

## 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 marriage 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 Mulya (they duly do so – see below).

Six months later however, Abdul receives a notice from the Minister for the Mulyan Home Office (Border Agency) informing him that he is no longer eligible to remain in Mulya and that, unless he leaves voluntarily, he will be deported within 60 days to Turkey under the terms of an agreement between Mulya 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 Mulya. 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 Mulya’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 Zarif 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 (Fadiyah 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 Mulyan 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 Mulyan 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 [Mulyan] 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 Mulya 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 so feel safe so at Abdul’s suggestion they left the camp on 10 January 2011 and applied for and were granted refugee status in Mulya in February 2011.

At that time Mulyan 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 July 1951 Relating to the Status of Refugees: ‘the 1951 Convention’), inasmuch as it did not exclude 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*.

Mulya’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 Mulya. As a result, Mulyan 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 Mulya, 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 Mulyans whose birth rate is declining. The main opposition party in Mulya 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 Mulyan voters’ political preferences. The Mulyan 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 Mulya 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 Mulya 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) Mulya’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 them 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 Mulya?*

## SUMMARY OF QUESTIONS TO BE REFERRED UNDER TO ECJ

### First Round questions

#### All concerning the Refugee issues

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?*

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(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 Mulyan 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 Mulya’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 Mulya’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 Mulya?*

## QUESTIONS FOR SECOND ROUND

### **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***

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### ***The Refugees Directive***

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