

THE COMMON EUROPEAN ASYLUM SYSTEM

Part II.

Qualification Directive, Procedures Directive, EASO, Future

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2012

Qualification directive

Purpose

- **Guaranteeing a minimum of protection**
- **Closing the protection gap concerning persons not threatened with Geneva Convention type persecution**
- **Prevention of asylum shopping and abuse of the asylum system**

Scope of application

- **26 Member states of the EU, including the UK and Ireland who opted in (Denmark not)**

Minimum standards

- **According to Art 3. states may introduce or retain more favourable standards. This is the bare minimum**

Major innovations

- **Introduction of „subsidiary protection” and identification of rights accompanying it.**
- **Non-state actors may qualify as persecutors in a Geneva Convention sense**
- **Internal flight alternative is an exclusion ground.**
- **The directive not only offers detailed definition (as the common position of 1996), but also identifies the rights of the protected persons.**

Qualification directive (cont'd)

- 2 § Definitions:
 - Application = seeking refugee **or** subsidiary protection status
 - **Refugee** = Geneva Convention (1951/67) definition + absence of exclusion grounds according to Art 12 of the D.
 - **Person eligible for subsidiary protection**

» See next slide

Qualification directive (cont'd)

Art 2 (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”

Qualification directive (cont'd)

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.

QUALIFICATION DIRECTIVE PERSECUTION (CONT'D)

Persecutor / serious harm doer

- the State;
- parties or organizations controlling the State or a substantial part of the territory of the State;
- **non-State actors**, if the state or other agents are **unable** or unwilling to provide protection

Protector

- the State; or
 - parties or organizations, **including international organizations**, controlling the State or a substantial part of the territory of the State.
 - Protection means at least that
 - an effective legal system for the detection, prosecution and punishment of persecution or serious harm is operated
 - the applicant has access to such protection.
-
- Recast, 2009: Protection **must be effective and durable** and can only be provided by the above mentioned actors if they are **willing and able to enforce the rule of law**.

Qualification directive Persecution (cont'd)

Internal relocation alternative (8§)

- Optional! (MS „may” determine)
- In a **part of the country** of origin
 - there is **no well-founded fear** of being persecuted / **no real risk** of suffering serious harm
 - the applicant „can **reasonably be expected to stay** in that part of the country”
- „Have regard” to –general circumstances +personal circumstances of the applicant
- If no possibility to return for technical reasons, still applies!

Recast, 2009:

- incorporates the 2007 Salah Sheek judgment of the ECtHR: legally travel there, gain admittance and settle there
- removes the applicability even if technical obstacles
- Establishes obligation of authorities to have up-to-date info

Qualifications directive

Cessation, exclusion

Cessation

Usual GC grounds (re-avaiement of protection, re-acquiring nationality, acquiring new nationality, re-establishment in country of origin, circumstances justifying ref. status cease to exist)

The change of circumstances must be of such a **significant and non-temporary nature** that the refugee's fear of persecution can no longer be regarded as well-founded.

Questions:

Durability

Justified grounds to resist return solely for memories of past persecution

-
- Recast, 2009: introduces to exception to ceased circumstances if „a refugee 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”

Qualifications directive Cessation, exclusion

GC grounds:

- protection by other UN organ (UNRWA)
- enjoying rights equivalent to those of nationals
- crime against peace, war crime, crime against humanity
- a serious non-political crime outside the country of refuge **prior to the issuing of residence permit** based on refugee status; **particularly cruel actions**, - even if committed with political objective - may be classified as serious non-political crimes;
- Acts contrary to the purposes and principles of the UN

Exclusion ≠ return: non refoulement may apply!

Qualifications directive

Procedure, including revocation of refugee status

- MS **must** „grant” (i.e.: recognize) refugee status to those who qualify! (13 §)
- MS **must** „revoke, end or refuse to renew” refugee status if **cessation grounds** apply or „he or she **should have been or is excluded** from being a refugee” (14 § 3. (a)) or his or her **misrepresentation or omission of facts**, including the use of false documents, were decisive for the granting of refugee status.
- MS **may** „revoke, end or refuse to renew” status **when GC exceptions to non-refoulement** (33§ (2)) apply, i.e. national security or danger to the community
- Burden of proof:
 - cessation: MS „demonstrate” on an individual basis
 - Exclusion: „establish”

Confusion of cessation, cancellation and revocation

Cessation – normal end of status – changed circumstances

Cancellation – should not have been recognized

Revocation – after recognition engages in 1 F (a) and (c) activities

Ending status = in fact ending asylum, not refugee quality in the Geneva 33(2)cases

Subsidiary protection – conceptual issues

Complementary – subsidiary

Preamble (24) :

„Subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention”

Is subsidiary protection of a lesser standing, do beneficiaries deserve less rights/protection?

The moral dilemma – what is the basis of subsidiary protection?

Compassion

- Differentiation between Convention status and complementary protection is conceivable
- State discretion in granting or withholding it

Integrity, dignity and human rights of the human being

- Differentiation is unjustified
 - The state only recognizes the necessity of protection
- "There is no legal justification for differentiating between convention refugees and the status of beneficiaries of complementary protection,"*
- (McAdam, 2007, p.1.)

The Elgafaji case – C-465/07 ECJ – Judgment, 17 February 2009

- Is it more than Article 3 of ECHR and
(Answer: yes)
- , **when** does a person run „**a real risk of serious and individual threat** by reason of indiscriminate violence

ECJ:

- It does not refer to specific acts of violence, but to the **threat** of the applicant's life and person.
- That threat is **triggered by violence**, which is indiscriminate (34. §)
- **Indiscriminate**: it extends to the person „**irrespective of her/his personal circumstances**”

The Elgafaji case - Judgment, 17 February 2009

The key sentence

- ...[T]he word **‘individual’** [threat-BN] must be understood as covering **harm** to civilians **irrespective of their identity**, where the **degree of indiscriminate violence** characterising the armed conflict taking place ... **reaches such a high level** that substantial grounds are shown for believing **that a civilian**, returned to the relevant country or, as the case may be, to the relevant region, **would, solely on account of his presence on the territory** of that country or region, **face a real risk of being subject to the serious threat** referred in Article 15(c) of the Directive

- „**the existence** of a serious and individual **threat** to the life or person of an applicant for subsidiary protection **is not subject to** the condition that that applicant adduce evidence **that he is specifically targeted by** reason of factors particular to his personal circumstances”

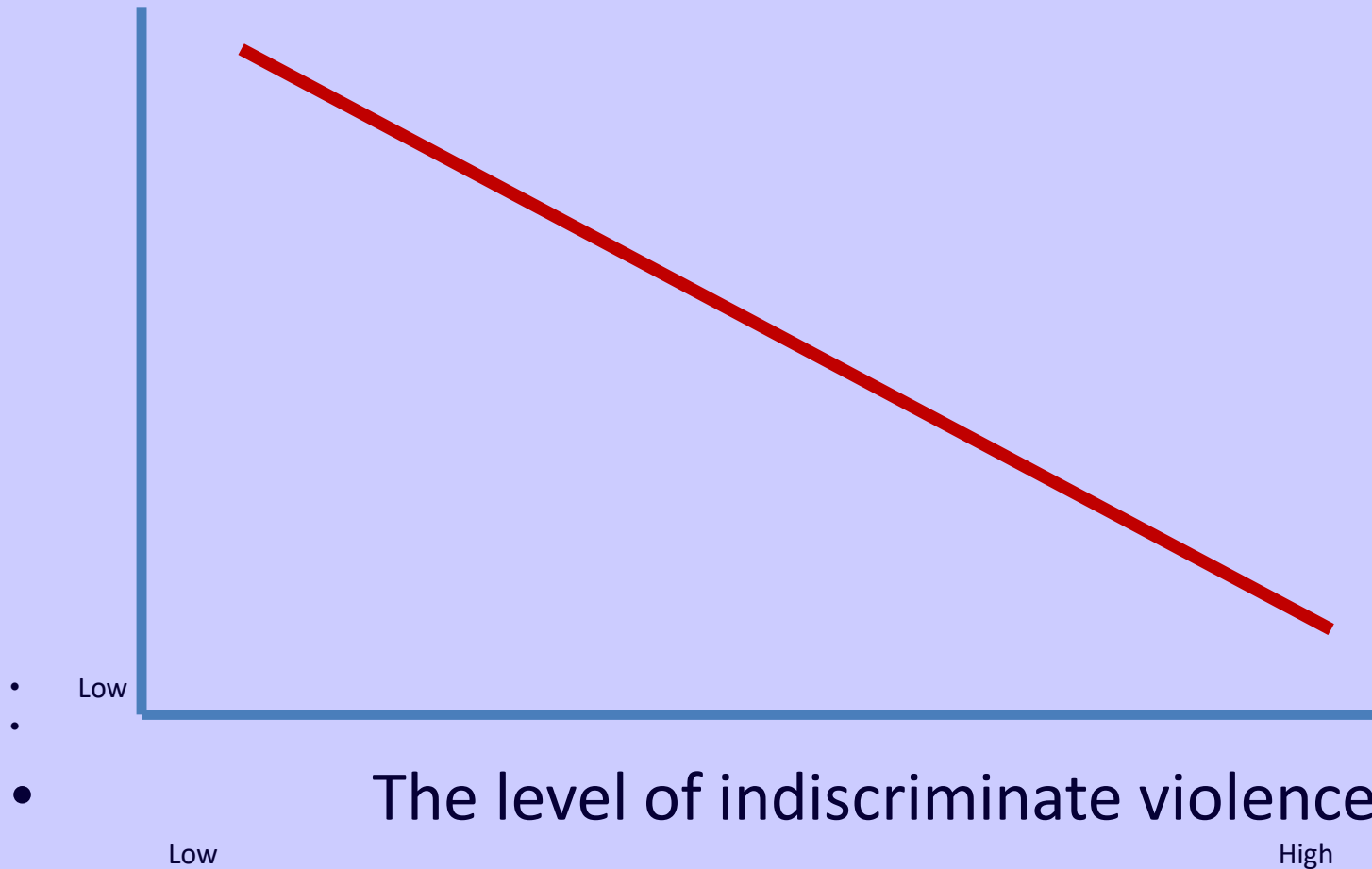
(§ 43)

The measure of individualisation and the level of violence

Elgafaji, 39. pont

- Individualisation

- High



Qualifications directive

Subsidiary protection: procedure, including revocation of status

- MS **must** „grant” (i.e.: recognize) subsidiary protection status to those who qualify! (18 §)
- **Cessation**: A person shall cease to be eligible for subsidiary protection when the **circumstances** which led recognition **have ceased to exist** or **have changed to such a degree** that protection is no longer required.
- the change must be **significant and of a non-temporary nature**, therefore the person no longer faces a **real risk of serious harm**.

Recast, 2009: here also exception to ceased circumstances?
If **compelling reasons** to refuse protection, **arising out of previous harm**

Qualifications directive: Subsidiary protection: procedure, including revocation of status (Cont'd)

Exclusion

- A person „**is excluded** from being eligible for s.p. if 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,
- (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
- (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.
- Member States **may exclude** a person from being eligible for subsidiary protection, if prior to admission the person has committed **one or more (non-serious) crime**, punishable in the Member State concerned, **and** if the person **left** his or her country of origin **solely in order to avoid sanctions resulting from these crimes**.

Qualifications directive: Subsidiary protection: procedure, including revocation of status (Cont'd)

Compulsory

Optional

revocation

- Cessation clauses
 - Exclusion clauses: for
 - Peace, war, humanity
 - serious common crime
 - UN principles,
 - Misrepresentation of decisive facts
- Fleeing prosecution
 - Smaller crime

Qualifications directive: substantive rights

- Without prejudice to GC
- **Same rights** to refugees and beneficiaries of subsid. prot - **unless otherwise** indicated!
- Specific attention to **vulnerable groups** + best interest of the child
- In „manufactured cases“ (refugee and subs. prot.) MS „**may reduce the benefits**“
- 21 § **confirms non-refoulement** both for asylum seekers and recognized refugees

Qualifications directive: substantive rights

- MS **shall** ensure **family unity** (23 §)
 - (def – see there, unity and benefits according to national law)
 - national security or public order: grounds for refusal, reduction or withdrawal of benefits from fam. members
 - MS **may** extend to other close relatives, who lived together and were dependent on the beneficiary of ref or subsid prot status before his/her departure
- **Residence permits**: min **3** years for refugees **1** year for subsid. prot.
- **Travel document**: refugees: as in GC, subsid. prot: „document” „at least when serious humanitarian reasons arise” (25 § (2))

Recast, 2009:

- Would abolish difference in benefits to family members between Convention status and subsid prot (23§ (2))
- Residence permit: 3 years for both status
- Travel doc: no limitation to humanitarian reasons – generally accessible

Qualifications directive: substantive rights

- **Employment, self employment, vocational (further) training:**
 - Refugees: subject to rules applicable to the profession
 - Subsidiary protection beneficiaries: the same
 - + examination of the labour market situation
 - + limited period access
 - + vocational training: state's discretion
- **Education:** Minors: full access; adults: as third country nationals.

Recast, 2009:

- eliminates difference between ref prot and subsid prot in employment

New:

- MS must facilitate (by grants and loans) access to employment related education and training
- New article (28) on access to procedures for recognition of qualifications

Qualifications directive: substantive rights

- **Social welfare and health care:**

national treatment, but for subsid. prot. beneficiaries MS may limit to core benefits

Accommodation:

As legally resident third country nationals

Integration: MS must create programs but subsid. prot. beneficiaries only get access to them „where it is considered appropriate by MS” (33 §)

Repatriation: MS **may** provide assistance to voluntary return.

Unaccompanied minors: 30 § details the protection of their special interests

Recast, 2009: equal treatment of Conv ref and subsid prot in matters of social welfare, health care and integration

THE „PROCEDURES DIRECTIVE” (2005)

**Council Directive 2005/85/EC of 1 December
2005 on minimum standards on procedures in
Member States for granting and withdrawing
refugee status**

(OJ L 326/13 of 13.12.2005)

Directive on minimum standards on procedures Scope, definitions, more favourable rules

- **Purpose:** common minimum standards for the procedures on recognizing and withdrawing refugee status
- **Scope:**
 - obligatory: for Geneva Conv status applications
 - optional: for protection other than Geneva

More favourable provisions: MS may maintain or introduce „insofar” as are compatible with this directive (5 §)

Directive on minimum standards on procedures

Basic principles and guarantees

- **Access** to procedure - each adult has the right
- **Right to stay** - until first instance decision (exception: subsequent application and European Arrest Warrant + int'l criminal courts)
- Procedural requirements: **appropriate examination**:
 - = individual, objective, impartial,
 - = up to date country of origin and transit info
 - = personnel knowledgeable about asylum law
 - = appeal authorities also informed about country of orig. and transit
- **Decision: in writing**, justification if negative (!)

Directive on minimum standards on procedures

Further guarantees

Information on procedure and consequences (in a language the applicant „may reasonably be supposed to understand”)

Interpreter „whenever necessary”

Access to **UNHCR** or an agency working on its behalf

Notice of the decision **on time** in a language supposed to be understood – if not assisted by lawyer

On appeal: only interpreter, access to UNHCR, timely notification

Directive on minimum standards on procedures

Duties of the applicant:

Report to authorities, hand over documents, report place of residence, allow search, photograph and recorded statement

Interview: Compulsory, but exceptions (Dublin II, assistance at submission of request, „not reasonably practicable” /e.g.unfit applicant/)

Requirements: minimal

- „steps” to ensure comprehensive account,
- interviewer „sufficiently competent”,
(to take account of applicant’s cultural origin or vulnerability)
- interpreter to ensure „appropriate communication”, not necessarily in language preferred by applicant.
- written report: access before or after the decision, approval of applicant not necessary!

Directive on minimum standards on procedures

Legal assistance:

- Applicant must have **access to lawyer** (at his cost)

Lawyers access to closed areas may be curtailed but not rendered impossible

- **Free legal assistance/representation**: MS „shall ensure” *after negative decision* on conditions as to nationals + further grounds for not offering:

- only for appeal (not admin. review)
- if applicant has no means to finance
- if „review is likely to succeed”
- only from among chosen representatives

Ms may set time or financial limits and not disclose sensible info

Presence at interview: MS discretion

Unaccompanied minors:

must have representative before interview

interviewer and decision maker has specialized knowledge

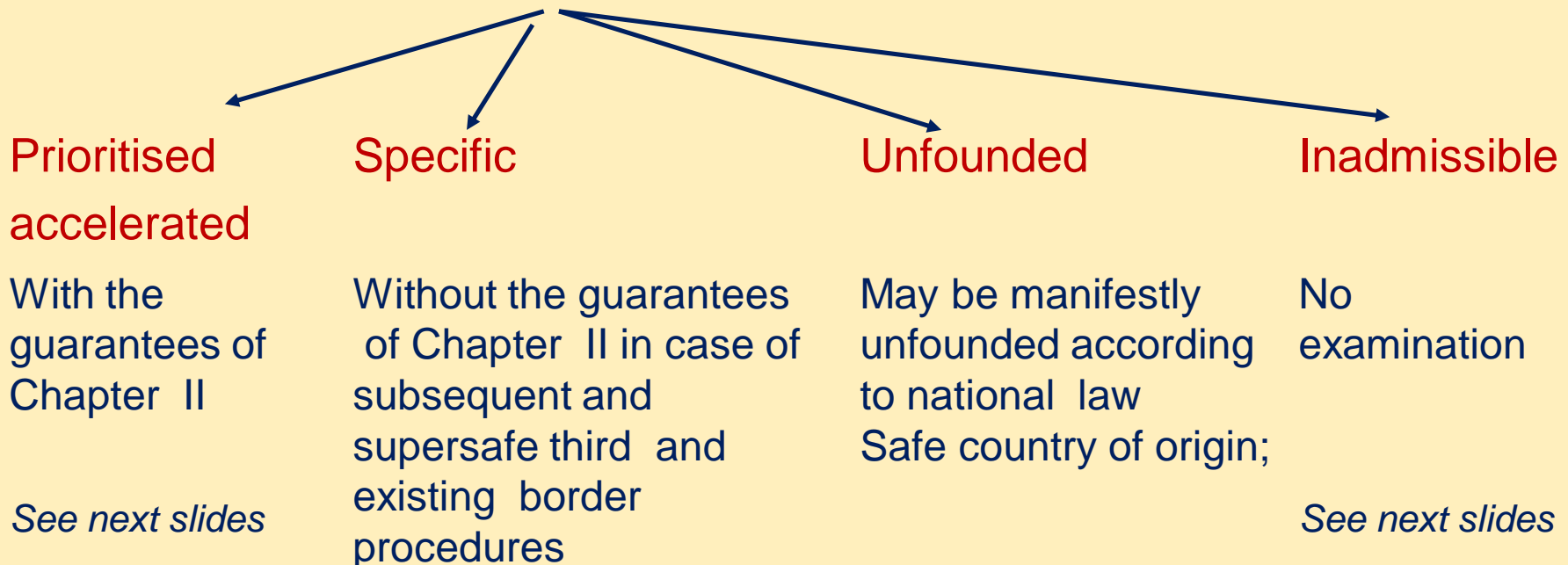
several exceptions to this duty (e.g 16 years of age, married etc.)

Directive on minimum standards on procedures

- **Detention:**
 - „shall not hold in detention for the sole reason that he/she is an applicant”
 - Condition, duration: not fixed, „speedy judicial review required”
- **Implicit withdrawal:** Conceivable if applicant does not report, absconds, does not appear for an interview, does not provide information
- **UNHCR** (and organizations acting on its behalf):
 - access to: applicant, information
 - right to present its view

Directive on minimum standards on procedures

- Normal „examination” procedure (Art 23, 1-2)
 - no deadline prescribed „as soon as possible” - after 6 months „information” on the delay and expected time frame
- Other procedures and applications



Directive on minimum standards on procedures Accelerated or prioritized procedures

1. No relevant issue raised
2. the applicant clearly does not qualify as a refugee
- 3 safe country of origin
4. safe third country (non MS)
5. misled the authorities by presenting false information or documents with respect to his/her identity
6. filed another application for asylum stating other personal data; or
- 7 destroyed or disposed of an identity or travel document that would have helped establish his/her identity or nationality; or
- 8 the applicant has made inconsistent, contradictory, unlikely or insufficient representations
- 9 subsequent application raising no relevant new elements
- 10 failed to make his/her application earlier,
- 11 merely in order to delay or frustrate removal
- 12 violations of behavioral rules (reporting etc.)
- 13 entered unlawfully or prolonged his/her stay unlawfully and, without good reason, has either not presented himself/herself to the authorities and/or filed an application for asylum as soon as possible
- 14 the applicant is a danger to the national security or the public order
- 15 refuses to have his/her fingerprints taken
- 16 the application was made by an unmarried minor after the application of the parents responsible for the minor has been rejected

C-69/10 *Diouf v Ministre du Travail, de l'Emploi et de l'Immigration (Luxembourg)* decided: 28 July 2011. No separate appeal against a decision to examine in accelerated procedure, 15 days for appeal are enough, one level court review constitutes effective remedy

Directive on minimum standards on procedures

Specific procedures-Unfounded – Inadmissible applications

Specific	Unfounded	Inadmissible
Subsequent application	safe country of origin	Dublin II applies
Border procedures		Refugee status in another MS
Supersafe" third country cases „European safe third countries" 36 § - CJEU abolished in 2008		Non MS = first country of asylum (already recognized there as refugee)
		„Normal" safe third country applies
		Other title to stay, with at least refugees' rights pending the determination of that other title
		identical repeat application
		Dependent repeating parents rejected application

Directive on minimum standards on procedures Criticism, concerns

- “**Safe third country**” criteria that go below any standards that could ensure effective protection and provisions that lack any possibility of individual review before return to a “safe” country, and extension of the concept to countries where the applicant may have no links and which he or she may not even have transited;
- Need for minimum principles and guarantees during **border procedures**;
- **Lack of “suspensive effect** of appeals” (or denial of right to remain in the country while an appeal is heard);
- Provisions that channel up to **16** different categories into **accelerated procedures**;
- Failure to limit or define permissible grounds for **detention** of asylum-seekers;
- **Restrictions on free legal assistance** and representation including at appeal, for asylum-seekers arriving irregularly as well as unaccompanied children;
- **Lack of** specific provisions to ensure the **gender sensitivity** of procedures;
- Failure to take advantage of the opportunity to introduce a **single procedure**.

Source: UNHCR Aide Memoire, November 2003

THE EUROPEAN ASYLUM SUPPORT OFFICE (EASO)

**REGULATION (EU) No 439/2010 OF THE
EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 19 May 2010
establishing a European Asylum Support Office
(OJ L 132/11 of 29.5.2010)**

The European Asylum Support Office

- ❑ Commission Proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office, adopted on 18.2.2009 (COM (2009) 66 final)
- ❑ Political agreement on a common position in November 2009
- ❑ Adoption 19 May 2010
- ❑ Seat: Malta

Purposes

- **coordinate and strengthen practical cooperation** among Member States
- and **help to improve the implementation** of the Common European Asylum System.
- **operational support** to Member States subject to **particular pressure**
- **scientific and technical assistance** for Community policy-making and legislation

The European Asylum Support Office

EASO planned activities - a few highlights

- Source of Country of origin information
- Coordination and assistance to intra EU reallocation of beneficiaries of protection
- Intervention at the request of the affected MS in case of mass influx:
 - Sending asylum support teams with expertise in
 - » interpreting services,
 - » information on the countries of origin
 - » and knowledge of the handling and management of asylum cases
 - Decision to send: 3/4 of Management Board – experts sent by MS chosen from an Asylum Intervention Pool

The European Asylum Support Office

Ministers agreed on priorities in the Fall of 2010

Support of training

Country of origin info
(Portal, analysis)

Capacity building
(especially in countries exposed to particular pressure)

Promoting implementation of the CEAS (Assisting the Commission in controlling its implementation)

First meeting of the Board of Managers: Malta, 2010 nov 25-26

Start of operation June 2011 (in a hotel room....)

**THE FUTURE OF THE
INTERNATIONAL AND
EUROPEAN REFUGEE
REGIME**

Recasts

Qualifications directive

**Adopted recast: Directive
2011/95/EU of 13
December 2011
OJ L 337/9**

Recast of the Qualification Directive, 2009 (COM (2009) 551 and related documents)

Problems identified:

Symptoms

- Divergent recognition rates
- Remaining secondary movements
- Lack of integration

Causes

Vague terms, different interpretation

- actors of protection
- internal protection
- membership of a particular social group

Different standards of protection

- Convention refugees – beneficiaries of subsidiary protection
- Limited right to family unification

Suggested changes to QD

- **Restrict the broad interpretation of the concepts "actors of protection" and "internal protection"** by specifying the criteria for assessing the accessibility and effectiveness of protection
- Ensure a **more inclusive interpretation of the concept "particular social group"** in line with the standards of the Geneva Convention, by better defining the significance to be attached to aspects arising from the applicants' **gender** and thus enhancing access to protection in particular for women.
- **Approximate the rights of beneficiaries of subsidiary protection to those of refugees** by removing all differences
 - regarding the duration of their residence permit;
 - access to employment and employment-related education activities;
 - access to social welfare, health care and to integration facilities;
 - access to benefits for their family members.

- Done – see new Art 7
- Extended
- Done, see e.g. Arts 20 (2) and 26

Suggested changes to QD

- Enhance the **integration of beneficiaries of protection** taking into account their specific needs:
 - enhance recognition of their qualifications;
 - vocational training and employment support;
 - accommodation and integration programmes
- Enhance respect the protection to family life: **broaden the definition of family members** so as to address the case where a beneficiary is a minor and the wide range of situations where a minor might be considered dependent, while ensuring the best interest of the child.

- Done, see eg. New Art 28.
- Done, see new Art 2 (j) third French para

Procedures directive

Recast (COM (2009) 554 final, 21.10.2009

Major suggestions

- Refined definitions in line with the Qualifications directive (QD) and the Convention on the Rights of the Child
- Compulsory extension to the procedure on application for subsidiary protection (envisaging a single procedure)
- New article granting access to border zones (HHC practice!)
- Limits on avoiding personal interview
- Deadline for 1st instance decision: 6 months
- Separation of prioritized procedures from accelerated procedures
 - Prioritized = well founded or persons with special needs
 - Accelerated: abuse or no serious ground of the application
(Irregular entry, border application, lack of documents or forged documents – not automatic accelerated procedure)
Even then reasonable time limits have to be set
- Abolition of the „specific procedures” category

Recast (COM (2009)554 final, 21.10.2009

- Right to „present their views“ if the application is inadmissible (ref status in another MS, first country of asylum elsewhere, safe third country, identical application before, dependant makes application after refusal)
- Safe third country
 - Material and procedural changes
 - if no risk of serious harm according to QD (added to the already existing criteria)
 - Challenge extended: if not safe (not only torture etc.) or if no connection to it
 - Minimum common list of safe third countries. no longer expected
- Safe country of origin:
 - No common list!
 - Further refinement of the criteria (no application to a part of a country, regular review obligatory)
 - Standstill clause to be abolished (no retaining of national criteria with less guarantees than in Annex II)
 - As no common list exist application is not unfounded

Recast (COM (2009)554 final, 21.10.2009

- Subsequent (repeat applications):
 - more lenient towards those with new facts or evidence (no time limit to submit them) harsher with multiple applications (no right to stay)
- Border procedures: only if accelerated (basically: abuse)
- Appeal
 - must extend to facts and law (to be effective)
 - have automatic suspensive effect (except in accelerated or identical if MS opt so)

THE STOCKHOLM PROGRAM

The Stockholm Programme -

**An open and secure Europe serving and
protecting the citizen**

**Formally adopted by the European Council on
10/11 December 2009**

**See Council Conclusions of 11 December 2009
(EUCO 6/09) and the programme in Council
register doc 17024/09)**

6.2 Asylum: a common area of protection and solidarity

The European Council remains committed to establishing a **common asylum procedure and a uniform status for those granted international protection.**

6.2.1 A common area of protection

Starting points/Goals

The development of a Common Asylum Policy **should be based on a full and inclusive application of the Geneva Convention on the status of refugees and other relevant international treaties.**

The European Asylum Support Office (EASO) will be an important tool strengthening all forms of practical cooperation between the Member States. EASO should further develop a common educational platform for national asylum officials.

Stockholm - 6.2.1 A common area of protection

Proposals

The Council and the European Parliament intensify the efforts to establish a common asylum procedure and a uniform status in accordance with Article 78 TFUE for those who are granted asylum or subsidiary protection by 2012 at the latest,

The Commission to consider (after 2012) the possibilities for creating a framework for the transfer of protection of beneficiaries of international protection when exercising their acquired residence rights under EU law,

A feasibility study on Eurodac as a supporting tool for the entire CEAS, while fully respecting data protection rules,

Finalise Commission study on the joint processing of asylum applications.

Stockholm - 6.2.2 Sharing of responsibilities and solidarity

6.2.2 Sharing of responsibilities and solidarity between the Member States

Starting points/Goals:

Effective solidarity with the Member States facing particular pressures should be promoted.

Proposals

Developing mechanism for **sharing responsibility** between the Member States

Creating instruments and coordinating mechanisms for MS to support **each other** in **building capacity**,

A **more effective use of existing EU financial systems** aiming at reinforcing internal solidarity,

Secondment of officials in order to help those Member States facing particular pressures of asylum seekers.

Stockholm - 6.2.3 The external dimension of asylum

6.2.3 The external dimension of asylum

Starting points/goals

Partnership and cooperation with third countries hosting large refugee populations.

A common EU approach and cooperation with the UNHCR and other actors

The EU should promote its accession to the 1951 Geneva Convention

Solidarity with third countries: capacity building and help in protracted refugee situations

Proposals

To enhance capacity building in third countries

Develop and expand the idea of Regional Protection Programmes.

Encourage the voluntary participation of Member States in the joint EU resettlement scheme and increase the total number of resettled refugees. (Commission to report on resettlement yearly)

Strengthen EU support for the UNHCR

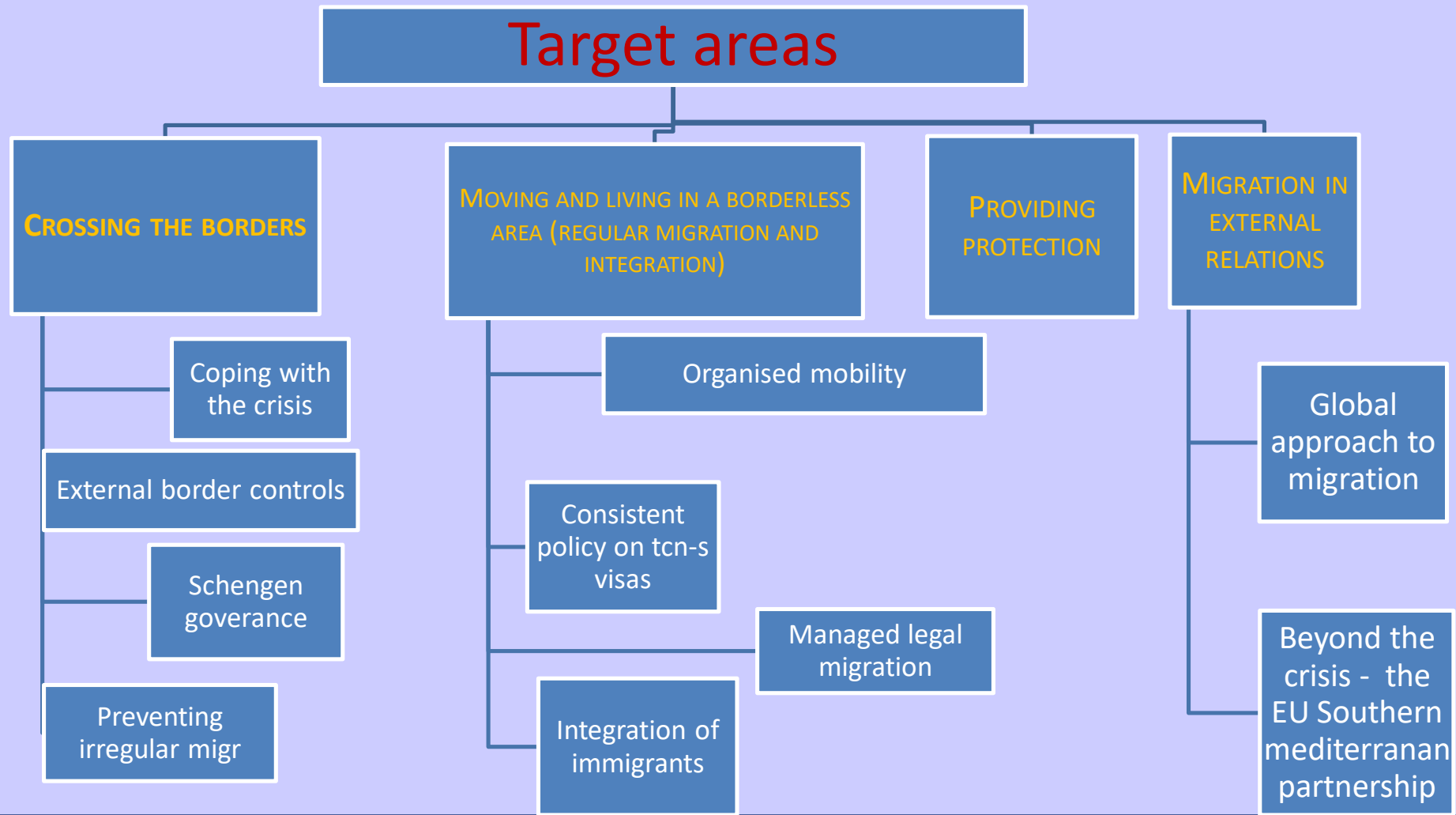
Enhance access to asylum procedures in main transit countries - Member States could participate on a voluntary basis.

**THE MISSING COMPASS
AND THE LACK OF A MUSE**

**TO FIND THE WAY –
FINISH THE SYMPHONY**

Communication on migration COM(2011) 248 final, 4 May 2011

Not simply a reaction to the Tunisian and Lybian outflow in Spring 2011, but a „roadmap” of the Commission’s plans on migration



The Commission's ambitions enshrined in the 2011 communication on migration COM (2011) 248 final

The common asylum system should provide for

- „(a) the **fair treatment** of and **appropriate guarantees** for asylum seekers and beneficiaries of international protection;
- (b) procedural devices that will help national authorities to **properly and quickly** assess asylum claims, in **a more convergent way** and with tools to **deal with abusive claims**;
- (c) the appropriate level of **approximation of rights for beneficiaries** of international protection which will contribute to cost savings in administrative processes and to limiting secondary movements and asylum shopping, while at the same time improving integration prospects;
- (d) the **improvement of** the efficiency of the '**Dublin system**', while **catering for situations of exceptional pressures** which may be faced by individual Member States; and (e) a EURODAC database which continues to support the efficiency of the Dublin Regulation, whilst also meeting other needs of law enforcement authorities but under very strict conditions.”

No word on uniform status or common procedure (neither on single procedure) let alone integration of refugees

SUMMARY

- **No chance** to have **the second phase** of the CEAS – the uniform status and the common procedure - completed by 2012.
- The Commission in its 2011 round of **recasts** pretends that they are a step in that direction, but in fact they are still about establishing **minimum standards**.
- They limit their **scope** to territorial waters (beyond the land), so actions on the high seas are (thought to be) still exempt
- Whereas the **Commission** was seeking genuine **improvement and clarification** the **states** insist on having their **national priorities** incorporated in the texts
- Instead of heading towards a common asylum area (where the geographic location of the submission of an application does not really matter) **practical co-operation** is the name of the game

SUMMARY

- The new buzzword: principle of **solidarity** and **fair sharing of responsibility**
- **EASO, relocation within Europe, increased co-operation with third states** are the genuine priorities, all targeting the asylum seeker in with a view to **diminish his/her impact** on Europe or the member States
- The absurd (non) functioning of the Dublin system, the hectic reactions to the Arab Spring, the extremely unequal distribution of asylum seekers and the wide margin of decisions concerning the same groups show that **the system is not working (properly)**.

Thanks!

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ANNEX

M.S.S v. Belgium and Greece – main points

Facts:

- The applicant is M.S.S. is an Afghan man, who worked as an interpreter in Afghanistan and chose Belgium as the destination country because of his contacts with Belgian troops in Kabul
- He travelled through Iran, Turkey Greece and France. He was caught in Greece in December 2008 but did not apply for asylum. On 10 February 2009 he arrived in Belgium, presented himself to the Aliens office and applied for asylum.
- Feared persecution: reprisal by the Taliban for his having worked as an interpreter for the international air force troops stationed in Kabul. He produced certificates confirming that he had worked as an interpreter.
- Belgian authorities denied appeal against transfer, ECtHR did not grant Rule 39 relief (provisional measure to halt transfer)
- 15 June 2009: M.S.S. was returned to Greece which was obliged to take charge (as it had remained silent for two months)

M.S.S v. Belgium and Greece – main points

Facts continued

15-18 June 2009 detention of M.S.S. in Greece under harsh conditions

§34: „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.”

After living in the park (and not reporting to the police) on 1 August 2009: attempt to leave Greece with a false Bulgarian passport → second detention, expulsion order, later revoked due to the pending asylum procedure. The applicant contacted the police, had his residence card renewed twice for 6 months, but no accommodation was provided to him.

August 2010: another attempt to leave Greece, towards Italy – caught again, almost expelled to Turkey

His family back in Afghanistan, strongly advised him not to come home because the insecurity and the threat of reprisals had grown steadily worse

The case was pending in the Court since 11 June 2009

Facts as to Greece:

88 % of illegal arrivals into Europe through Greece (in 2009)

Recognition rates 0,04 % Convention status, 0,06 Subsid protection = 1 out of 10 000 at first instance

Appeal: 25 Convention status and 11 subsid prot out of 12 905

M.S.S v. Belgium and Greece – Claims against Greece

M. S. S. – the applicant

- A) Both periods of detention amounted to inhuman and degrading treatment.
- B) The state of extreme poverty in which he had lived since he arrived in Greece amounted to inhuman and degrading treatment
- C) He had no effective remedy concerning the above claims

The issue of the detention (A)

The Government

The rooms were suitable equipped for a short stay + (in August 2009) on 110 m² there were 9 rooms and two toilets + public phone and water fountain

The Court

General principles to be applied (as to detention) – the meaning of Article 3.

„confinement of aliens, .. is acceptable only in order to enable States to prevent unlawful immigration while complying the 1951 Geneva Convention and the European Convention on Human Rights.” (§ 216)

„ **Article 3** of the Convention, ... enshrines one of the most fundamental values of democratic societies and **prohibits in absolute terms** torture and inhuman or degrading treatment or punishment irrespective of the circumstances and of the victim's conduct” (§218)

Ill treatment „must attain a certain level of severity”

Severity is relative: duration, physical, mental effects, and sex, gender and age of the victim matter as well as his/her state of health

M.S.S v. Belgium and Greece – Claims against Greece

Ill treatment „must attain a **certain level of severity**”

Severity is relative: duration, physical, mental effects, and sex, gender and age of the victim matter as well as his/her state of health (§ 219)

Inhuman treatment = when it was “premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering” (§ 220)

„Treatment is considered to be **“degrading”** when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance”. (ibid)

„It may suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others (see, among other authorities.” The purpose of the treatment need not be humiliation.

M.S.S v. Belgium and Greece – Claims against Greece

„Article 3 of the Convention requires the State to ensure that **detention conditions are compatible with respect for human dignity**, that the manner and method of the execution of the measure **do not subject the detainees to distress or hardship of an intensity exceeding the unavoidable level** of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured” (§ 221)

Application of the principle to the present case – the Court’s dictum

The Court acknowledges the increased hardship of external border states because of Dublin, but Art. 3 is absolute

After return to Greece the authorities new, that M.S.S. did not „have the profile of an ‘illegal migrant’”

145 persons on 110 m² usually locked up, without hygienic tools

+ the asylum seeker especially vulnerable -->

„taken together, **the feeling of arbitrariness** and the **feeling of inferiority** and **anxiety** often associated with it, as well as the profound **effect such conditions of detention** indubitably have on a person's dignity, **constitute degrading treatment** contrary to Article 3 of the Convention.

In addition, **the applicant's distress was accentuated** by the vulnerability **inherent in** his situation as an **asylum seeker.**” (§ 233)

VIOLATION of Article 3 held UNANIMOUSLY

M.S.S v. Belgium and Greece – Claims against Greece

The issue of the living (reception) conditions during the procedure (B)

The government

The applicant has not visited the police station as advised.

After December 2009 when he showed up, efforts were made to find an accommodation but M.S.S. had no address where to inform him.

Homelessness is widespread in States, parties to the ECHR – it is not contrary to the Convention.

The Court

General principles: as above +

There is no duty under Article 3 to provide home or financial assistance.

Application to the present case

The reception conditions directive bounds Greece

Asylum seekers constitute a special group in need of special protection

The reception capacity of Greece is clearly inadequate, „an adult male asylum seeker has virtually no chance of getting a place in a reception centre” (§ 258) none of the Dublin returnees between February and April 2010 got one.

The authorities have not informed M.S.S. of the available accommodation even when they saw him in June 2010

There was no realistic access to the job market due to administrative riddles

M.S.S v. Belgium and Greece – Claims against Greece

. “..the Court considers that the Greek authorities **have not had due regard to the applicant's vulnerability as an asylum seeker** and must be held **responsible, because of their inaction**, for the situation in which he has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs.

The Court considers that the applicant **has been the victim of humiliating treatment** showing a **lack of respect for his dignity** and that this situation has, without doubt, **aroused in him feelings of fear, anguish or inferiority** capable of inducing desperation. It considers that such living conditions, combined with the **prolonged uncertainty** in which he has remained and **the total lack of any prospects of his situation improving**, have **attained the level of severity** required to fall within the scope of Article 3 of the Convention.” (§ 263)

= VIOLATION OF ARTICLE 3. HELD 16 : 1

M.S.S v. Belgium and Greece – Claims against Greece

The issue of effective remedies with respect to Articles 2 and 3 - claim (C)

(Only protected from refoulement because of ECtHR interim measure, no serious examination of the merits of the asylum claim. The appeal to the Supreme Court would not have suspensive effect, practically nobody is recognised by the Greek authorities)

The Government

The applicant

failed to cooperate,
assumed different identities (when trying to leave Greece),
had access to interpreter.

The review by the Supreme Court is effective remedy,
Asylum seekers were not entitled to a right to appeal under the ECHR
and Article 6 (Right to a fair hearing) of the Convention did not
apply to asylum cases,

No danger to transfer to Turkey as the readmission agreement with
Turkey does not cover returnees from other EU MS.

The applicant did not appear at the hearing planned for 2 July - = did
not exhaust local remedies

M.S.S v. Belgium and Greece – Claims against Greece

The Court

General principles

The remedy must be linked to a Convention right and must **deal with the substance** of an arguable complaint

It must be **available in law and in practice**

It must grant **appropriate relief** and must not be of excessive duration

„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 ..., **independent and rigorous scrutiny** of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 .., as well as a particularly **prompt response**

In cases of Article 3 threat the remedy must have **automatic suspensive effect**

M.S.S v. Belgium and Greece – Claims against Greece

Application to the present case

The gravity of the situation in Afghanistan and the risks that exist there are not disputed by the parties - arguable claim (but the Court does not rule on the possible consequences of return only on whether there was an effective remedy against removal within Greece) (§§ 296 – 298)

M.S.S. had not enough information and his non-appearance is the result of lack of reliable communication.

Uncertainty about the hearing on 2 July – perhaps only told in Greek.

„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” (314)

His efforts to escape from Greece can not be held against him as he tried to escape Art 3 treatment.

Conclusion: violation of Art 13 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.**

VIOLATION of Article 13 in conjunction with Article 3 held UNANIMOUSLY

M.S.S v. Belgium and Greece – Claims against Belgium

M. S. S. – the applicant

Sending him by Belgium to Greece exposes him to the risk of violating Article 2 and 3 by way of *refoulement*

The application of the Dublin Regulation did not dispense the Belgian authorities from verifying whether sufficient guarantees against *refoulement* existed in Greece (and they were insufficient)

Belgium

When needed Belgium applied the sovereignty clause (§3 (2)) of the Dublin regulation

M.S.S did not complain about Greece, nor had he told that he had abandoned an asylum claim in Greece

Greece assured that it would investigate the merits of the case

In the *K.R.S v. UK* case Greece gave assurances that no *refoulement* would occur

M.S.S v. Belgium and Greece – Claims against Belgium

Interveners

The Netherlands: „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.” (§ 330)

„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...” (§ 330)

UK: Dublin is to speed up the process – calling to account under § 3 ECHR would slow it down

UNHCR: **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.

AIRE Center and AI: transferring to a state violating Art 3 entails the responsibility of the transferring state

M.S.S v. Belgium and Greece – Claims against Belgium

The Court

Difference from the Bosphorus case: there sovereign powers were transferred to an organisation which entailed protection of fundamental rights equivalent with the Convention protection. (Namely the EU legal order and the CJEU) and the state was obliged to act.

Here Belgium could refrain from the transfer so it was not an international obligation (§ 340)

Lessons from T.I and K.R.S.:

„When they apply the Dublin Regulation, ... **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.”

„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” (ibid) → **rejection was based on the fact that Germany had an adequate asylum procedure.**

In K.R.S the Court **could assume that Greece was complying** with the reception conditions directive and the asylum procedures directive , nor was a danger that a rule 39 intervention by the Court would not be observed.

M.S.S v. Belgium and Greece – Claims against Belgium

- The Court had to consider whether the Belgian authorities ought to have regarded as rebutted the presumption that the Greek authorities would respect their international obligations.
- The situation changed since December 2008 (K.R.S v UK decision)
 - more and more reports about the conditions in Greece
 - UNHCR's letter to Belgium to suspend transfers
 - Commissions proposal for Dublin recast – entailing a rule on suspension of transfers
 - The Belgian Aliens Office Regulation left no possibility for the applicant to state the reasons militating against his transfer to Greece
- Adequate protection: existence of domestic laws and accession to treaties not enough when reliable sources report contrary practices
- Guarantee by the Greek Government was too general, not about the person
- „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” (§ 357)

M.S.S v. Belgium and Greece – Claims against Belgium

The Courts conclusion on the application of Dublin

- 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.” (§ 358)
- „...it was in fact up to the Belgian authorities, ...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.” (§ 359)
- VIOLATION OF ARTICLE 3. by the transfer and exposing him to the deficiencies of the asylum procedure (threat of refoulement) HELD 16 : 1
- VIOLATION OF ARTICLE 3. by returning him to the Greek the detention and living conditions HELD 15 : 2