A NEW SUPRANATIONAL COURT FOR REFUGEE AND ASYLUM LAW: THE COURT OF JUSTICE OF THE EUROPEAN UNION A COMMENTARY OF ITS RECENT CASE LAW

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7 - 9 September 2011 - Between border control, security concerns and international protection: A judicial perspective.

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The inclusion of refugee and asylum into the competence of the European Union is a landmark in the history of this legal area. The aim of this paper is not to provide an exhaustive assessment of it but to present a number of remarks on its judicial aspect: the competence of the Court of justice of the European Union (CJEU) to adjudicate on such issues and the consequences for domestic courts. In Part I I shall comment on the silence of the 1951 Convention and the impact of the case law of the European Court of Human Rights. In Part II I shall discuss the nature of this change and try to provide a tentative assessment .

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I. From the silence of the 1951 Convention to the impact of the case law of the European Court of Human Rights

During a very long time no international court had jurisdiction to adjudicate directly on issues relating to refugee and asylum law.

I.1. The silence of the 1951 Convention

During the preparatory works of the 1951 Geneva Convention no one thought of creating an international court or a body composed of experts in charge of overseeing its implementation by State Parties, on the model of the monitoring systems included later on in the UN human rights conventions adopted from the mid-1960s on[2]. The UNHCR, created one year earlier, was supposed to be sufficient. Not without some misgivings. There seems to have been some reluctance to create a permanent institution. Hence, in its 1950 Statute, the provision under which the UN General Assembly would determine, within three years, "whether the Office should be continued beyond 31 December 1953"[3]. It was. Its competence is wide one[4] . But the Statute could not mention the 1951 Convention. The latter mentions that the UNHCR "is charged with the task of supervising international conventions[5] providing for the protection of refugees" and mentions "the co-operation of States" with it[6]. Consequently domestic administrative and judicial institutions were left on their own.

I.2. The impact of the case law of the European Court of Human Rights

The ECHR was initially silent of the rights of aliens and did not mention asylum, which is not surprising, given its date (1950). Indeed its two initial provisions relating to aliens allow a *restriction* of their rights[7]. The content of the additional Protocols 4 (art.4) and 7 (art.1) is minimal. In addition the European Court of Human Rights has held that article 6.1 does not apply to migration issues. In spite of this the Strasbourg Court plays an important indirect role in cases relating to asylum seekers through its case law on several provisions of the

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[2] Under art. 38: " 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". This provision has never been used.

[3] Statute of the Office of the United Nations High Commissioner for Refugees, art.5.

[4] Statute, ch.II.6.

[5] The plural is noteworthy.

[6] Preamble, para 6.

[7] See art. 5.1.f on arrest and detention of a person to prevent his unauthorised entry into the country or against whom deportation or extradition is contemplated and art. 16 on restrictions on the political activities of aliens.

Convention such as articles 3[8] , 8 [9]and 13 on the right to an effective remedy[10]. The Court has also used extensively article 39 of its Rules of procedure on interim measures[11].

In addition, the case law of the European Court of Human Rights has to be taken to-day into account for two general reasons. The first one lies in article 6.3 TEU:" Fundamental rights, as guaranteed by the European Convention on 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". The second reason the future accession of the EU to ECHR, mentioned in article 6.2 TEU.

II. **The judicial consequences of the inclusion of refugee and asylum law into the competence of the EU**

I shall comment in turn on some general issues (II.1), on the references sent to the Court (II.2),on the lessons for domestic courts concerning the referrals (II.2.3) and finally on the CJEU's methods of interpretation and its outcome (II.4).

II. 1. General issues

When the Rome Treaty creating the European Economic Community was drafted and finally signed in 1957 no one imagined that asylum, together with immigration, would ever be part of the competence of the Community. This is the case to-day under articles 3.2 TEU and 67.2 and 78 TFEU. The first consequence is that refugee and asylum law in EU Member States is primarily composed of the 1951 Geneva Convention and of a series of EU instruments:

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[8] *Chahal v UK* (1996) ECHR 54 (15 Nov.1996) on expulsion of aliens ;*Cruz Varas and Others v Sweden* (1991)ECHR 14 (20 March 1991);*Vilvarajah and Others c UK* (1991) ECHR 26 (30 Oct. 1991); *Salah Sheek v The Netherlands* (2007) ECHR 36 (11 Jan. 2007). See A. Fornerod, " L'article 3 de la convention européenne des droits de l'homme et l'éloignement forcé des étrangers", *Revue trimestrielle des droits de l'homme*, 82, Apri1 1,2010.315. On the implementation of the Dublin II Regulation see *AA v Greece*, 22 July 2010 and *MMS v Belgium and Greece*, (2011) ECHR 108 (21 Jan. 2011). The consequences of MMS are far reaching. The interpretation and implementation of this Regulation is mentioned in a number of recent references by domestic courts to the CJEU (see infra).

[9] In 2010 the Court held Greece in breach of art.8 combined with art. 14 for refusing to serve family allowances to refugees on the ground that they were not Greek nationals, nationals of another EU Member State or of Greek origin: *Fawsie v Greece*, 21 Oct. 2010 and *Saidoun v Greece,* same date; *Rahimi v Greece* (2011) ECHR 751.

[10] *Jabari v Turkey* (2000) ECHR 369 (11 July 2000), *Conka v Belgium* (2002) ECHR 14 (5 Feb. 2002),*Gebremedhin v France*, 26 April 2007.

[11] Since *Mamatkulov and Askarov v Turkey* (2005)ECHR 64 (4 Feb. 2005), the State Parties are under an obligation to comply with them. The Court has repeatedly used it in cases relating to Sri Lanka: see R. Errera, "The European Court of Human Rights and interim measures: Scope of powers and issues for domestic courts"; N. Mole, *Asylum and the European Convention on Human Rights* , Council of Europe Publishing, 2007, H. Lambert, *The position of aliens in relation to the European Convention on human rights*, id, 2006.

Directives[12], Regulations[13] and decisions[14]. The second consequence is that for the first time in the history of refugee and asylum law a supra-national court, the CJEU, adjudicates directly on issues relating to this area of law. It does so in actions relating to the validity and the interpretation of the instruments mentioned above. In this domain as in others the main and most significant and influential part of its case law comes from references from domestic courts for a preliminary ruling under article 267 TFEU[15].

Several remarks are in order here.

a) This is a court to court procedure, an original and unique instrument of cooperation between national courts, which are the first instance courts applying EU law and the Court, under the guidance of the latter. It belongs to the domestic courts to decide whether it is necessary to request the Court for its interpretation of certain provisions of an EU instrument. This can be done at any stage of the proceedings.

b) The CJEU has discretion, whenever it thinks it appropriate, to rephrase the questions, not to answer some of them or to add to them.

c) The central issue here is that of interpretation, a key notion for all judges. The importance of such an exercise, here, is increased by several facts:

- Refugee and asylum law is a totally new field for the Court.
- Many EU instruments, especially Directives, are not a model of clarity and consistency, due to the conditions of their drafting and the inevitable compromises between the Commission and the Council or between Member States.[16]
- EU instruments are recent and new ones for domestic courts and drafted differently from national law.

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[12] Directives 2001/55 on temporary protection, 2003 / 09 on reception conditions, 2004/83 on refugee and subsidiary protection definition and content and 2005/85 on asylum procedures.

[13] Regulations 2725/ 2000 on Eurodac,407/202 implementing the precedent one, 343/2003 (Dublin II), 1560/2003 implementing the precedent one and 439/ 2010 on the European Asylum Support Office.

[14] Decisions 2000/596/EC on the European Refugee Fund and 2004 Decision on the second Fund.

[15] «The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning a) the interpretation of Treaties b) the validity an interpretation of the institutions, bodies, offices or agencies of the Union.- Where such a question is raised in a case pending 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 in regard to persons in custody, the Court of Justice of the European Union shall act with the minimum of delay".

[16] Art. 15.c of the Qualification Directive is an apt illustration. Needless to say EU instruments do not have the monopoly of such defects. In her opinion relating to the *Bolbol* case (Case C-31/09, 17 June 2010, *Nawras Bolbol v Bevandorlasi es Allampolgarsagi Hivatal*) Advocate General E. Sharpston, commenting on article 1D of the Geneva Convention on exclusion, mentioned " four broad areas of opacity", at § 46.

- The Court's jurisdiction is restricted to EU instruments but here, given the pre-eminence of the Geneva Convention, constantly reaffirmed, and the fact that some Directives, e.g. the Qualification Directive, are an elaboration of it and repeat many of its provisions, its ruling are bound to have a direct influence on the interpretation of the Geneva Convention by domestic courts. Hence the interest of its case law for the courts of States which do not belong to the EU and are parties to the 1951 Convention. A good example is the content of the Qualification directive on the key notions of protection, persecution, exclusion and cessation.

d) In addition to the Treaties and to the Directives and Regulations mentioned above, another instrument must be mentioned: The Charter of fundamental rights of the European Union (hereafter: the Charter). Under article 6.1 TEU "The Union recognises the rights, freedoms and principles set put in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2009, which shall have the same legal values as Treaties"[17]. On asylum the Charter says very little: "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 July 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')"[18]. The Qualification Directive mentions the Charter in its preamble[19]. The link between the Charter and the ECHR is explained in its article 52(3).[20]

The Charter has been mentioned in several rulings[21] A number of pending references mention provisions of the Charter among other instruments[22], which will lead the Court to give its interpretation of them[23] and of the Charter in general.

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[17] Under the third para of the same article : « 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 application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions". This convoluted language is a safe recipe for divergences of interpretation of the Charter.

[18] Art. 18.

[19] "This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union", Recital 10, first phrase.

[20] "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".

[21] *Bolbol*, § 38, *Abdulla*,§ 53-4 and *B and D,* § 78.

[22] See Case C-411/10, a reference by the London Court of appeal, in which articles 1, 4, 18,19-2, 47 and 51 are mentioned and Case C - 493/10, a reference from the High Court of Ireland, mentioning article 18. In his opinion on case C-69/10, *Samba Diouf*, delivered on March 1, 2011, Advocate General P.Cruz Villalon quoted article 47.

[23] The 2010 Report of the Commission on the application of the Charter is silent on asylum and refugees issues. (European Commission, *Report from the Commission to the European Parliament, the Council, the*

e) The Court's rulings are binding for the domestic court from which the reference came and for all authorities of the Member States who have to decide on the same issue. Its decisions must be read in combination with the opinion of the Advocate General, which assist the Court.[24] A full understanding of the Court's ruling would usually require the reading the Advocate General's opinion for at least two reasons: The first one is that it is more developed than the judgment itself and contains in most cases a thorough exposé of the applicable law, including the "travaux préparatoires". The second one is that it is the opinion of one person and not the outcome of the deliberation of a collegiate bench. It is made public together with the Court's decision.

II.2. The cases sent to the Court

. To this day the CJEU has delivered 6 rulings on refugee and asylum issues. One was the result of an action brought by the European Parliament against a decision of the Council on their respective powers on the procedure of adoption of the common list of safe countries of origin[25]. The five other decisions followed references by domestic courts. Four related to the Qualification directive (hereafter: QD): one on the interpretation of article 15 (c) on subsidiary protection[26], one of that of articles 2 (c),7 (1), 11-1 (e) and 15 relating to cessation[27], one on article 12 (1)(a) on exclusion[28] and one on articles 12(2)(b) and (c) on exclusion and 3[29]. The other reference related to procedural aspects of the Dublin II Regulation[30].

The number of references is increasing. 8 cases are now [31] pending before the Court. Two relate to the procedures Directive[32] , one to the QD[33] and four on the Dublin II Regulation[34], a sign of the times. One reference has been withdrawn[35].

European Economic and Social Committee and the Committee of the regions. 2010 Report on the Application of the EU Charter of Fundamental Rights ,SEC(2011) 396 final.

24 Under article 252, second para, TFEU : « 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.

25 Case C-133/06, *European Parliament v Council of the European Union,* 2008 ECR 1-3189.

26 Case C-465/07, *Meki Elgafaji and Noor Elgafaji v Staatsecretaris van Justitie*, Grand Chamber,2009,ECR 1- 921; (2009) 21 *IJRL* 297-307.See R.Errera," The CJEU and Subsidiary Protection: Reflections on *Elgafaji* - and after", 23 *IJRL* 93-112.

27 Joined cases C- 175/08, C-176/08, C-178/08 and C-179/98, *Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi and Dler Jamal v Bundesrepublik Deutschland ,* 2 March 2010. See R. Errera, "Cessation and Assessment of New Circumstances: a Comment on *Abdulla* ,CJEU, 2 March 2010, forthcoming, *IJRL.*

28 *Nawras Bolbol*, mentioned n.16 above.

29 Joined Cases C-57/09 and C-101/09, *Bundesrepublik Deutschland v B and D.*

30 Case C - 19/08, *Migrationsverket v Petrosian*, 29 jan. 2009.

31 As of June 2011.

II.3. The lessons for domestic courts : The reference judgment

Particular attention should be given to the drafting of the judgment and to the wording of the questions sent to the CJEU[36]. The former should contain a full and precise statement of the facts of the case, of the administrative and judicial decisions taken at the domestic level and of the legal issues before the court and how they relate to the interpretation of the EU instrument. Three examples can be given. In its 25 pages long judgment that led to the CJEU decision in *B and D* on exclusion, the German Federal Administrative Court, after analysing the domestic proceedings, commented at length, for each of the questions, the relevant international instruments, the case law of foreign courts as well as the domestic one[37] . The same method was followed in Cases C-71/11 and C-99/11 concerning religious persecution. The same Court commented extensively the respective scope of article 9 ECHR and 9(1)QD and the relevant case law, together with UNHCR statements.[38] In its judgment referring a case concerning the interpretation of the Dublin II Regulation[39] the London Court of Appeal quoted extensively the first instance judgment[40] on findings of fact, mentioned the domestic case law, the contentions of the parties and of the interveners[41] before listing the questions sent.[42] More and more references contain several inter-related questions and sub-questions. During the panel on the role of the national referring court that was part of the IARLJ's European Chapter's Workshop held in Berlin in 2009 Judge Dörig and Lord Justice Carnwath rightly insisted on the importance of these quality of the judgment of the domestic courts.

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32 Case C-69/10, *Samba Diouf*. Advocate General P. Cruz Villalon delivered his opinion on March 1, 2011; Case C-175/11 *H.I.D.*

33 Joined Cases C-71/11 Y and C-99/11 7, on religious persecution.

34 Case C- 41110, *NS* ;Case C-493/10, *ME and Others;*Case C-620/10, *Kastrati* and Case C- 4/11, *Puid*;Case C –
CIMADE et GISTI .

35 Case C-563/10, *Khavand* relating to homosexuals.

36 The best guide here is : H. Storey, H. Dörig, B. Zalar and N. Blake, «Preliminary references to the Court of Justice of the European Union : a Note for national judges handling asylum-related cases ». See also Court of Justice of the European Union, Information note on references by national courts for preliminary rulings (2009/C 297/01).

37 BVerwG 10 C 48.07

38 BVerwG 10 C 19.09.²

39 Case C-411/10

40 (2010) EWHC 705 (Adm)

41 The AIRE Centre, Amnesty International, the UNHCR and the Equality an Human Rights Commission. This shall give them the right to present observations before the CJEU.

42 *NS, R (on the application of) v Secretary of State for the Home Department* (2010) EWCA civ 990 (12 July 2010)

II.4. The CJEU's methods of interpretation and their outcome

A number of elements emerge from the rulings handed down so far:

a) The provisions to be interpreted are never considered in isolation, but always examined in a wider context: that of the instrument itself and of its purpose and, above, all that of refugee and asylum law, of which the 1951 Convention is" the cornerstone"[43].

b) In some cases the context is, by necessity, a wider one. One apt example is the interpretation of the notion of "cessation" contained in article 11 (1)(e) QD. To answer the questions sent to it the Court explored, in *Abdulla,* the meaning of other related notions such as those of " change or circumstances", " persecution" and " protection". This led it to insist on the human rights dimension of the issue. In *Bolbol*, which concerned the interpretation of article 12(1)(a) QD the Court mentioned a number of UN instruments. In her opinion Advocate General Sharpston quoted, in addition, EC Joint Positions, UNHCR Statements and the historical background of the texts relating to the case. In *B and D*, which related to exclusion, the Court said: that the QD must "be interpreted in the light of its general scheme and purpose[44], and in a manner consistent with the 1951 Convention and the other relevant treaties referred to in…Article 78(1) TFEU…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…"[45]. In his opinion Advocate General Mengozzi stressed the links between refugee law and international humanitarian law and the international law on human rights[46]

c) The autonomous character of the EU legal order[47] remains a fundamental principle, albeit somewhat qualified here by the use of the instruments mentioned above.

d) Placed before ambiguous or vague provisions, often the fruit of political compromise, the Court has always interpreted them taking into account the key concept of refugee and asylum law, that of *protection.*

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[43] This has been the method of the Court , as shown by some of its earliest and most important rulings. See Case C-26/62, *van Gend en Loos*, 1963 ECR 1:" … according to the spirit, the general scheme and the wording…".

[44] On the teleological interpretation used by the Court see the remarks of Advocate General Poiares Maduro, » « Interpreting European law- Judicial activism in a context of constitutional pluralism »,(2007) 1 *European Journal of Legal Studies.*

[45] § 78

[46] At § 44.

[47] Emphasized by the Court in *Elgafaji* in relation to subsidiary protection, a creation of the QD and in particular its article 15 (c): see judgment, § 28 and Advocate General Poiares Maduro's Opinion, § 19.

e) Taking into account the general principles governing refugee law, The Court took a narrow interpretation of exclusion and cessation clauses, as made explicit both in *Bolbol* and in *B and D*[48]. In the latter case Advocate General Mengozzi rightly underlined "the aims underlying the grounds for exclusion"[49] This led the Court to a strict interpretation of the words "has committed "a serious non-political crime" and is " guilty of acts…" contained in article 12 (2) (b) and (c) QD. It also led it, in *Abdulla,* to include the human rights and rule of law dimension in the interpretation of the cessation provisions.

We are only at the beginning of the " politique jurisprudentielle" of the CJEU concerning refugee and asylum law. Many important issues await proper interpretation, such as

- the notion of " safe country of origin", aptly characterized as a " dubious concept " by Nicholas Blake in a recent paper[50]. The same applies to the notion of safe country of transit[51]
- the proper scope of article 3 QD allowing Member States to introduce or retain more favourable standards " in so far as those standards are compatible with this Directive"
- the notion of internal asylum
- the limits of the implementation of the Dublin II Regulation

It belongs to national courts to participate fully to this necessary task.

48 See Advocate General Mengozzi's opinion, § 46

49 « i) to deny refugee status to persons whose conduct has rendered them ' undeserving' of the international protection accorded by the Convention and ii) to prevent such individuals from being able to escape justice by invoking the law on refugees », § 47.

50 N. Blake,The impact of the minimum standards Directive 2004/83/EC on national case law.

51 Both notions are mentioned in art. 25 of Directive 2005/85 on procedure.