest to the general public, such as documents relating to law-making and to the development of policies and strategies. However, in her view the Commission had missed the fact that Regulation 1049/2001 expressly provides for openness in *all* areas of Union activity. Files on State aid investigation procedures were in no way exempted from this:

"Furthermore, the public interest in the reviewing of State aid is not necessarily less than the public interest in legislative procedure. There are admittedly many administrative procedures that are of very limited interest but the

reviewing of aid is often, quite rightly, of great interest. It affects the economic development of the Member States and, in particular, measures relating to the creation or safeguarding of jobs". (para 60)

Similarly, in *Bavarian Lager*, Advocate General Sharpston argued that, although the disclosure of the names constituted interference in privacy, the Commission had been wrong not to disclose the names, since "the context (an official meeting involving representatives of an industry group acting as spokesmen for their employers, and thus purely in a professional capacity), taken together with the principle of transparency, provided ample justification" (para 192). In *Bavarian Lager* there seemed to be a strong case for openness and public availability of information; after all, questions relating to who lobbies the Commission are by no means irrelevant.

The Court, however, wished in *TGI*, to underline the difference between the cases where Union institutions act in a legislative capacity, as in *Turco*, and requests for documents relating to procedures for reviewing State aid, such as those requested by TGI, that fall within the framework of administrative functions specifically allocated to the said institutions (para 60). Correspondingly, in *API* the Court noted that pleadings lodged before the Court of Justice are wholly specific since they are inherently more a part of the judicial activities of the Court than of the administrative activities of the Commission; those latter activities, moreover, do not require the same breadth of access to documents as the legislative activities of an EU institution (para 77). This is the same logic that the General Court invoked in *MyTravel*, where it considered that the report requested by the applicant "falls within the purely administrative functions of the Commission". In the view of the General Court,

"[T]hose who were primarily concerned by the appeal proceedings that were considered and by the improvements discussed in the report were the undertakings affected … Consequently, the interest of the public in obtaining access to a document pursuant to the principle of transparency … does not carry the same weight in the case of a document drawn up in an administrative procedure intended to apply rules governing the control of concentrations or competition law in general, as in the case of a document relating to a procedure in which the Community institution acts in its capacity as legislator."77

In its appeal, Sweden argues that the principle of openness and access to documents is of great importance in *all* the institutions' activities, and thus also in the administrative procedure within an institution, as established by Article 2(3) of Regulation 1049/2001. In the view of Sweden, the reasoning of the General Court is not consistent with the principle of the greatest possible openness. 78 In her Opinion of March 2011, Advocate General Kokott agrees with the Court of Justice that "administrative activities do not require the same breadth of access to documents as the legislative activities of an EU institution" (para 61), but underlines that transparency is of a great importance for administrative matters as well:

"Union citizens are ... intended to understand how and for what reasons the administration takes its decisions. It is one of the aims of Regulation No 1049/2001 to provide citizens with information on positions which the institution in question has discussed internally and subsequently rejected. They are thus able to form an opinion regarding the quality of the administration's action, in particular its decision-making processes, participate in the public discussion on the administration's action and possibly be given guidance in making their democratic vote" (para 48).

Advocate General Kokott argues that the interest in protecting decision-making diminishes for procedures in which a decision has been taken (para 75), and suggests that the Court should set aside the Commission decisions refusing access in their entirety.

The relationship between legislative and other matters is something that both the Court of Justice and the General Court will need to return to. In addition to *MyTravel*, there are currently at least two cases pending before the General Court that can shed light on the question of public interest relating to legislative and other matters. The first one, *Toland* v. *Parliament*,79 concerns a request to obtain access to a Report by the Parliament's Internal Audit Service entitled "Audit of the Parliamentary Assistance Allowance". The application is justified, *inter alia*, by reference to a failure by the Parliament to consider whether there was an overriding public interest which might outweigh the openness and transparency are overriding public interests which outweigh the grounds for refusal. A second pending case, *LPN* v. *Commission*,80 concerns both Regulation 1049/2001 and the so-called Arhus Regulation on access to environmental information,81 and the central argument is that the information requested by LPN should be regarded information which can and must be made available given the significant environmental interest and the duty by the Commission to weigh the overriding public interest in each individual case.82 *Toland* and *LPN* could provide two reasonably solid candidates for matters with a strong interest in transparency, as strong as for legislative matters, in that the cases concern protection of the environment and use of EU funds. But since the case law on transparency has recently shown wide differences between the General Court and the Court of Justice, it is unlikely that the last word will be said in that matter before the case has reached the ECJ.

The special significance attached to legislative matters by the Court in *Turco* seems to relate to all documents that are linked to legislative procedures, as has been recently confirmed by the General Court in *Access Info Europe*. 83 This would seem to be a different consideration from the reasoning of the ECJ in *TGI* and *API*, where it referred to the possibility of openness sometimes being "especially pressing" even in contexts where a general presumption of no access applies. In *TGI*, in establishing that a general presumption of non-disclosure applied to documents relating to pending investigations, the Court underlined that the presumption did not "*exclude the right of those interested parties to demonstrate that a given document disclosure of which has been requested is not covered by that presumption, or that there is a higher public interest justifying the disclosure of the document concerned by virtue of Article 4(2) of Regulation No 1049/2001" (para 62).*

This finding in *TGI* links up to the arguments brought by Sweden and API in *API* that the general public interest in receiving information relating to pending court proceedings could constitute an overriding public interest for the purposes of Article 4(2) of Regulation 1049/2001. The ECJ pointed out in *API* that the overriding public interest referred to in Article 4(2) must, in general, be distinct from the principle of transparency. It found that the General Court had correctly weighed the interest in transparency against the interest of preventing all external influences on the proper conduct of court proceedings. It recalled the General Court's finding that:

"it is only where the particular circumstances of the case substantiate a finding that the principle of transparency is especially pressing that that principle can constitute an overriding public interest capable of prevailing over the need for protection of the disputed documents and, accordingly, capable of justifying their disclosure in accordance with the last line of Article 4(2) of Regulation No 1049/2001" (para 156).

In the ECJ's view, the vague considerations raised by API could not provide an appropriate basis for establishing that, in the present case, the principle of transparency was in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the documents in question.

The logical question then would seem to be whether the "higher public interest" referred to by the Court in *TGI* is the same "overriding public interest" that underlies Regulation 1049/2001 and which the institutions are required to consider under Article 4(2) when granting or refusing access. The ECJ does not specify this, but since it places the obligation to invoke the "especially pressing" interest on the applicant, the argument seems to be separate from the general "public interest", the existence of which the institutions are to consider assessing applications. The challenge from the point of view of the applicant is the same that Advocate General Maduro noted in his Opinion in *Turco:*

"The duty of striking a balance, which lies with the institution concerned, cannot be limited … to the prior demonstration by the applicant that, having regard to the specific facts of the case, the principle of transparency is so pressing that it overrides the need to protect the legal opinion in question. That would be to forget that one of the fundamental reasons for the specific and individual examination imposed on the institution concerned lies in that duty of balancing public interests." (para 54)

Advocate General Maduro went on to argue that accepting the opposite outcome would impose an excessive burden of proof on the applicant. Since the applicant does not know the content of the document sought, he would scarcely be able to show the interest in disclosing it, and will tend to rely on the overriding public interest in general terms. Thus, Advocate General Maduro argues, it is only the institution that "can, – and must –, carry out such an assessment on the basis of the content of the document in question and of the specific circumstances of the case" (para 54). Exactly the same finding would have been correct in *TGI*: it is extremely problematic if the Court places the burden of proof for reversing the "general presumption" on the applicant, who, according to Regulation 1049/2001 does not need to reason his application and, when making the application, has not seen the document applied for and may thus have only a vague idea of its content. The applicant will not know whether the content of the documents justifies the "general presumption" being reversed, but will need to argue this in any case as a procedural point.

7. What happened to the EU's sunshine legislation?

There are in essence two ways of looking at the Court's recent case law. The pragmatic one is to treat the rulings as being of limited relevance and only affecting the individual applications at issue or others with exactly the same characteristics. In terms of their contents, the rulings confirm that certain documents relating to pending State aid investigations and certain documents relating to Court proceedings fall under a "general presumption" of no public access, which can, however, be reversed. Since documents of this kind have in fact seldom been released, the

practical effect of the cases is limited. As for *Bavarian Lager*, the relationship between the public access rules and the data protection rules will be reconsidered by the legislature in near future in any case. The ruling thus offers a short term solution. Transparency is essentially legislative in nature, seems to be the Court's clearest message, a message it will soon in a position to rectify or clarify. Other than that, the 2010 rulings are characterized by a certain amount of conceptual confusion, making the underlying logic difficult to follow and equally difficult to implement in practice. The clearest result of the rulings might be that they created an interest for the transparency-minded to revise the current Regulation, the interpretation of which had – until the summer of 2010 – been broadly satisfactory. Today, those who are tired of the rain and hope for a bit more sunshine might have more to gain if the legislature decided to amend the Regulation.

The other possible interpretation is to conclude dramatically that the vision of openness, legitimacy and citizen participation seems to have reached its culmination in the Court's *Turco* ruling. Since then, if the ECJ's case law serves as any kind of an indicator, the destination is getting blurred, as the Court has given its authoritative blessing to some of the Commission's most serious attempts to limit citizens' access and, what is more, has done so against the specific wording of Regulation 1049/2001. *API* and *TGI* were an obvious continuation of the *VKI* ruling, but unfortunately, do not achieve the same level of transparency, since the threshold for accepting a "general presumption" is now significantly lowered – and the story will continue. One may now only hope that the development will not lead to a situation where the Regulation, which after all was supposed to apply to *all* documents held by the institutions in *all* policy areas, is effectively emptied of contents through "general presumptions" applying to entire policy fields. As a question of principle, a general presumption of no access is problematic in a regime which is based on the opposite assumption: that everything is in principle open and accessible unless there are justified grounds to deny access.

Suggesting that the latter interpretation has at least some truth is of course the latest move by the Commission in March 2011 to give a second legislative proposal on reforming Regulation 1049/2001. The Commission, which certainly was harshly criticized for its 2008 proposal, now seems to have drawn the conclusion that it should not place the obvious gains it has since then received through the Court's case law at risk by amending the exceptions that the Regulation currently contains. It is not unlikely that in the near future the Commission will formally withdraw its 2008 proposal, on the ground that negotiations on the file have not advanced, and instead of the block exceptions it tried to introduce through the legislative avenue comfort itself with the Court's acceptance of "general presumptions", which seem to serve the same logic. But in times when negotiations on Article 298 TFEU and a new regulation on "open, efficient and independent" EU administration are drawing closer, it is of course illuminating to consider what kind of a picture the Commission's recent activities in Court give of the EU administration today: it is hardly an example of good, responsive administration to use litigation against citizens to try to secure one's own position at all costs. Think of the *Bavarian Lager* saga for example: 14 years spent in Court arguing, against the advice of both the European Ombudsman and the European Data Protection Supervisor, over the release of five names in an official meeting protocol. What might have been won in terms of data protection, was certainly lost in the name of good administration.

It might be wise for both the Court and the legislature to return to some of the basics of open government – if this principle is indeed still an ideology with some foothold in the European Union. This would require putting the consideration of potential harm back to the core of questions of public access. Quite simply: when there is no harm in releasing a document, then there is no reason to limit access either. Requests for access to documents are hardly ever convenient for the administration that is under an obligation to deal with them. And yet transparency is specifically one of the keys to enhance the trust of the citizens in the very same institutions.

* Doctor of Laws, The Erik Castren Institute for International Law and Human Rights, University of Helsinki, Finland. I thank my friend Bolette and another friend who wishes to remain anonymous for their comments on an earlier draft. Any remaining faults or weaknesses of opinion are, of course, my own responsibility.

1. European Parliament and Council Regulation (EC) No 1049/2001 of 30 May 2001, O.J. 2001, L 145/43.

2. For a useful summary, see e.g. Case T-36/04, *API* v. *Commission*, [2007] ECR II-3201, paras. 51–56.

3. P6_A(2006) 052.

4. Green Paper "Public Access to Documents held by institutions of the European Community – A review", COM(2007)185.

5. Proposal for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, 30 April 2008, COM(2008)229 final, 2008/0090 (COD).

6. See "Revision of access rules would boost confidence. Seven ministers call for the EU to make good its commitment to transparency", published in European Voice on 5 March 2009, available at <www.europeanvoice.com/article/imported/revision-of-access-rules-would-boostconfidence-/ 64189.aspx> .

7. See the European Parliament resolution on the Commission proposal adopted on 11 March 2009, P6_TA-PROV(2009)0114, and e.g. "Journalists angry over the European Parliament's views on transparency – Swedish Union of Journalists", available at <www.statewatch.org/ news/2009/mar/02sweden-journalists-access-reg.htm> .

8. See "Commissioner Wallstroms hits back at critics: 'They can't have read the text'", available at the Wobbing Europe website, <www.wobsite.be/index.php?page=4&detail=375&PHPS ESSID=7100ec23c3451225d9573bff14ba3c76> .

9. Judgment of the Grand Chamber of 29 June 2010, nyr.

10. Judgment of the Grand Chamber of 29 June 2010, nyr.

11. Joined Cases C-514/07 P, 528/07 P & 532/07 P, *Sweden* v. *API*, *API* v. *Commission*, and *Commission* v. *API*, judgment of the Grand Chamber of 21 Sept. 2010, nyr.

12. E.g., the proposal to align the Regulation with the provisions on access to environmental information (Reg. 1367/2006 implementing the Aarhus Convention, O.J. 2006, L 264/13) seems to gain widespread support.

13. See e.g. Contribution of the XL COSAC, Paris, 4 Nov 2008, O.J. 2009, C 17/01, expressing "its concerns about the proposal for a regulation regarding public access to documents ..., which should not limit the access to documents in comparison with the current situation". See also the UK House of Lords European Union Committee, 15th Report of Session 2008–09, Access to EU Documents, Report with Evidence, published 18 Jun 2009; 510th Resolution of the Czech Senate, delivered on the 17th session held on 30 Oct 2008 and arguing that the Commission proposal "is in its essential parts a step backwards which does not contribute to enhancing of the legitimacy of European administration or strengthening of its responsibility towards the public"; Resolution of the Grand Committee of the Parliament of Finland of 17 Oct 2008 emphasizing that "if approved, the Commission's proposal would lead to a major reversal of the Union's transparency and the public's access to documents. The proposal is thus in contradiction to goals that have been repeatedly affirmed by the European Council. The Grand Committee considers it worrying and reproachable that the Commission has advanced in support of its proposal justifications that must be considered untrue and misleading. Such conduct is liable to weaken the Commission's public credibility."

14. Joined Cases C-39 & 52/05 P, *Kingdom of Sweden and Maurizio Turco* v. *Council of the European Union*, [2008] ECR 1-4723; annotation by Arnull, 46 CML Rev. (2009) 1219–1238. For a similar logic relating to the transparency of legislative matters, see Case T-233/09 *Access Info* Europe v. *Council*, judgment of 22 March 2011, nyr.

15. The Court acknowledged that there might be specific legal opinions whose disclosure could still be refused if they were of a "particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question" (para 69). These exceptions are to be interpreted by the General Court in the pending Case T-452/10, *ClientEarth* v. *Council*, O.J. 2010, C 328/37.

16. Adamski, "How wide is the 'widest possible'? Judicial interpretation of the exceptions to the right of access to official documents revisited", 46 CML Rev (2009) 521–549, 536.

17. Arnull, op. cit. *supra* note 14, at 1238.

18. Regulation (EC) 45/2001 of the European Parliament and of the Council of 18 Dec 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, O.J. 2001, L 8/1.

19. Council Regulation (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty O.J. 1999, L 83/1.

20. Recital 4

21. Communication from the Commission to the European Parliament and the Council. Consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decisionmaking procedures, Brussels, 2.12.2009, COM(2009) 665 final.

22. See Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, 21 March 2011, COM(2011)137 final.

23. European Parliament resolution of 17 December 2009 on improvements needed to the legal framework for access to documents

following the entry into force of the Lisbon Treaty, Regulation (EC) No 1049/2001, P7_TA(2009)0116. 24. Art. 1 25. Art. 2(1).

24. Art 1

25. Art 2((1)

26. This was established already in Case C-353/99 P, *Council* v. *Hautala and others*, [2001] ECR I-9565. 27. Case T-2/03, *Verein fur Konsumenteninformation* v. *Commission*, [2005] ECR II-1121.

28. I owe the term, referring to Sweden, Denmark, Finland and the Netherlands, to my former professor, see Harlow, "Transparency in the European Union: Weighing the Public and Private Interest" in Wouters, Verhey and Kiiver (Eds.), *European Constitutionalism beyond Lisbon* (Intersentia 2009), pp. 209–238, 210.

29. Heliskoski and Leino, "Darkness at the break of noon: the case law on Regulation No. 1049/2001 on access to documents", 43 CML Rev. (2006), 735–781, 759.

30. Ruling of 14 Dec 2006 in Case T-237/02, *Technische Glaswerke Ilmenau* v. *Commission*, [2006] ECR II-5131.

31. Maes, Deputy Head of Unit, European Commission, Secretariat-General, Directorate for Better Regulation and Institutional Matters, "Increasing the involvement of citizens in decisionmaking. Aims and objectives of the Commission's proposal amending regulation (EC) no 1049/2001 on public access to European Parliament, Council and Commission documents". Paper presented at a Seminar on the reform of the regulation organized on 11 Dec 2008. Contributions are available at:

www.om.fi/en/Etusivu/Ministerio/OikeusasiatEUssa/Seminaronaccesstodocuments/Contributionsoftheseminar

32. Some of the information would be permanently (up to 30 years) unavailable for the public, namely information gathered from individuals or undertakings under investigative powers and which may only be used for the purpose of the investigation, such as documents seized during inspections or information provided by applicants for immunity or a reduction of fines (leniency scheme). See also Maes, Ibid.

33. T6-0114/2009 .

34. A number of Council documents are available on the Statewatch website, <www.state watch.org/foi/observatory-access-reg-2008-2009.htm> .

35. Case T-29/08, *Liga para a Proteccao da Natureza* v. *Commission*, O.J. 2008, C 79/58.

36. Ibid.

37. See Case C-477/10 P, by the Commission against the judgment of the GC of 7 July 2010 in Case T-111/07, O.J. 2010, C 328/39.

38. Open skies cases: Case C-466/98, *Commission* v. *United Kingdom*, [2002] ECR I-9427, and Cases C-467/98, *Commission* v. *Denmark*; C-468/98, *Commission* v. *Sweden*; C-469/98, *Commission* v. *Finland*; C-471, *Commission* v. *Belgium*; C-472/98, *Commission* v. *Luxembourg*; C-475/98, *Commission* v. *Austria*; C-476/98, *Commission* v. *Germany*.

39. Judgment in Case T-36/04, *API* v. *Commission*, [2007] ECR II-3201.

40. Opinion of A.G. Maduro in *API*, cited *supra* note 11, para 25.

41. Proposal cited *supra* note 5, 6.

42. Ibid. 7.

43. Maes, cited *supra* note 31

44. T6-0114/2009.

45. Proposal cited *supra* note 22.

46. A.G. Maduro's Opinion in *API*, cited *supra* note 11, para 26.

47. Regulation (EC) No 45/2001, cited *supra* note 18.

48. Recital 15 of Regulation No 45/2001 indicates that access to documents, including those containing personal data, is governed by Art. 255 EC, while Recital 11 of Regulation No 1049/2001 underlines that the institutions should take account of the principles in Community legislation concerning the protection of personal data in all areas of activity of the Union. For a discussion of the two regulations, see Kranenborg, "Access to documents and data protection in the European Union: on the public nature of personal data", 45 CML Rev. (2008), 1079–1114.

49. Proposal cited *supra* note 5, 4.

50. O.J. 1993, L 340/41. In 1997, Bavarian Lager asked the Commission for a copy of the 'reasoned opinion' under the Code of Conduct but was refused. Bavarian Lager brought an action before the General Court against that decision but the action was dismissed. In May 1998 Bavarian Lager addressed a new request to the Commission for access to all of the submissions in the relevant file by 11 named companies and organizations and by three defined categories of person or company. The Commission refused the application on the ground that the Code of Conduct applied only to documents of which the Commission was the author.

51. Case T-309/97, *Bavarian Lager* v. *Commission* [1999] ECR II-3217, in which the GC found that the preservation of the aim in question, namely allowing a Member State to comply voluntarily with the requirements of the Treaty, or, where necessary, to give it the

opportunity to justify its position, justified, for the protection of the public interest, the refusal of access to a preparatory document relating to the investigation stage of the procedure under ex Art. 169 EC.

52. Reference 713/98/IJH. Bavarian Lager argued that it wished to obtain the names of the delegates of the CBMC who had attended the meeting on 11 Oct 1996 and the names of the companies and any persons who fell into one of the 14 categories identified in the original request for access to documents containing the communications to the Commission under file reference P/93/4490/UK. The Commission indicated to the Ombudsman that, of the 45 letters that it had written to the persons concerned requesting approval to disclose their identities to Bavarian Lager, 20 replies had been received, 14 positive and 6 negative. The Commission supplied the names and addresses of those that had responded positively. Bavarian Lager stated to the Ombudsman that the information provided by the Commission was still incomplete. In his special report of November 2000, the Ombudsman recommended that the Commission should inform the applicant of the names of the CBMC delegates who had attended the meeting and of companies and persons in the 14 categories identified in the original request.

53. Case T-194/04, *Bavarian Lager* v. *Commission*, [2007] ECR II-4523. For a detailed analysis, see Kranenborg op. cit. *supra* note 48.

54. A.G. Sharpston's contribution was, in fact, so original that after its delivery both the Commission and the European Data Protection Supervisor applied for the reopening of the oral procedure, claiming that the Opinion was based on arguments that were not debated either before the General Court or before the Court of Justice. However, the Court found no need to reopen the oral procedure.

55. See "Review of relationship between transparency and data protection more urgent after Court ruling on Bavarian Lager", press release by the European Data Protection Supervisor, 30 June 2010. Available on the EDPS website at: www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/PressNews/Press/2010/EDPS-2010-11_ECJ_Bavarian_Lager_EN.pdf

56. Unfortunately, the Grand Chamber has recently delivered another similar ruling relating to the publication of information relating to persons receiving agricultural aid. Joined cases *Volker und Markus Schecke* GbR (C-92/09) and *Hartmut Eifert* (C-93/09) v. *Land Hessen*, Judgment of 9 Nov 2010, nyr. While the ruling as such is better reasoned, the logic behind it seems similar. Common to both cases was that priority was given to the protection of personal data – any personal data – in a situation where a person's personal integrity would not seem to be seriously at risk. In the latter case, the ECJ declared void those provisions that required the publication of names of natural persons that receive agricultural aid. And the justification? These provisions were in conflict with the right of private life and protection of personal data included in the EU Charter. Again, there was no consideration of the harm caused, and the data was already legally in the public domain.

57. Opinion of the European Data Protection Supervisor on the Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents O.J. 2009, C 2/03, para 48.

58. Proposal cited *supra* note 5, 8.

59. Opinion of the European Data Protection Supervisor cited *supra* note 57.

60. Ibid, para 37.

61. The EDPS referred to Art. 29 Working Party and the Convention of the Council of Europe on Access to Official Documents, which establishes that contracting parties may limit the right of access to official documents to the aim of protecting, *inter alia*, "privacy and other legitimate private interests".

62. See the European Parliament resolution on the Commission proposal adopted on 11 Mar 2009, P6_TA-PROV(2009)0114, Amendments 90, 96 and 102.

63. See press release cited *supra* note 55.

64. The Commission Communication of 4 Nov. 2010, COM(2010)609 final, disregards this need; but, see the Council conclusions on the Communication from the Commission to the European Parliament and the Council – A comprehensive approach on personal data protection in the European Union, JHA Council meeting, 24–25 Feb. 2011, preamble, para 7.

65. See e.g. Case T-82/09, *Dennekamp* v. *Parlement*, pending, O.J. 2009, C 102/29, which concerns *inter alia* access to the names of those Members of the European Parliament that are members of the Additional Pension Scheme. The Parliament has based its refusal on Art. 4(1)(b) of Regulation No 1049/2001.

66. In *Bavarian Lager*, the applicant had lodged a complaint with the Commission, which led the Commission to institute proceedings against the UK. In the context of these proceedings the Commission organized a meeting with UK officials and an interest group. Bavarian Lager had requested the right to attend the meeting, but the Commission refused to grant permission to attend. Later the UK decided to amend its national legislation, which led the Commission to suspend the proceedings. It was only after its avenue as a complainant in the infringement proceedings context had come to an end that Bavarian Lager decided to invoke the rules on public access to request access to documents relating to the meeting which it had not been able to attend. The widest access was granted to Bavarian Lager following its request based on Regulation No 1049/2001, but also a significant amount of time had lapsed from its first requests, the effect of which is difficult to evaluate retrospectively.

67. Council Regulation (EC) No 659/1999 of 22 March1999 laying down detailed rules for the application of Art. 88 of the EC Treaty, O.J. 1999, L 83/1. Art. 20 headed "Rights of interested parties" establishes, in para 1, that any interested party may submit comments following a Commission decision to initiate the formal investigation procedure. Any interested party which has submitted such comments and any beneficiary of individual aid shall be sent a copy of the decision taken by the Commission. Under para 2, any interested party may inform the Commission of any alleged unlawful aid and any alleged misuse of aid. Where the Commission takes a decision on a case concerning the subject matter of the information supplied, the interested party shall be sent a copy of that decision. Under para 3, at its

request, any interested party shall obtain a copy of any decision pursuant to Arts. 4 and 7, Art. 10(3) and Art. 11 of the Regulation.

68. Proposal cited *supra* note 5, 7.

69. In Case C-266/05 P, *Jose Maria Sison* v. *Council of the European Union*, [2007] ECR I-1233, in which the Court upheld the earlier Genera Court ruling, Joined Cases T-110, 150 & 405/03, *Sison* v. *Council*, [2005] ECR II-1429, para 43.

70. See Case C-477/10 P, appeal by European Commission against the judgment of the General Court in Case T-111/07, *Agrofert*, judgment of 7 July 2010, nyr, O.J. 2010, C 328/22.

71. Case T-403/05, *MyTravel Group plc* v. *the Commission*, [2008] ECR II-2027.

72. Case 506/08 P, *Sweden* v. *MyTravel and Commission,* O.J. 2009, C 55/6, para 8.

73. For a more detailed discussion, see Leino, "Minding the Gap in European administrative law: On lacunae, fragmentation and the prospect of a brighter future", Briefing note prepared for the European Parliament Committee on Legal Affairs, March 2011. The document is available on the internet at <www.europarl,europa.eu/studies> .

74. Recital 6 and Art. 12(2) of the Regulation, which establishes that "Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent."

75. Preamble, Recital 11.

76. Preamble, Recital 2.

77. *MyTravel Group plc* v. *the Commission*, cited *supra* note 71, para 66.

78. *Sweden* v. *MyTravel and Commission*, cited *supra* note 72, p.6, para 1.

79. Case T-471/08, *Toland* v. *Parliament*, pending, O.J. 2009, C 32/72.

80. *Liga para a Proteccao da Natureza* v. *Commission of the European Communities*, cited *supra* note 35.

81. Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 Sept. 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, O.J. 2006, L 264/13.

82. *Liga para a Proteccao da Natureza*, cited *supra* note 35. 83. *Access Info Europe* v. *Council*, cited *supra* note 14.