

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



The influence of ECJ and ECtHR case law on asylum and immigration

STUDY



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CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

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Summary

Measuring the influence of the case law of the European Court of Human Rights and the Court of Justice of the European Union enables important observations to be made. The Strasbourg Court should continue to play a decisive role in asylum and immigration proceedings. Based on the protection of fundamental rights, its abundant case law has shaped European asylum and immigration law. In contrast, the case law of the Luxembourg Court is lacking in volume, regardless of the progress in judicial protection made by the Treaty of Lisbon. However, the quality of some of the decisions given demonstrates the great potential of the Luxembourg Court in interpreting EU law and framing Member States' actions. Even the planned EU accession to the European Convention on Human Rights, which may be satisfactory for lawyers who are familiar with the system, opens up new perspectives. However, this group of lawyers are out of touch with the realities. It is difficult to comprehend the low number of EU proceedings given the everyday reality. Of course, this observation still lacks the background needed to be able to judge the situation. However, shortcomings in the system can be seen. It thus remains difficult to accept that we had to wait until the end of 2011 for the Dublin system crisis to be dealt with in Luxembourg, even though the European Court had prepared the groundwork. Similarly, the low number of referrals for a preliminary ruling is surprising given the complexity of European law. With everything that is happening, it as though national courts, as it were, do not feel the need to use EU courts, disregarding the national standards in force. Finally, it seems that the Commission has reduced its role as guardian of the treaties to merely respecting time limits for transposition regardless of the quality of national standards and their effective implementation in practice. Furthermore, the protection of human rights currently seems to be more effective in the Strasbourg Court. This observation is doubly paradoxical just when the role of this court has been called into question by judicial subsidiarity and when the EU has declared that it is committed to protecting fundamental rights. Asylum and immigration proceedings are indicative of these contradictions

This note was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE).

AUTHORS

Mr Henri Labayle, Professor at Université de Pau et des pays de l'Adour, Faculty of Law at the University of Bayonne, member of the Odysseus Academic Network for Legal Studies on Immigration and Asylum in Europe for France.

Mr Philippe De Bruycker, Professor at the Institute for European Studies and Faculty of Law at the Université Libre de Bruxelles, Coordinator of the Odysseus Academic Network for Legal Studies on Immigration and Asylum in Europe.

RESPONSIBLE ADMINISTRATOR

Jean-Louis Antoine-Grégoire

Policy department: Citizens' Rights and Constitutional Affairs

European Parliament

B-1047 Brussels

E-mail: jean-louis.antoine@europarl.europa.eu

LANGUAGE VERSIONS

Original: FR

ABOUT THE PUBLISHER

To contact the Policy Department or to subscribe to its monthly newsletter, please write to: poldep-citizens@europarl.europa.eu.

Manuscript completed in April 2012.

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This document is available on the Internet at:

<http://www.europarl.europa.eu/studies>

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SUMMARY

CASE LAW REVIEW

In terms of quantity, a review of the activity of both courts indicates a clear contrast. Case law on immigration and asylum plays an important role in the activity of the European Court of Human Rights, particularly in relation to proceedings for provisional measures which have risen dramatically since 2006. By contrast, the number of proceedings in the Court of Justice is particularly modest. To date, it has only delivered around 20 judgments on failure to fulfil an obligation and 15 requests for preliminary rulings since the end of the 2000s. Although various institutional factors can, to a large extent, explain this lack of case law, the Commission's strategy on a declaration to fulfil an obligation as well as the effectiveness of the mechanism for requesting preliminary rulings are questionable.

TECHNICAL ANALYSIS

The European Court of Human Rights has played a precursor role since the mid 1980s by developing praetorian case law despite the fact that the European Convention on Human Rights only includes a few provisions on aliens. This case law was firstly built on the technique of the protection of the alien by reason (*infra*) and then through proceedings of provisional measures which gained particular importance in protecting aliens from expulsion. The Court of Justice became involved much later as the European Union was only granted competencies on immigration and asylum in the 1990s. Initially called on to operate within the Institutions, the Court of Justice then became involved in fundamental rights.

THE CONTRIBUTION OF CASE LAW TO EUROPEAN LAW ON IMMIGRATION AND ASYLUM

The influence of case law, particularly the case law of the European Court of Human Rights, is crucial to the content of European law on immigration and asylum.

Access to the territory

The European Court of Human Rights protects asylum, which, indirectly, is a right that is not recognised by the European Convention on Human Rights on the basis of Article 3 which prohibits torture and inhuman or degrading treatment. This case law, which goes back almost twenty years, has recently led to some spectacular judgments through which the Strasbourg Court has become the court of asylum in European Union law. The *M.S.S.* judgment of 21 January 2011 thus condemns the automatic application of the Dublin Regulation by Member States for determining which Member State was responsible for examining the asylum application, while the *Hirsi Jamaa* judgment of 23 February 2012 condemning the 'push back' of asylum seeker boats giving an extraterritorial effect to the Convention has proved to be crucially important in interception operations by Member States coordinated by the Frontex agency and generally, in all attempts to externalise EU asylum policy. The Court of Justice was asked to take over the case law from Strasbourg in the judgment of *N.S.* of 21 December 2011 regarding the Dublin Regulation by providing general guidance on EU asylum policy, on the basis of Article 18 of the EU Charter of Fundamental Rights and Article 78 of the TFEU, which states that a common European asylum system should be based on full compliance with the Geneva Convention.

The Strasbourg Court has also investigated the issue of the right to family reunification in

Article 8 of the European Convention, which protects the right to family life. On the basis of the finding that this provision authorises interference by public authorities for the 'economic well-being of the country', the Court has developed case law based on the 'balance of interests' attempting to reconcile, on the one hand, the interests of migrants for living in a family and, on the other hand, the interests of the Member States in regulating access to territory by aliens. Given that Article 8 cannot establish the right to family reunification in a general way and that it leaves a high level of discretion to the Member States on this issue, the Court considers and weighs different factors (the alien's links with the Member State in question, precluding that the family return to live in their country of origin, considerations of public order and compliance with immigration rules, etc.). However, this is not done without some hesitation which could give the impression of a rather complicated case law. The Court of Justice was brought into line with this case law when it was called on to give a decision on Council Directive 2003/86 on the right to family reunification, which has a low level of harmonisation and leaves a wide margin of manoeuvre for the Member States.

Expulsion from the territory

The European Court of Human Rights has played a decisive role in protecting the fundamental rights of aliens facing expulsion from the territory by developing a number of guarantees to their advantage, which the European Union then used as a basis when it started developing its own standards on immigration and asylum.

The first guarantees are of a substantive nature and constitute an obstacle to the expulsion of the alien. In accordance with these guarantees, the Member States are not condemned for committing a direct breach of the Convention but they are indirectly condemned for expelling an alien to a country where the rights of the Convention are at risk of being breached.

The prohibition of inhuman or degrading treatment provided for by Article 3 of the Convention has provided the most developed case law initiated by Soering in 1990. Member States must eschew the expulsion of an alien when they run the real risk of being subjected to such treatment in the country of destination. The Court has firmly reiterated that this prohibition is absolute and permits no derogation, even for terrorists. The Court takes into consideration the actions of the State authorities, for example stoning penalties, as well as the actions of individuals such as drug cartels in Colombia, organised groups threatening personal freedoms where the State cannot find effective solutions and even families in cases of genital mutilation, honour crimes and domestic violence. Even objective situations such as the non-existence of an adequate healthcare system in the country of destination in the event of the expulsion of a terminally ill AIDS patient have been considered, although the most recent case law, in which it is not yet known if this constitutes an overturn or an isolated case, takes into account the fact that the duty to provide free and unlimited healthcare to all aliens residing illegally would place an excessive burden on the Member States.

In these situations, the Court undertakes a specific appraisal of each individual case. Ill treatment must have a minimum level of seriousness, and a general violent situation is not enough; those concerned must be at risk of ill treatment. The Court uses information provided by the parties or any information that it has obtained to carry out this appraisal including reliable and objective reports from intergovernmental or non-governmental organisations. Its appraisal considers developments in the country of destination. Diplomatic assurances given by the country of destination may be considered under certain conditions (accuracy, calibre of the authors) and, following a recent decision, a mechanism

for monitoring the situation of the expellee in their country of destination.

The Court's control also extends to the actions of the country which carries out the expulsion of the alien. The issue of the detention conditions of aliens has become a major concern, particularly in cases of asylum seekers and unaccompanied or accompanied minors. The Court takes into consideration that these cases involve vulnerable people, without condemning the principle of the detention of minors itself.

Article 8 of the Convention on the right to family life could also constitute an obstacle to expulsion and allow aliens to uphold their right to the maintenance of the family group in certain cases. At first, the Court dealt with second generation immigrants who often have deeper attachments to their country of immigration than to their country of origin which meant that it had to consider family life as well as the private lives of those concerned. After creating the impression of a virtual ban on the expulsion of these aliens, the Court relaxed its position by giving more attention to the interests of the Member States where particularly serious offences had been committed resulting in a case law which tries to balance the respective interests of aliens and the Member States. It also seems to not make a difference in principle for first generation immigrants. However, it attaches particular importance to the case of minors who are being returned to their country of origin on the basis of the 'child's best interests' in accordance with Article 3 of the Convention on the rights of the child.

Finally, it is interesting to note that the Court has just considered Article 6 of the Convention of the right to a fair trial to refuse the expulsion of an alien at risk of being sentenced on the basis of proof obtained under torture.

The second guarantees are procedural and mainly concern three provisions of the Convention.

Firstly, the right to freedom requires the Court to check the way in which the Member States applies Article 5(1)(f) of the Convention permitting the detention of a person to prevent his/her unauthorised entry into the country or of a person against whom action is being taken. Refusing to make a distinction between ordinary immigrants and asylum seekers, the Court rigorously checks whether action justifying the detention of a person is being taken with due diligence. It has also developed case law listing the conditions that each detention must fulfil so that it is not classified as 'arbitrary' (it must be carried out in good faith, it must be directed at expulsion, it must not exceed a reasonable amount of time and it must be in an appropriate place and according to suitable detention conditions for those who are not the subject of criminal proceedings). Paying particular attention to minors based on the best interests of the child which are protected by the Convention on the rights of the child, the Court ruled that Article 5 of the European Convention had been breached, even though children accompanied by their parents had been detained in a specific wing in a detention centre reserved for families, due to the fact that the authorities had not verified whether the detention was a last-resort measure to which no alternative could be found. The Court of Justice was also required to give its opinion on the detention period in the Kadzoev case on the basis of the various facts of the case and delivered a detailed decision, which was endorsed.

Subsequently, the right to an effective remedy enshrined by Article 13 of the European Convention plays a particularly important role in the Court's case law while Protocol No 7 on procedural guarantees in the event of expulsion has received little attention as its scope is limited to those residing legally in the territory. Although Article 13 does not require the

case to be dealt with by a real jurisdiction, the procedure, in law as well as in practice, must avoid irreversible damage being caused to the claimant, which is the case when there is a risk of inhuman or degrading treatment due to the person being expelled from the territory. It is on this basis that the European Court, in a series of judgments, has required that an appeal that is part of a special asylum procedure (border procedure) has a suspensive effect, that it must undergo a rigorous review and that the Court's control must be extensive, that those concerned should have access to the information needed to make an appeal and that the time limits of the appeal procedure are not too short to prevent exercising the right in question (which is the case when the time limit is 48 hours).

The final guarantee concerns collective expulsions prohibited by Article 4 of Protocol No 4 of the Convention. Defining collective expulsion as 'any measure compelling aliens, as a group, to leave a country, except where such a measure is taken following and on the basis of a reasonable and objective examination of the particular case of each individual alien of the group', in the renowned *Conka* case, the Court considers the circumstances surrounding the expulsion and concludes that any doubt over the collective nature of the expulsion was ruled out. However, with regard to Council Decision 2004/573 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders, the Court considered that 'the fact that similar decisions have been taken with regard to a number of aliens does not in itself lead to the conclusion that there is a collective expulsion when each person concerned has been given the opportunity to put arguments against his/her expulsion to the competent authorities on an individual basis'. In the renowned *Hirsi Jamaa* case where the Court decided on the extraterritorial application of Protocol No 4, it also added important procedural details, in particular on the right to obtain adequate information allowing those concerned to have effective access to appeal procedures.

THE INFLUENCE OF CASE LAW ON EUROPEAN ASYLUM AND IMMIGRATION LAW

The issues of case law for the EU's institutional system

The allocation of executive power within the EU for implementing the area of freedom, security and justice has been a problem since its creation. The European Parliament has paid particular attention to this issue through the two referrals for proceedings for annulment it brought before the Court of Justice. The Court first ruled in favour of the proceedings concerning the adoption of the list of safe countries in asylum policy. On the basis of the finding that this did not involve an implementing measure, the Court decided that the Council could not introduce a derived legal basis modifying the relevant ordinary legislative procedure in its 'asylum procedures' Directive. The second case, for which the Court's decision is still pending, concerns the Decision of 26 April 2010 on interceptions at sea adopted as part of a comitology procedure which may only be used to modify the non-essential elements of secondary legislation as the Parliament considers that this Decision does in fact concern an essential element of the Schengen Borders Code. A third referral could be made on the establishment of annual priorities for resettlement. While the Commission proposed the use of comitology procedures, the European Parliament proposed the use of legislative delegation. Although a transitional solution was found for 2013, conflict will recommence during negotiations on the new Asylum and Migration Fund for the period 2014–2020 as part of the new Institutional Framework under the Lisbon Treaty. In actual fact, it involves delineating the scope of application for both delegated acts and implementing acts that the Court of Justice will probably be called on to settle in the future...

Regardless of this issue it has raised, the Treaty of Lisbon has greatly improved the legal protection of individuals in the area of freedom, security and justice. It has removed Article 68 of the Treaty of Amsterdam which restricted the Court of Justice's ways of bringing matters before the court as part of preliminary rulings in courts of last resort, which to a large extent explains the lack of case law on immigration and asylum. It also extended judicial review to any potential measures for reinstating internal border controls; it removed the basis of judicial review for the activities of agencies such as Frontex and the European Asylum Support Office; it allowed the Charter on Fundamental Rights to be brought before the Court by conferring on it the status of a treaty. Finally, it should be remembered that an urgent preliminary ruling (PPU) was created for the area of freedom, security and justice to allow the Court to respond to national courts within suitable time frames with respect to the situation of those concerned facing detention. It appears that this procedure is failing. As well as the fact that the Court is rarely called upon by national courts in an emergency, the Court seems to have an extremely limited idea of what constitutes an emergency, when it is not adopting a contradictory attitude, refusing the case as a matter of urgency but agreeing to use an accelerated procedure based on identical grounds. A reform of these procedures could be necessary if the Court does not adopt a more comprehensible approach to emergencies in the future.

Finally, communication between the courts is crucial to the correct functioning of the EU's institutional system. Firstly, this involves communication between the national court and the European courts. Relations with the European Court of Human Rights are unorganised. Communication depends on the requirement for domestic remedies and the Court's case law to have been exhausted based on the general principles of ordinary law or the national margin of appreciation. The situation is the exact opposite in the Court of Justice of the European Union where relations with the national judge are institutionalised through the system of reference for a preliminary ruling. Surprisingly, this system is failing, given the extreme reduction in the number of decisions delivered by the Court on immigration and asylum (supra). Secondly, communication involves dialogue between the European courts. As no communication channel exists between the two courts, a spontaneous dialogue has developed. The Court of Justice has had to resort to this in respect of the primacy of European law to avoid Member States being sentenced in contradiction to the European Convention. Even though the European Court is not subject to the same constraints, in its renowned Bosphorus case law, it states that the protection of fundamental rights in the EU must be guaranteed in the same way as that of the European Convention, a rebuttable presumption, which was revoked in the M.S.S. case with regard to the Dublin Regulation to the detriment of the Member State responsible for examining an asylum application. The EU Charter of Fundamental Rights has set out this method of communication around two decisive mechanisms aimed at guaranteeing the harmonious co-existence of the two systems: Firstly, the 'minimum protection' required by the Charter may not infringe upon the protection of human rights which are protected by the European Convention. Secondly, the 'corresponding rights' require the rights set out by the Charter which correspond to the rights of the Convention to have the same meaning and the same weight as those of the latter.

The immediate consequences of the case law of the Court of Justice

The Luxembourg Court has three roles. The first and most common role is the mechanism for preliminary ruling in interpretation. The Court has thus interpreted derogations from law on family reunification to offset these possibilities, reduced to mere circumstances among all other circumstances, which should be taken into account in the case law of the European Court of Human Rights, which has itself been integrated into the Directive on the right to

family reunification. Recalling the margin of appreciation afforded to the Member States in Strasbourg case law, the Court has transformed this power into a duty by obliging all appropriate administrative departments in the Member States to treat each request for family reunification individually so that they can consider the specific circumstances in a case which should not require them to apply a derogation which has nevertheless been authorised. The Court has clarified the notion of subsidiary protection which, in a broad sense, is marked by an internal contradiction in the text of Article 15(c) of the Qualification Directive. However, the precautionary principle remains, as the Court believes its interpretation should only be applied in exceptional circumstances. Through this case law, the European legislator has been able to avoid re-opening this difficult debate by referring to the solution provided by the Court. It has once again shown that the right to appeal effectively in asylum cases does not imply that it can be lodged against each preparatory decision in asylum proceedings at the risk of prolonging proceedings disastrously. This is provided that the appeal against the final decision of rejection also involves the reasons given in the preparatory decisions, specifying that a time limit of 15 days is reasonable and proportional to the requirements of an effective appeal. Finally, it has confirmed the primacy of the Geneva Convention over secondary EU legislation on asylum for which it is a guarantee and that it directly interprets this Convention even though the EU is not party to it. Providing the Geneva Convention with the international court it lacked, it could also revive this 60 year-old text and contribute to the development of a European branch of refugee law which could influence international refugee law.

The second role of the Court of Justice goes further than interpretation. It requires the Court to support the implementation of EU immigration and asylum law by the Member States to which it sends guidelines based on the objectives of the European legislator. It also sets itself up as a judge of the proportionality of the conditions the Member States are authorised to impose on the members of the family for whom Directive 2003/86 has recognised a subjective right to family reunification. This could lead it to oppose the Member States' carrying out the wishes expressed in the European Pact on Immigration and Asylum adopted in 2008 by the European Council. In terms of combating illegal immigration, to a certain extent, it limits the Member States' competencies concerning criminal convictions for illegal residence based on the various stages at which a forced return can be carried out. Finally, it limits the possibility of carrying out checks in border areas by requiring the Member States to verify that these do not constitute internal border checks which are prohibited by the Treaties.

The third role of the Court, which is as spectacular as it is rare, is to call into question any interpretation or use of European standards on the general principles of law or on human rights. In a judgment by N&S following the judgment of M.S.S at the Strasbourg Court, the Luxembourg Court decided not to condemn the Dublin system for determining the Member State responsible for examining an asylum application as such, but the indiscriminate use of this regulation by certain Member States, arguing that EU law opposes the application of a rebuttable presumption according to which the Member State responsible must respect the fundamental rights of the EU.

The potential consequences of the case law of the Court of Justice for European asylum and immigration law

After a gap in the area of fundamental rights in the early years of the European Communities, the situation of the European Union is the exact opposite.

Firstly, the increase in the ability to exercise fundamental rights, however beneficial it may

be, raises issues. First of all, technical issues are raised as the requirements of these rights must be taken into consideration both upstream, through impact assessments during legislative negotiations, as well as downstream, during the application phase of EU standards or when developing appeal or court proceedings. It also raises political issues, as contesting the judicial review system of the European Convention on Human Rights expresses the concern of the Member States even though this is a minor concern. The topic of the subsidiarity of the control applied by the European Court of Human Rights, particularly with regard to asylum and immigration is, paradoxically, used by both the Court to call on Member States to make efforts to protect human rights on a national level and by the Member States to contest the extent of the control applied by the Court and to extend the Member States' margin of appreciation. Now more than ever, the volume and complexity of proceedings involving aliens makes it the powerhouse for the protection for human rights in Europe.

Secondly, the European Union now has its own Charter of Fundamental Rights which has been conferred the status of a treaty along with the European Convention on Human Rights, which all EU Member States are party to. Even though, to date, the Charter has not had a fundamental impact, the dual existence of the texts raises questions over the duality and complementarity of the texts in the future. Although the complementarity hypothesis currently prevails, it cannot be ruled out that Luxembourg case law will develop protection standards which are more ambitious than those of the Strasbourg court. In any case, it has certain tools to do this, such as Article 18 of the Charter, which directly establishes the right to asylum and poses the question of the positive obligations which could result from this, as opposed to the negative obligations of the Geneva Convention.

Thirdly, the plan for the EU's accession to the European Convention on Human Rights has been fulfilled. This accession will guarantee the cohesion of the protection of fundamental rights in Europe and will provide the same guarantee for litigants facing action as well as the Member States and the European Union. The subjection of the EU to an external judicial review, which is revolutionary, is based on the co-defendant mechanism which will allow the EU and the Member States to participate in proceedings in the Strasbourg Court and in preliminary rulings, which will allow the Luxembourg Court to rule in the first instance in order to preserve the autonomy of EU law. However convincing this may be, particularly for lawyers specialising in this area, the current system remains disconnected from reality. This reality is the crisis of judicial subsidiarity.

CONCLUSION

The regular assessment of case law of the two major European supreme courts on asylum and immigration law reveals a number of significant observations, considering that these proceedings have a very specific nature and can involve the difference between life and death for those involved.

Firstly, it cannot be denied that the European Court of Human Rights plays and continues to play a decisive role in the protection of the fundamental rights of migrants. Ultimately, as in the search for balance with public policy needs, its case law is the backbone of EU law on asylum and immigration. This role was either not fulfilled by the Court of Justice or abandoned by national courts. The concern caused by this observation, 20 years after Schengen and Maastricht, calls for an in-depth examination at a time when the Strasbourg court's recent case law is being criticised by Member States.

European case law has correctly established an internal order of priority which includes the migration policies of the EU and of its Member States. With no strong textual support available as yet, the Court has drawn up 'red' lines which the Member States cannot surpass, whatever the context may be, on the inalienable rights to life and physical integrity, whereas the margin of appreciation it granted to the Member States in other cases afforded them a certain freedom of movement. All lines were accompanied by procedural obligations, safeguarding and enforcing the rights guaranteed.

In doing so, the case law of the European Court of Human Rights has provided the framework for EU secondary legislation on asylum and immigration. With regard to international protection, 'subsidiary protection', as with family reunification, is down to the court as the reliance on its solutions has been decisive.

Conversely, the success of the Strasbourg Court raises questions on the 'subsidiary' nature of its control. The number of appeals submitted, those related to judgments, and the particularly worrying amount of 'provisional measures' applied by the European Court indicate gaps in the national systems. The safety net that the ECtHR's control represents is too full to have a purely subsidiary function. For example, in the recent judgment of *IM v. France* where the asylum seeker was being sent home, only the Court's emergency intervention allowed the person concerned to escape danger that was subsequently recognised by the French court. In these circumstances, how many people have been sent back to their persecutor, as it is plausible that there are more of these cases than imagined?

Secondly, the role European case law still plays in migratory matters, more than a decade after the Treaty of Amsterdam and the start of European Union secondary legislation, raises questions on the inadequate protection provided by this case law. The lack of EU case law, although there are some objective explanations, cannot be accepted. Although restricted, the EU court's involvement should be greater given the amount of questions raised by a law which is often poor-quality due to the conditions of its negotiation. Given the practical importance of issues concerning family reunification, how can the virtual absence of preliminary rulings on such controversial issues as integration and the practical arrangements of family reunification in all Member States be explained? With regard to the legislative contradictions on protection, why have a large number of questions not been raised with the Court of Justice by national courts? However, at a time when the justiciability of the Charter of Fundamental Rights is assured and the accession to the

ECtHR is in sight, it is necessary to seek an explanation to these unanswered questions.

The first answer involves time. The entry into force of the Treaty of Amsterdam, the difficulty in developing secondary EU legislation for the first time in 2004 and the time required to transpose this legislation by the Member States before its entry into force, ultimately reduce the period which can be used to evaluate the treatment of EU law by national courts. The lack of the necessary background hinders the evaluation. It is nevertheless surprising that certain obvious failings of asylum and immigration law in the Member States have not been brought before the courts. It is difficult to understand why the Dublin system crisis, which had been high on the agenda for many years, had to wait until the end of 2011 to be dealt with in the N.S case by the Court of Justice after the European Court of Human Rights had prepared the ground in the M.S.S case. Ignorance of the European foundations of national legislation or a lack of interest by the internal court in the preliminary ruling procedure? It is clearly a little of both.

It is revealing to put into perspective the stagnation in proceedings observed in Strasbourg, indicated by the number of 'provisional measures' and the virtual silence held by the Luxembourg Court on the same issues¹. It seems that everything is carried out as if the national court felt that there was little or no need to call for the help of the EU court. This is not necessarily typical of the matter and is part of a wider trend. In its 2010 activity report, the President of the Court correctly highlighted 'the unprecedented increase in the number of cases brought before the court and particularly the number of requests for a preliminary ruling'.² This is proportionally accurate as it involves an increase of 27.4 % compared with the previous year. However, this volume should be looked at more closely as, in all matters, the Court dealt with only 381 cases of which only one in ten concerned the area of freedom, security and justice³. The proportion is even more revealing for cases closed by a judgment or an opinion: of the 482 decisions delivered in 2010, only 24 concerned the area of freedom, security and justice. Given the deluge of cases that EU asylum and immigration law gives rise to, this discrepancy raises the question of the credibility of existing legal protection in the EU.

Furthermore, since others are neglecting their responsibilities. The fact that the Commission, guardian of the treaties, tolerated the prevailing situation in Greece without referring the matter to the Court for failure to fulfil an obligation, despite regular warnings from the European Court of Human Rights, did not do the Commission any favours given the length and the seriousness of the humanitarian crisis in this Member State. As with other cases concerning fundamental rights such as the fight against terrorism or CIA secret flights, it is ultimately in Strasbourg that protection has proved to be most efficient, obliging the EU to bring its actions in line with its words. It is therefore paradoxical that the moment the EU took on its role as the protector of fundamental rights through the Treaty of Lisbon, it was no longer fully capable of carrying out its responsibilities.

In addition and in conclusion, the current positions in Strasbourg on 'judicial subsidiarity' should be taken carefully and measured against the risks involved for those who are not protected by this subsidiarity on a national level. The amount of difficulties faced by national courts when dealing with asylum and immigration proceedings must encourage the European courts, particularly the Court of Justice, to engage more actively in the judicial protection of individuals.

¹ See quantitative assessment above.

² ECJ, Activity Report 2010, p. 9.

³ All questions considered.

LIST OF THE MAIN ECtHR JUDGMENTS

Applicability of the Convention

- 7 July 1989, SOERING: the Court stated the applicability of the European Convention with regard to expulsion in the case of risk of violation of a right that it guarantees
- 4 February 2005, MAMATKULOV and ASKAROV: the Court stated the obligatory nature of the 'provisional measures' it ordered
- 23 February 2012, HIRSI JAMAA: the Court recognised the extraterritorial application of the Convention and Protocol No 4 on collective expulsions
- 17 January 2012, OTHMAN (Abu Qatada): the Court stated the 'diplomatic assurances' received by the alien's country of destination and the applicability of Article 6

The right to asylum and subsidiary protection

- 20 March 1991, CRUZ VARAS: the Court protects asylum seekers through Article 3 ECTHR
- 29 April 1997, H.L.R: the Court stated the protection of Article 3 against threats from private persons
- 11 July 2000, JABARI: the Court subjects the country to a serious review on protection requirements
- 21 January 2011, M.S.S. vs. Belgium: the Court prohibits the automatic application of the Dublin Regulation by the EU Member States and emphasises the vulnerable situation of asylum seekers
- 28 February 2008, SAADI: the Court re-affirms the absolute nature of protection against torture as a result of expulsion including in relation to the fight against terrorism

The right to a family life

- 28 May 1985, ABDULAZIZ CABALES: the Court stated the principle of the balance of interest in the area of family reunification of aliens
- 19 February 1996, GÜL: the Court sets the limits for the right to family reunification in the area of access to the territory
- 18 October 2006, UNER: the Court sets the extent of protection for family life in the area of expulsion

Procedural rights

- 31 January 2012, M.S: the Court sets the limits for the deprivation of liberty of aliens

- 5 February 2002, CONKA: the Court condemns collective expulsions
- 26 April 2007, GEBREMEDHIN: the Court condemns the lack of an effective appeal with suspensory effect available to an asylum seeker

LIST OF THE MAIN ECJ JUDGMENTS

The right to asylum and subsidiary protection

- 17 February 2009, C-465/07, ELGAFAJI: the Court considers that 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/she is specifically targeted by reason of factors particular to his/her personal circumstances; the existence of such a threat can exceptionally be considered to be established 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/her presence on the territory of that country or region, face a real risk of being subject to that threat.
- 17 June 2010, C-31/09, BOLBOL: the Court directly interprets the Geneva Convention to which it guarantees compliance by EU law.
- 21 December 2011, C-411/10, N.S: the Court considers that EU law precludes the operation of a conclusive presumption that the Member State which Article 3(1) of the 'Dublin' Regulation designates as the responsible State will observe EU fundamental rights and considers that Member States may not transfer an asylum seeker to the Member State responsible where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment, within the meaning of Article 4 of the Charter on Fundamental Rights. The Court added that the Member State in which the asylum seeker is present must ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time.

The right to family reunification

- 4 March 2010, C-578/08, CHAKROUN: the Court considers that since authorisation of family reunification is the general rule for members of the nuclear family, the faculty of Member States to set the conditions for family reunification must be interpreted strictly. The margin for manoeuvre which the Member States are recognised as having must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family reunification, and the effectiveness thereof. The Court also considers that Article 17 of Directive 2003/86 requires individual examination of applications for family reunification.

Procedural rights

- 6 December 2011, C-329/11, ACHUGHBABIAN: the Court ruled that legislation repressing illegal stays by criminal sanctions cannot be applied during the return procedure but could be applied when the return procedure has been established and that the third-country national is staying illegally in that country with no justified grounds.

Borders

- 22 June 2010, C-188/10, MELKI: the Court, on the basis of the absence of internal border controls provided for by the Treaties, ruled that Member States cannot carry out identity controls in a border area without providing the necessary framework to guarantee that these are not equivalent to border controls.

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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ISBN
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