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Contents:

FROM THE SECRETARY-GENERAL'S DESK 3

By Yves KREINS, Secretary-General of ACA-Europe

GENERAL REPORT: ASYLUM AND IMMIGRATION LAW : THE NATIONAL JUDGE BETWEEN NATIONAL AND EUROPEAN STANDARDS 4

By Geert DEBERSAQUES, First President of the Council for Alien Law Litigation of Belgium, and Serge BODART, President, of the Council for Alien Law Litigation of Belgium

With the assistance of
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INTRODUCTION 4

THEME I. EVIDENCE LAW IN COMPETENT NATIONAL COURTS WITH REGARD TO ACTIONS FILED BY FOREIGN NATIONALS 5

THEME II. COMPETENCE OF THE NATIONAL COURT TO ACT OF ITS OWN MOTION IN A EUROPEAN CONTEXT 17

THEME III. THE NATIONAL COURT AND EUROPEAN INSTRUMENTS 22

FROM THE SECRETARY-GENERAL'S DESK

The Member States of the European Union have been working to harmonise their asylum and immigration policies for more than twenty years now. Some progress has already been made in this area, particularly as part of the Tampere and Hague programmes. The European Union recently made additional efforts to create a truly common asylum and immigration policy that takes account of both the collective interest of the Union and the special needs of its Member States. It was against this backdrop that the Stockholm programme was adopted.

The Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA-Europe) wanted to contribute to this process and, with a view to doing so, held a seminar titled "Asylum and immigration law: the national judge between national and European standards" in Brussels on 17 December 2010. The Belgian Aliens Litigation Council provided ACA-Europe with technical support by creating the questionnaire to which ACA-Europe's member high courts responded. The responses were analysed by the Aliens Litigation Council, which then drew up a general report enabling lessons to be learned from the current legal mechanisms and case law in the Member States of the European Union.

The seminar dealt with three topics, which were divided into sub-topics:

- Evidence law in competent national courts with regard to actions filed by foreign nationals, and more specifically, the exclusion of certain types of evidence or the existence of presumption, the burden of proof and weighting or classifying evidence;
- The competence of the national court to act of its own motion in a European context with regard to preliminary questions but also with regard to the direct applicability of certain articles of the Charter of Fundamental Rights of the European Union;
- The relationship between the national court and European instruments when referring to the case law of other Member States or in the application of the Geneva Convention of 28 July 1951, derived from the application of Directive 2004/83/EC (known as the "Qualification Directive"), and the application of those principles of the Qualification Directive (among others) that cannot be transposed directly.

The general report, which is the subject of this newsletter, was presented by Ms N. VERMANDER of the Belgian Aliens Litigation Council.

Over the course of the seminar, each of the topics was addressed by several participants, some of whom were delegates representing associations or institutions specialising in the subject under discussion, such as the International Association of Refugee Law Judges or the Office of the UN High Commissioner for Refugees. Indeed, ACA-Europe's intention when it opened up participation – particularly in this activity – was to create useful synergies within a framework where other expert contributors are likely to be able to share their know-how and experience.

Mr S. BODART, President of the Belgian Aliens Litigation Council, presented the seminar's general conclusions, which covered both the aspects raised in speakers' contributions and the ideas exchanged during the subsequent debates.

The national reports, most of the speakers' contributions and the seminar's general conclusions are available on ACA-Europe's website, www.aca-europe.eu (under Colloquia / Seminars)

Yves KREINS
Secretary-General

GENERAL REPORT: ASYLUM AND IMMIGRATION LAW: THE NATIONAL JUDGE BETWEEN NATIONAL AND EUROPEAN STANDARDS

By Geert DEBERSAQUES, First President, and Serge BODART, President, of the Council for Alien Law Litigation of Belgium

With the assistance of
Nele VERMANDER, Head of the Legal Department of the Council for Alien Law Litigation
and Jean-Christophe WERENNE, Legal Expert at the Legal Department of the Council for Alien Law Litigation

INTRODUCTION

The legislation relating to alien litigation, especially concerning immigration and asylum, accounts for a large share of the workload of the jurisdictions. These matters, once the prerogative of national sovereignty, are being increasingly influenced by an ever-growing body of integrative European legislation. How does the national judge juggle this double standard?

The questionnaire supplied to the member jurisdictions of our association covered three main themes perceived as being of major importance: the law of evidence in the competent national jurisdictions, the ability of the national judge to intervene of their own motion in the European context, and the relations between the national judge and the European instruments.

“Alien litigation” is taken to mean litigation relating to “asylum” as derived from Article 78 of the Treaty on the Functioning of the European Union, and litigation relating to “immigration” as derived by Article 79 of the Treaty on the Functioning of the European Union.

ACA-Europe received 30 reports from the 27 EU Member States, two candidate countries (Croatia and Turkey) and one guest country (Norway). All these reports, as well as this general report, are available on the ACA-Europe website (www.aca-europe) in the “Colloquia” section. We are very pleased with this excellent response rate.

THEME I. EVIDENCE LAW IN COMPETENT NATIONAL COURTS WITH REGARD TO ACTIONS FILED BY FOREIGN NATIONALS

I. - RULES OF EVIDENCE

Are the rules of evidence in actions filed by foreign nationals laid down specifically in internal law?

Generally speaking, the rules of evidence regarding alien litigation are not laid down specifically in national law. Proof can be furnished by all means ("La preuve est libre"). Except for Lithuania, Portugal and the Netherlands, which reported having specific rules concerning the admissibility of evidence, and despite the fact that, like Spain, all countries agree that certain documents have a special value, the surveyed countries stated that they had no specific provisions concerning the rules of evidence regarding alien litigation.

Alien litigation is often the prerogative of the administrative courts. Like Poland, the respondent countries felt that the laws relating to asylum and immigration were *leges speciales* of general administrative law, and consequently fell under the codes of administrative procedure, or in the absence of such codes, as in the Czech Republic, under the codes of judicial procedure. In Cyprus, the rules of civil procedure are applicable as well, unless otherwise stated by the Constitutional Court or the judge.

While issues concerning immigration are often subject to remedies limited to the control of the legality (sovereignty of States in this matter), asylum is most often, without it being the *quod plerumque fit*, subject to a remedy of full jurisdiction, as in Belgium, France, Germany or Luxemburg. In the same line of thought, as if to emphasise the special character of asylum law, asylum and issues relating to "refoulement" are in certain cases (e.g. Italy) treated by the civil courts, whereas issues relating to residence are treated by the administrative courts.

The principle in immigration law is that proof can be furnished by all means, a principle that imposes itself on both the administration and the judge that controls it. In France for instance, regarding the proof that the applicant for a Schengen entry visa for France has adequate means of subsistence for the duration of the stay on the national territory, the Council of State imposed on the administration, who refused, to take into account documents provided by the applicant that established he had withdrawn significant amounts of money from his personal bank account (French Council of State, 10 October 2007, Mokhtari, No. 281842). The same principle applies in litigation relating to asylum. Judges thus take into account judicial decisions, administrative documents, medical documents, private documents, correspondence, and testimonies. Nevertheless, it should be emphasised that these documents are only taken into consideration when they are accompanied of their translation, e.g. into French (French Council of State, 27 February 1987, Callejo Madrigal, No. 62851).

1. Exclusion of certain types of evidence

Does national law or case law rule out certain types of evidence? Where applicable, make a distinction between those actions relating to asylum and those relating to immigration.

Apart from Turkey, Lithuania, Greece and Malta, the participating countries emphasised that although no particular type of evidence was ruled out ex officio, jurisprudence took more particular account of the relevance and importance of the documents in the case under consideration than any given rules. Thus must be understood the rulings of the Estonian Supreme Court that the summary of a phone conversation does not constitute a testimony (Judgment of the Administrative Chamber of the Supreme Court of 20 December 2007 in administrative case No.3-3-1-74-07). The Czech Republic also mentions the fact that some types of evidence are difficult to collect as applicants are unable to contact the actors of persecution. That being said, the French Council of State has ruled that the fact that a refugee has applied to the diplomatic authorities of his country for the issuance or renewal of a passport makes it possible to presume that the applicant has applied to the authorities of his country of origin, even though this presumption is not conclusive (French Council of State, 13 January 1989, Thevarayan, No. 78055).

However, in certain cases, the law requires that a specific document be provided as proof of a right or status. In the matter of immigration, the issues concerning nationality and identity benefit from special treatment. In Portugal, passports and other travel documents do not constitute evidence of nationality, although they may serve to support judges in their opinion concerning the matter. In Belgium it is no different, as proof of identity and of the quality of family member of a citizen of the European Union is not restricted to the presentation of a passport, but may be furnished by all legal means, i.e. the presentation of an identity card and birth certificate (Belgian Council of State, 30 March 2010, 1No. 202.620). However, the issue of proof of a family relationship is more delicate: the authorities need to take into account other factors to establish the existence of family ties. Thus, applications for asylum may be declared to be inadmissible or admissible depending on the circumstantial evidence supplied to the judge. In general, the legislations do not restrict the means of proving the existence of a family relationship; however, for a right of residence to be granted, ascendants of EU citizens must prove their family relationship by means of documents of indubitable authenticity and probative character.

Greek administrative law also makes it possible to request expert's reports. However, once again, legislation relating to alien litigation takes on his status of *lex specialis*. According to the Greek report, the existing imbalance relating to immigration matters justifies exceptions being made to this rule in such cases. However, this exception is not absolute and certain expert's reports may be supplied by applicants, especially to establish the risks of torture, by way of verification of the motivation of de disputed decisions.

There are notable exceptions to these general rules: the competent administrative jurisdictions of Turkey, Lithuania and Greece require written evidence and do not take oral testimonies into consideration, unless the judge has access to a hearing performed by experts and transcribed in a written report. Thus, judges base themselves exclusively on the administrative dossier and the written documents supplied by the applicant. Similarly, oral testimony is unacceptable in Italy. Another of these scarce cases that provide a particular exception occurs in Malta, where hearsay evidence is specifically ruled out. Finally, Turkey applies geographical limitations to alien litigation.

The United Kingdom, Turkey, Greece and Belgium emphasise the importance of supplying evidence within a specified time-frame, although they are generally flexible in the application of this rule. For instance, the Greek report specifies that the evidence must be supplied at the latest eight days before the public hearing. In Belgian law, when the administrative authority (defendant or respondent) does not supply the administrative dossier to the jurisdiction approached within the specified time-frame, the facts cited by the applicants are deemed to be proven unless they are obviously inaccurate. A similar presumption exists in French immigration law.

2. Presumptions

Does national law or case law allow certain presumptions (e.g. in asylum cases, in the event of past persecution or safe countries of origin)? Where applicable, make a distinction between those actions relating to asylum and those relating to immigration.

With the exception of Denmark, which stated that its legislation included no such presumptions, the other countries allow certain presumptions to lighten the burden of proof on applicants as well as to lighten the work of assessment by the judge. However, it should be noted that it is difficult to agree upon the very concept of presumption. Whereas presumption is frequent in asylum law, it is far scarcer and often less favourable to applicants in the case of immigration law. It is remarkable that asylum law dissociate itself from alien litigation in general, to be a matter that takes on a specific and protective character. The proof of certain facts is frequently facilitated by the assumption of the specific probative force of certain acts or documents, the supply of which therefore creates a presumption in favour of the supplying applicant.

a) Asylum

Under asylum law, evidence requirements are often reduced and legal or jurisprudential presumptions may exist. The level of proof required in asylum law is lower than in other matters.

More specific, the required level of proof required by French law is tempered in specific cases (e.g. those covered by Articles 6 and 7 of the UNHCR statutes, or in the case of constitutional asylum, which is specific to France). French jurisprudence also applies a presumption in the

case of a risk of persecution relating to excision (female genital mutilation) (membership of a specific ethnic group in a specific country allows that such a risk can be assumed). Moreover, in accordance with the interpretation given by the CJEU in its decision of 17 February 2009 (Elgafaji, C-465/07), the French judge considered that the existence of a serious, direct and individual threat against the life or person of an applicant for subsidiary protection was not subject to the condition that he/she supply proof that he/she was being targeted specifically due to elements specific to his/her personal situation, in so far as the degree of blind violence characterising armed conflict had reached such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or 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 (French Council of State, 3 July 2009, Office français de protection des réfugiés et apatrides [OFPRA] v. Baskarathas, No. 320295).

If the respondents advance as presumptions those prescribed by the European regulation, various countries remind that those presumptions are rebuttable and may make way for an individual examination of the application by the judge. Thus, Bulgaria, Finland, Luxemburg, Germany, Austria, the Netherlands and Lithuania cite the presumption relating to registration on the list of safe third countries, a possibility which has not been transposed by Belgium. In this connection, it is interesting to note that although the use of the list of safe third countries is considered by the above countries as a presumption, Maltese law considers that it is rather an item of evaluation of proof on the basis of the criteria laid down by law and European law.

Although Germany, Ireland, Slovakia, Belgium and Poland cite the presumption linked to past persecution, as serious indication of the applicant's grounds for fearing to be persecuted, which is based on Article 4(4) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, hereafter referred to as the Qualification Directive, the United Kingdom notes that they consider that such a presumption is inadmissible.

European law also admits the existence of a rebuttable presumption of the principle of mutual trust between Member States. In Belgium, this was applied by the Council for Alien Law Litigation under Council Regulation (EC) 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, hereafter referred to as the Dublin Regulation. Such a presumption implies that the burden of proof rests with the applicant, who is required to supply evidence which may demonstrate that there are serious grounds for believing that, should the denounced measure be implemented, he/she would be exposed to a real risk of treatment contrary to Article 3 of the ECHR.

Whereas France and Norway also cite presumptions relating to family unity, Sweden mentions presumptions relating to the concept of "refugié sur place" and Cyprus the principle of the legality of the administrative act. Facts of public knowledge are also cited as presumptions favourable for the applicant by Slovenia, Spain ("*data certa*"), Lithuania and Poland. Article 4(5) of the Qualification Directive and the "benefit of the doubt" are also mentioned by Spain and Sweden. It should also be noted that although Article 4(5) has not been transposed into Czech legislation, judges in the Czech Republic acknowledge its direct effect.

Belgium has also procedural presumptions in the area of asylum law. For instance, Belgian law assumes that applicants who have been granted an indefinite right of residence have lost interest in taking action should they fail to perform certain administrative formalities. Article 23 of the Royal Decree on the procedure of the Council for Alien Law Litigation of 21 December 2006 imposes a specific procedure when a document is alleged to be forged.

The Belgian report also underlines the need to comply with legal principles such as the principle res judicata (the binding character of court decisions), the principle of contradictory discussion ("débat contradictoire") (documents of which not all parties to the case have had knowledge must not be taken into account, a principle which will be included in the discussion of the burden of proof), the probative value of authenticated documents.

Let us conclude with the following presumption, which is based on the Protocol on Asylum for Nationals of Member States of the European Union attached to the Amsterdam Treaty amending the TEU, the treaties establishing the European Communities and a number of related documents (OJEU, No. C340 of 10 November 1997), the single article of which specifies that "any application for asylum made by a national of a Member State may be taken into consideration or declared admissible for processing by another Member State only in the following cases: ... d) if a Member State should so decide unilaterally in respect of the application of a national of another Member State; in that case the Council shall be immediately informed; the application shall be dealt with on the basis of the presumption that it is manifestly unfounded without affecting in any way, whatever the case may be, the decision-making power of the Member State." In a specific declaration, Belgium has expressed its intention to make use of this possibility and to perform "in accordance with the provision of the single article, item d) of the Protocol, an individual examination of all applications for asylum made by a national of a Member State". This has been applied by the Council of State on the basis that the application is then presumed to be obviously unfounded, and that consequently it is up to the applicant to reverse this presumption (viz. Belgian Council of State, 27 March 2009, No.191.947). The decision by the French Council of State of 30 December 2009, OFPRA v. Covaciu, No. 30522, also specifies a framework for the examination of such applications.

b) Immigration

There are noticeably fewer presumptions in the area of immigration, and, generally speaking, they are unfavourable to applicants. For instance, Lithuania emphasises a presumption according to which applicants do not meet the national criteria for residence should they refuse the age determination test. Similarly, in the area of family reunification, alleged partnerships are considered to be fictitious should the applicant refuse to be interviewed.

A contrario, French law has a presumption that is rather favourable to the applicant: Article 47 of the Civil Code stipulates that any (legal) act of civil status of French and foreign citizens issued in a foreign country in accordance with the usual forms of that country shall constitute proof. However, the same article specifies that this presumption may be reversed should other acts or documents held, external data or information drawn from the actual act establish, if necessary after all useful verification, that this act is irregular, forged, or the facts declared therein do not correspond to reality. In applying this provision, the administrative judge is very often required to assess the probative value of foreign (legal) acts of civil status supplied, in particular in the case of disputes concerning the refusal of entry visas to France, which constitute a difficult task. The principles established by the French judge concerning the scope

of the "attestation d'accueil" (statement of accommodation) required by the CESEDA of all foreigners wishing to make a family or private visit to France should also be noted. When this statement is validated by the relevant authority, and, in accordance with the law, includes a commitment by the host that he/she agrees to pay the costs of the applicant's stay, the existence of a presumption in the applicant's favour has been determined, according to which his/her resources are sufficient to pay the costs of his/her stay in France, unless the administration supplies evidence which demonstrates that the host is unable to fulfil the undertaking thus entered into (French Council of State, 27 March 2009, Merzougui, No. 309071).

→ ***As we were able to note in this section, in general, the rules of evidence are not specifically laid down in internal law applicable to matters of alien litigation. Very few means of proof are expressly excluded, and presumptions are generally based on European law.***

II. – BURDEN OF PROOF

1. **The parties**

What is the role of the parties in the administration of evidence in actions filed by foreign nationals? Where applicable, make a distinction between those actions relating to asylum and those relating to immigration.

Throughout Europe, in the case of matters relating to both asylum and immigration, the burden of proof rests primarily on the applicant. However, the adage *Actori incumbit probatio* needs to be nuanced.

a) Immigration

Immigration law lays the burden of proof on the applicant in so far as he/she makes an allegation. For instance, in Belgium, when an applicant mentions the existence of DNA test results and then neglects to supply them, the authority cannot be blamed for considering that no proof of a family relationship has been produced (Belgian Council of State,12 June 2008, No.184.098) or when an applicant, when applying for residence, has never mentioned a specific fact, the defendant cannot be blamed for not taking this information into account even when it has been supplied within the scope of another case, as the administration cannot be required to examine a dossier on the basis of information in other dossiers (Belgian Council of State, 21 December 2001, No.102.350). In Poland, the obligation of loyal cooperation can be illustrated by the refusal of a residence permit to an applicant should the information given in support of the application be false.

The time at which proof is supplied is significant. Judges that are required to examine the legality, often dismiss the presentation of evidence when it requires a preliminary examination, as in Greece, or when it is supplied for the first time during cancellation proceedings without a convincing explanation of why it was not supplied previously. However, the Italian system specifies that although in theory both parties are expected to

cooperate, in practice the burden of proof rests most often on the administration in so far as the administrative judge uses the administrative dossier as a basis. The United Kingdom takes the opposite stance, in that the burden of proof is only shifted to the State in cases where the State wishes to deprive a person of their rights (e.g. withdrawal of a residence permit, or fraud). In the area of asylum, which is discussed hereunder, similar requirements apply in Norway, with the "non-refoulement" clause.

b) Asylum

Although readers of the reports might be tempted to believe that there is genuine cooperation between the parties, who both bear the burden of proof, the national reports insist on the fact that although a certain amount of flexibility applies in asylum law for the interpretation of the concept of proof, the general legal principle remain that the burden of proof rests on the applicant.

What gives proof its specific character in asylum cases is that it combines a subjective and objective element. On the one hand, the acknowledgement of the refugee status under the Geneva Convention provides an essentially subjective element, that of fear. On the other hand, the acts and threats of persecution, by which such a fear is justified, must be established in an objective way. However, difficulties frequently appear.

If the applicant's fear is reasonable, he/she must be able to explain what he/she fears, and why. First of all, he/she must at least endeavour to supply proof whenever possible, or, in the absence of such proof, an acceptable explanation. Absence of cooperation by the applicant to establish the facts, when it would have been possible to gather certain elements of proof, is generally considered as a negative indicator. For instance, in Germany, an applicant who fails to actively cooperate in the search for proof is subject to an accelerated procedure.

As a rule, persons claiming the status of refugee are required to establish that they have reasonable grounds for fearing persecution, by supplying at the very least a credible and coherent account showing no contradictions on the important issues. In this perspective, candidate-refugees must supply all facts and circumstances of which they have knowledge (Belgian Council of State, 19 April 2000, No. 86.823).

However, the administration has a duty to collaborate on good governance of justice, and must endeavour to seek and collect proof which may help the court issue a fast and fair decision. In Case No. 45.142, Portugal's Supreme Administrative Court ruled in its decision of 15 February 2000 that it is the administration's duty to carry out the procedure relating to the application for asylum as well as relating to the application for a special permit to residence as per Article 8 of Law No. 15/98 of [26 March 1998] (…) However, should the administration be unable to collect conclusive information concerning the identity, origin and nationality of the applicant, and there is legitimate reason to doubt the credibility of the information supplied by the applicant, the administration shall be considered to have fulfilled this duty, and the burden of proof concerning these facts shall rest on the applicant, in so far as the information concerned is personal.

Thus, in matters relating to asylum law, and to use the preferred expression of the French authors, the European countries tend to apply "a more balanced logic of shared proof". In Slovak law, such a balance is achieved at the hearings between the National Migration Office and the applicants.

Although the burden of proof rests primarily on the applicant, the administration seldom remains passive, and the burden of proof may even be reversed. For instance, when there is great difficulty in obtaining certain types of documentary evidence, the administration may take on a far more active role. This concept is close to the situation as schematic presented in the report of Poland, where, although applicants are required to substantiate their allegations, investigation of the political situation is the administration's responsibility. In Sweden, in so far as an applicant's allegations appear to be credible, the burden of proof is shifted. Romania's position is that the burden of proof rests primarily on the National Refugee Office.

However, the burden of proof rests unequivocally on applicants when it comes to proving their nationality and on the defendant when it comes to provide the legal character of the returns (application of the cessation clause in France). In other cases, "substantiated contradiction" is an apt descriptor, even when it is certain that applicants must supply all relevant information which justifies their application.

2. The role of national judges

Can trial judges play a role in the administration of evidence in actions filed by foreign nationals? If so, on what terms (e.g. do trial judges have the authority to examine evidence in detail or do they give a more marginal assessment)? Where applicable, make a distinction between those actions relating to asylum and those relating to immigration.

In schematic terms, there are three main system types in Europe:

1. - In a number of countries, the judge is an active player: Germany, Estonia, Finland, Italy, Latvia, Lithuania, Luxemburg, Romania, Slovakia, Sweden and Turkey, where there does not appear to be a distinction between immigration and asylum, and France, where such a distinction is made. In most cases, the judge requests proof in order to complete the dossier.

Thus, judges may, of their own motion, take all investigating measures they deem necessary to the resolution of the case (even if, in most cases, the judge limits this measures to the supply of documents). In this respect, German judges are particularly proactive and encourage exchanges between the various competent jurisdictions; this enables them to gain access to important documentary resources. In Slovakia, judges are obliged to take additional evidence when such evidence is necessary to establish the facts in the proceedings, which can be initiated on the court's own motion, such as proceedings concerning the permission to contract marriage, determination or denial of paternity, adoption, company register and certain issues relating to companies and cooperatives.

Judges may also base themselves on "facts of public knowledge". Interestingly, Italy has only recently included such facts in its legislation while transposing the Qualification Directive, and to this day no decisions have been issued on the basis of this concept.

In French law, judges play a more active role in asylum proceedings than in immigration proceedings, and help administer proof by means of "any investigating measures that they judge as being useful" (R733-18 CESEDA). For instance, they may request that the parties express an opinion concerning the application of the exclusion clause (CNDA 2 December 2009, Omoruyi, No. 09006046) or supply any relevant information concerning their civil status and/or place of residence (CNDA 12 April 2010, Avakimian, No. 095364), request that documents be supplied relating to the situation of applicants' family members with respect to the refugee status (CNDA 16 September 2010, Thambiaiah, No. 08017584), and enter legal rulings leading to sentencing in the dossier (CNDA 23 December 2009, Celik, No. 08019322). Asylum judges may also order a medical examination or the verification of documents for authenticity. In Germany, where the principle of inquisitorial investigation is implemented with the cooperation of the parties, the judge may question the UNHCR concerning the status of an asylum seeker who has been granted conventional asylum in a third country, or, as specified in the German report, take into account reports by international organisations which support the applicant's allegations. Estonian judges have even broader scope for investigation should they deem that a party to the procedure is the weaker one, and explain the reasons why evidence is difficult to supply.

However, Greece reminds the reader that although its legislation stipulates that judges shall be active, the excessive number of applications in the country has prevented this provision from being fully implemented and has enabled the jurisprudence to institute a special procedure known as the in camera procedure, inspired by the German Constitutional Court.

2. - Portugal, Spain and the Czech Republic operate under a mixed system. Portugal specifies that although its judges may request investigative measures should they deem them necessary, it is essential that these measures not invade the powers of the administration. Spanish judges may also request documents from the parties, but must make prudent use of them (they may not be essential documents on which their decisions will be based, but on the contrary, information which corroborates the essential proof supplied by the parties). The Czech Republic also mentions its respect for the principle of contradictory discussion ("débat contradictoire"). In this respect, Czech judges organise, by means of a hearing, a confrontation between the parties concerning the proof obtained.

3. - Finally, in Belgium, Ireland, Norway, the Netherlands, Croatia, Austria and Denmark, judges play a lesser part in establishing the facts. They may be considered to be arbiters; therefore they play a slightly more passive role.

This is the case in countries where the competent judge, e.g. in Ireland, is the one that judges the legality of the decision taken by the administration. Maltese judges therefore only check the relevance and admissibility of the proof supplied by the parties.

In Asylum law, a formal prohibition to take investigative measures during asylum proceedings exists for Belgian judges. Should Belgian judges deem that they cannot reach a decision without complementary information, they must cancel the decision and remand the case to the competent administration.

Finally, in countries where the administration enjoys considerable discretionary power, judges assess evidence in a more marginal manner (test of reasonability). Thus, Danish judges take no part in the supply of evidence, except in cases of family reunification involving minors, in which they are a little more active than usual. Before the administration's discretionary powers, Norwegian, Dutch and Croatian judges also remain more aloof. In the same line of thought, Austrian judges may check the relevance of evidence that is supplied.

Under Belgian immigration law, trial judges usually check the legality of documents, which involves marginal assessment of the facts (test of reasonability), limited to the determination of the facts by the administration. In this case, they may censure an obvious error of appraisal. The judge then checks that the evidence supplied by the applicant as proof has indeed been taken into account by the defendant, or weighs it against other evidence supplied by the defendant, without, however, playing any part in the production of evidence. This, however, requires some nuancing: as in Italy, Belgian jurisprudence has already specified that the statements of an asylum seeker relating to his status as a Jehovah's Witness could be set aside as they were inconsistent with the doctrine professed by the latter, which was a matter of public knowledge and a known fact (Belgian Council of State, 11 September 2002, No. 110.127). As in all countries in which the respect for the principle of contradictory discussion ("débat contradictoire") prevails, e.g. the Czech Republic, the Belgian Council for Alien Law Litigation may not base itself on facts which have not been subjected to contradiction by the parties, and on knowledge which was acquired outside the hearing (Belgian Council of State, 25 January 2008, No.178.960).

→ ***Although the burden of proof falls of necessity on the applicant, a duty of cooperation frequently arises between the applicant and the national authority in charge of processing immigration- or asylum-related cases. The degree of intervention by trial judges in the investigation of proof, as specified in the various reports, is what makes the difference between Europe's three systems.***

III. - WEIGHT OF EVIDENCE AND ASSESSMENT OF EVIDENTIARY WEIGHTING OF DOCUMENTS

How and on what terms do trial judges weight the various types of evidence submitted to them in asylum and immigration cases? Is any such weighting determined by national law or by case law? Where applicable, make a distinction between those actions relating to asylum and those relating to immigration.

1. Weighting of evidence

In this respect, judges have a fairly wide margin of appreciation. The weighting of the various sources (reports by NGOs, national administrations) is not determined by law or case law. In accordance with the principle of the free evaluation of evidence, as specified in the Finnish report, the European countries set no specific rules in this area, although special probative force may occasionally be acknowledged in the case of certain documents. The weighting of evidence is therefore usually performed on a case-by-case basis. However, indications may be

found in Polish legislation, or even supplied by higher authorities such as Sweden's Migration Court of Appeal.

The Spanish and French reports emphasise the fact that asylum judges are liable to give more weight and accord special value to certain documentary proof, and in this connection base themselves on the European directives (mentions in reports, public sources of geopolitical information). Reports by governments or international organisations are frequently used and often influence judges when they have access to them. For instance, France mentions the EU's joint guidelines concerning the processing of information on the country of origin (April 2008).

In France and the United Kingdom, a hierarchy has also been established among international reports. In France, this is based on the guidelines specified in the above mentioned instruments (relevance, reliability, current nature, objectivity, accuracy, traceability and transparency of sources), as well as on the approach of the European Court of Human Rights (reference to reliable and objective sources such as those issued by contracting and non-contracting states, UN agencies and reputable NGOs (CNDA 12 October 2010, Mbundani, No. 10005973; CNDA 22 October 2010, Kitler, No. 09006659)). British judges apply similar criteria: independence, impartiality and accessibility.

2. Assessment by supreme administrative court

What power of review does the supreme administrative court have in assessing the evidentiary weighting of documents? Where applicable, make a distinction between those actions relating to asylum and those relating to immigration.

On the basis of the responses, it can be stated that, apart from the specified exceptions, the supreme courts of the various participating countries are courts of cassation, which are more likely to review points of law than the relevance of facts or the manner in which these facts were proven, and their decisions are final. As far as the review of facts is concerned, these courts usually content themselves with censuring errors in the assessment of facts with respect to the applicable legal provisions, objective errors in the material reporting of the facts accepted by the court, and checking whether the latter has taken into consideration the facts submitted to it. The Supreme Courts of Ireland and Slovakia, as Germany's Federal Administrative Court as well, work in that way. The Supreme Court of Slovenia also refers the case to a lower court should it deem that new facts need to be taken into consideration, or that the facts were inadequately established.

Slight deviations from this principle may occur. For instance, Britain's new Supreme Court (formerly the House of Lords) normally confines itself of considering whether the assessment of evidence by the court below or application of the law has been vitiated by legal error. Occasionally it will decide to assess the case and the evidence for itself. Also by way of an exception, the Estonia Supreme Court is competent to assess evidence to a certain extent in a situation where provisional legal protection is applied for to the Supreme Court and the Supreme Court must resolve the application as a court of first instance. In Turkey, the Council of State usually broadens its review to material facts as well, since there is no court of appeal. The Supreme Court of Luxemburg is the reforming judge in asylum matters and cancelling

judge in immigration matters. Therefore, unlike its French and Belgian counterparts, it assesses evidence. The Norwegian and Lithuanian Supreme Courts also have full powers to assess facts and the proof of these facts.

On the contrary, the Belgian Council of State usually leaves complete latitude to administrative courts whose decisions are being appealed before it. Thus, the Council for Alien Law Litigation assess in a sovereign way the probative force of a document which in law has no particular evidentiary value (Belgian Council of State, 23 December 2009, No. 199.222). Belgium's supreme jurisdiction specifies that the assessment of the relevance of alleged proof is the sovereign preserve of the trial jurisdiction (Belgian Council of State, 23 June 2006, 2No. 160.477), as is the assessment of the probative value of documents supplied (Belgian Council of State, 12 June 2001, No. 96.347). The French Council of State has issued identical rulings: the probative value of the documents supplied by the applicant is subject to sovereign appreciation by the CNDA" (French Council of State, 23 August 2006, Nicolas, No. 278387). The supreme jurisdiction therefore does not examine the appreciation made by the trial judges competent in matters of immigration concerning the probative value of the documents supplied to them (French Council of State, 7 May 1993, Commune de Cestas, No. 116386) unless these facts were distorted (French Council of State, 6 September 1993, Calica, No. 102716 and 3 July 2009, OFPRA v. Baskarathas, No. 320295).

→ This is the third and final section concerning the first subject covered by the questionnaire. Although we learn that Europe undoubtedly grants the courts a margin of appreciation in weighting evidence, the latter are sometimes inclined to acknowledge more value to some documents than to others. However, in so doing, they refer to the EU instruments and the European Court of Human Rights. Finally, the European supreme courts, the role of which is to uphold the law, seldom assess the probative force of documents, but may censure errors in the assessment of facts in view of the applicable legal provisions and objective errors in the material reporting of the facts taken into account by the court, and even check whether the latter has duly taken into account the facts submitted.

THEME II. COMPETENCE OF THE NATIONAL COURT TO ACT OF ITS OWN MOTION IN A EUROPEAN CONTEXT

I. - PROCEDURAL RESTRICTIONS ON PRELIMINARY QUESTIONS

Where the parties raise preliminary questions, can procedural restrictions be applied? For example, at what point in proceedings may the parties submit preliminary questions? Do these questions have to be submitted in a specific written procedural document or can they be submitted at any time, including at the hearing?

Under Article 267 of the Treaty on the Functioning of the European Union, hereafter referred to as the TFEU (OJEU, No. 115 C of 9 May 2008), the Court of Justice of the European Union is competent to give preliminary rulings on the interpretation of the Treaties and on the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Except in the case of national jurisdictions against whose decisions there is no judicial remedy under national law, consulting the Court of Justice of the European Union is optional.

The parties to the case may request that the trial judge raise a preliminary question with the Court of Justice of the European Union. In most European countries, there are no procedural rules governing these issues, and therefore, no procedural limits which may be imposed on parties who suggest that the trial judge raise a preliminary question. Thus, in Germany, Poland, Sweden, the Netherlands, Lithuania, Latvia, Greece, Finland and Romania, the parties may suggest that the trial judge raise a preliminary question at any stage in the proceedings, including the hearing. In Greece, such requests may also be made at any stage in the proceedings, including the hearing, on the condition that the principle of contradictory discussion ("débat contradictoire") is taken into account. This means that should a preliminary question be raised during a hearing, a new term is set, within which the parties may supply their arguments and conclusions.

However, Belgium, Luxemburg and Turkey apply procedural limits concerning the time-frame in which requests for preliminary questions may be made to the trial judge. In Luxemburg Alien Litigation, parties may request preliminary rulings by means of written procedural documents prescribed by law. Oral questions during the hearing are therefore not admissible. In Belgium, preliminary questions must also be included in the procedural documents as prescribed by the Council for Alien Law Litigation and the Council of State, in view of the fact that proceedings in these courts are essential written proceedings. To guarantee proper conduct of proceedings and to preserve equality of arms between the parties, the jurisprudence of each of these jurisdictions requires that the question be raised *in limine litis*, and therefore inserted in the earliest possible procedural document. Preliminary questions, therefore, may not be raised during the hearing or in procedural documents not prescribed by law. However, the Belgian Council of State does admit an exception when the question concerns public order, in which case a preliminary question may be raised at any stage in the proceedings. Similar procedural restrictions apply in Turkey, where preliminary questions must be raised in writing during the exchange of written documents. Although

questions relating to public order may be raised at a later stage, this must be done in writing and in such a manner that the other party is informed of the question raised.

A number of countries apply a distinction according to the type of procedure during which a preliminary question is raised. For instance, in Estonia, according to the general rule, parties can file applications, including for preliminary questions, until the judicial dispute in a court hearing, whereas in the case of an exclusively written procedure parties can file applications until the term for submission of additional applications and evidence has expired. In Italy, a distinction is made according to whether a preliminary question is requested by the parties, or by the parties and judge ex officio. In the former case, procedural restrictions apply, such as a deadline and the necessity of a written procedural document, whereas in the latter case, the preliminary question can be submitted up until the judicial sentence. In the second case, however, a written procedural document may also be required, although in some cases questions raised orally at the hearing may be allowed. In Malta, a distinction is made according to whether preliminary questions are raised before the High Commissioner and the Appeal Board, or in a court of law. In the former case, no legislative procedural restrictions are applied to preliminary questions, although in practice it is generally required that preliminary questions be raised at the outset of the proceedings. When it comes to court proceedings in Malta, preliminary questions must in principle be raised at the outset of the proceedings before the actual hearing in an appropriate written pleading, unless the reason for the plea arises at a later stage of the proceedings. Moreover, other reasons apply which enable certain pleas to be raised at any stage of the proceedings.

In the case of immigration law, France emphasises that it is up to the judge alone to determine whether there are grounds for raising preliminary questions with the Court of Justice. Although this course of action may be suggested by the parties, the court is in no way obliged to respond to their arguments. Under these conditions, according to the French report, the issue of the conditions in which a party may raise a preliminary question seems without relevance under French administrative law. Moreover, the French report specifies that in practice preliminary questions are seldom raised in immigration cases. The issue is also academic in asylum-related litigation, as to date no preliminary questions have ever been raised with the Court of Justice of the European Union. Nevertheless, France reports that its Cour nationale du droit d'asile (National Court for the Right of Asylum) is able to raise such questions.

In the absence of specific regulations or jurisprudence in this (which is the case in the vast majority of European countries), no specific conditions apply as to the form in which preliminary questions should be worded or raised. In Estonia, Poland, Sweden, Lithuania, Latvia and Finland, no such conditions are imposed, or at any rate no written procedural documents are required to raise a preliminary question. No specific procedural conditions apply in Romania and preliminary questions may be raised at any time, even during the hearing. However, Romania does specify that for this purpose written documents are preferred.

→ To conclude, it turns out that most European countries do not impose genuine procedural restrictions on parties who wish to raise preliminary questions with the trial judge. However, a number of countries do apply such conditions and require that requests that the trial judge raise a preliminary question with the Court of Justice of the European Union be made in writing and in the form of procedural document prescribed by law. It should also be noted that in those countries where procedural restrictions are imposed, exceptions are possible, usually for reasons of public order.

II. DIRECT APPLICABILITY OF ARTICLES 18 AND 47 OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Has the national court already ruled on the issue of direct applicability in your country of Articles 18 and 47 of the Charter of Fundamental Rights of the European Union? If so, is the national court which has jurisdiction to rule on disputes concerning actions filed by foreign nationals able or obliged to raise, of its own motion, arguments from these provisions?

Prior to embarking on the analysis of the various countries' responses, it may be useful to describe the theoretical framework of the Charter of Fundamental Rights of the European Union (OJEU, No. 303 C of 14 December 2007, Page 1), hereafter referred to as the Charter, and its Articles 18 and 47.

The Treaty of Lisbon came into force on 1 December 2009. This Treaty did not include the text of the Charter in the Treaty on European Union (OJEU, No.115 C of 9 May 2008), hereafter referred to as TEU. Nevertheless, the TEU stipulates that the rights, freedoms and principles set out in the Charter have the same legal value as the Treaties (Article 6(1), TEU). This reference to the Charter implies that it has the same legal status as if it had been incorporated into the Treaty itself.

Chapter VII of the Charter clarifies that the provisions of this Charter are addressed to the institutions, bodies and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law (Article 51(1), Charter).The requirement to respect fundamental rights defined in the context of the Union is binding on the Member States when they act in the scope of Union law (Explanations relating to the Charter of Fundamental Rights, OJEU, No. 303 C of 14 December 2007, Page 32). In so far as the Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, hereafter referred to as the ECHR, 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 (Article 52(3), Charter).

The explanations concerning Article 47 of the Charter (right to an effective remedy and to a fair trial) state that the first paragraph of this Article is based on Article 13 of the ECHR, and go on to emphasise that "However, in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court. The Court of Justice enshrined that right in its judgment of 15 May 1986 as a general principle of Union law [...]. According to the Court, that general principle of Union law also applies to the Member States when they are implementing Union law. [...]. Article 47 applies to the institutions of the Union and of Member States when they are implementing Union law and does so for all rights guaranteed by Union law".

The explanations then specify that the second paragraph of this article corresponds to Article 6(1) of the ECHR, and after citing its contents, stipulate that "in Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law as stated by the Court in Case 294/83, 'Les Verts' v. European Parliament' [...]. Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union". With regard to the third paragraph, the explanations note that, in accordance with the case-law of the European Court of Human Rights, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy, and adds that there is also a system of legal assistance for cases before the Court of Justice of the European Union (Explanations relating to the Charter of Fundamental Rights, OJEU, No 303 C of 14 December 2007, pages 29-30).

In the explanation relating to Article 18 of the Charter – right to asylum – it is mentioned that the text of the article is based on Article 78 of the TFEU, which requires the Union to respect the Geneva Convention on refugees (Explanations relating to the Charter of Fundamental Rights, OJEU, No. 303 C of 14 December 2007, Page 24).

The analysis of the national reports shows inter alia that Sweden's Migration Court of Appeal (MCA) has already been faced with the issues posed by Article 47 of the Charter. The case concerned the possibility for a foreign national to appeal against a decision by the Migration Board ("Migrationsverket"). The MCA found reason to include wording concerning Article 47 of the Charter of Fundamental Rights of the European Union in its reasoning, and also referred to the judgment of the Court of Justice of the European Union in Case C-540/03, The European Parliament v. The Council of the European Union, as to Article 13 of the ECHR as well. The MCA concluded that the appellant, notwithstanding the fact that the 2005 Aliens Act afforded no such right to him, had the right to appeal against the contested decision by the "Migrationsverket".

In Belgium, the issues relating to Article 47 of the Charter have been raised before the Council for Alien Law Litigation in both asylum and immigration cases. In these cases, the appellants argued that the remedies available before the Council – in the case of both asylum and immigration proceedings – did not meet the guarantees laid down by Article 47 of the Charter. In the case of the proceedings in asylum litigation, Belgium's Council for Alien Law Litigation responded to this grief by referring to a decision by the Belgian Constitutional Court, which specifies that the Council has full jurisdiction at its disposal when judging asylum cases, and that appellants are not deprived of an effective jurisdictional remedy, so that the appeal did fulfil the guarantees laid down by Article 47 of the Charter. In the immigration case, it noted that the Legislative Section of the Belgian Council of State had already judged that prima facie the jurisdictional remedy before the Council for Alien Law

Litigation met the requirement of an effective remedy in the sense of Article 13 of the ECHR. The Council for Alien Law Litigation emphasised that Article 47(1) of the Charter is based on Article 13 of the ECHR, and once more relies on a decision by the Belgian Constitutional Court which specified that the remedies available before the Council for Alien Law Litigation Council, proceeding in immigration litigation, did indeed meet the requirements of Article 13 of the ECHR. For the purpose of comparison, the above decision by the Belgian Constitutional Court refers to the judgment by the European Court of Human Rights of 7 November 2000, Kingsley v. United Kingdom.

The Supreme Administrative Court of Lithuania has ruled that Article 18 of the Charter of Fundamental Rights of the European Union, which is a constituent part of EU primary law, establishes that the right to asylum is guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, as well as the rules of the Treaty establishing the European Community and the TFEU. Therefore, the right to asylum is regarded as a fundamental right whose implementation is regulated by the European Union legal acts.

Finally, the Dutch report reveals the existence of pending cases relating to Articles 18 and 47.

Therefore, most European countries have not had to issue judgments on the issue of the direct applicability of these articles of the Charter. These countries include Austria, Bulgaria, Cyprus, Estonia, Italy, Luxemburg, Latvia, Greece, Slovakia, Belgium (Council of State), the United Kingdom, Finland, Slovenia, Ireland, Romania, Portugal, France and Malta. However, a number of finding can be expressed.

For instance, Bulgaria notes that due to transposition by national law, the provisions of Community law are applicable in the country and case law does not refer to the direct application of the rules of Articles 18 and 47 of the Charter. Although the Spanish courts have not adopted resolutions which specifically mention Articles 18 and 47 of the Charter, the Spanish Constitution has provisions with similar content. For its part, Portugal notes that the right of each individual to be heard in fair trial within a reasonable space of time is equally guaranteed by the ECHR and the Portuguese Constitution, Article 33 of which lists the principles which govern the legal guarantees for asylum. Moreover, Portugal specifies that the latter provision applies only to persons entitled to the right of asylum, and not to any other humanitarian measures or issues relating to the presence on its territory of immigrants in irregular situations.

Finally, the Irish report notes that it is difficult to envisage the circumstances in which the direct effect of Article 18 would arise, since the provisions of the Geneva Convention have already been given effect in Irish law.

Although the question relates to Articles 18 and 47 of the Charter, the Italian report notes that the Italian Constitutional Court has been required to verify the direct applicability in Italy of Article 9 of the Charter, regarding the issue of homosexual marriage. The Italian Court considered the issue of direct applicability not relevant to the case as Article 9 recognising the right to marry and to found a family commits the specific rules to national law. Therefore, the Court stated that Italian law was competent to decide whether or not to allow homosexual marriage. In a naturalisation case, Greece’s Council of State issued a negative answer concerning the direct effect of other provisions of the Charter.

As to the possibility of invoking Articles 18 and 47 ex officio, most European countries, e.g. Bulgaria and Lithuania, responded that their courts had not done so at the time of writing.

Nevertheless, the Estonian Court may in principle rely on Articles 18 and 47 of the Charter at its own initiative. In Malta, the court may request that the parties raise the issue, but is not obliged to do so ex officio. According to the Lithuanian report, the right to efficient judicial protection and other general principles of the EU and national law presuppose that the court shall refer to the provisions of its own motion if it considers it is necessary to do so in order to resolve a dispute brought before it. As mentioned earlier, the Swedish courts may refer to Article 47 ex officio. On the contrary, France explicitly states that its judges may not invoke Articles 18 and 47 of the Charter of their own motion.

→ In view of the recent coming into force of the Treaty of Lisbon, which gives the Charter the same legal value as the provisions of the treaties, the issue of the applicability of the provisions of the Charter is fairly new. However, a number of cases have already arisen which may form the subject of a highly interesting debate.

THEME III. THE NATIONAL COURT AND EUROPEAN INSTRUMENTS

I. - REFERENCE TO EUROPEAN CASE LAW AND THE CASE LAW OF OTHER MEMBER STATES WHEN HANDING DOWN NATIONAL JUDGMENTS

Do you regularly refer to European case law when handing down judgments? Have you ever referred to the case law of other Member States when handing down judgments?

The analysis of the national reports shows that in a number of European countries the jurisdictions, while judging asylum or immigration matters, refer occasionally or even on a regular basis to the case law of the European Court of Human Rights. This trend is apparent in Denmark, Germany, Sweden, Belgium, the Czech Republic, Greece, Finland, Slovenia, Ireland and France.

The national report of Belgium's Council for Alien Law Litigation cites a large body of European Court of Human Rights case law to which trial judges have referred in asylum or immigration cases. The report reveals that the most frequently cited is the case law of the Strasbourg Court relating to Articles 3, 6 and 8 of the ECHR. The French report also indicates that references to European Court of Human Rights case law are often made in cases involving alleged violations of Articles 3 and 8 of the ECHR.

In most European countries, during both asylum and immigration proceedings, references are regularly made to the case law of the Court of Justice of the European Union. Only a few European countries explicitly state that they do not refer to the Luxembourg Court. Estonia note, for instance, that so far its Supreme Court, in its asylum or immigration case law, does not refer to case law of the European Union. In the case of Croatia, it should be mentioned that although EU case law does not constitute a source of national law, Croatian judges are, in a certain sense, familiar with the European judgements.

A number of country reports present examples of European cases to which reference was made in the course of asylum or immigration proceedings.

Thus, the Belgian report mentions that the Council for Alien Law Litigation, which has jurisdiction in asylum cases, regularly refers to the Elgafaji ruling by the Court of Justice of the European Union (CJEU, 17 February 2009, Elgafaji v. Staatssecretaris van Justitie, C-465/07). When judging immigration cases, for the application of provisions of European directives or the interpretation of concepts based on European directives, the Council refers, inter alia, to the rulings in the following cases: Jia (CJEU, 9 January 2007, Yunying Jia v. Migrationsverket, C-1/05), Zhu and Chen (CJEU, 19 October 2004, Zhu and Chen v. Secretary of State for the Home Department, C-200/02), M.R.A.X. (CJEU, 25 July 2005, M.R.A.X. v. Etat belge, C-459/99), Giagounidis (CJEU, 5 March 1991, Giagounidis v. Stadt Reutlingen, C-376/89) and Singh (CJEU, 7 July 1992, The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte: Secretary of State for the Home Department, C-370/90). The Belgian Council of State also makes regular reference to the case law of the Court of Justice of the European Union.

In its report, the Czech Republic states that European case law is very frequently referred to, especially by the Supreme Administrative Court in immigration matters. Although there is not so much CJEU case law in asylum matters, it is also referred to by the courts of the Czech Republic when there is case law, e.g. the Elgafaji case.

Norway reports that its Supreme Court refers to European case law regularly within the scope of the EEA (European Economic Area) agreement. Furthermore, Norway notes that its legislature has to some extent chosen to adapt its legislation outside the scope of the EEA agreement to EU regulations and that European case law will be relevant and important to the interpretation of this legislation and therefore will also be referred to.

The Belgian Council for Alien Law Litigation, rather on an exceptional basis, also refers to the jurisprudence of other European or international institutions, such as the Tadic ruling of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, which interprets the concept of “armed conflict” also cited in Article 15 of the Qualification Directive.

The practice of referring to the case law of other Member States varies fairly substantially from one country to another. A number of Member States report that to date they have never referred to rulings by jurisdictions of other EU Member States in matters of asylum or immigration (Estonia, Lithuania, Latvia, Slovakia and Slovenia). Cyprus notes that its case law already referred to Greek and Polish judgements, but that in the exercise of its administrative jurisdiction, there is not yet made any reference to the case law of other Member States. Also Spain notes that their courts do not usually examine or mention decisions of other Member States courts, and the Netherlands emphasises that the role played

by the case law of other Member States is rather limited due to differences between national regulations and procedures. Furthermore, Portugal emphasises that it almost never refers to the case law of other Member States.

Other Member States report referring exceptionally, sporadically, or even very regularly to the case law of other Member States in asylum or immigration cases. For instance:

- Austria refers to the case law of other Member States only if it is available on the Internet.

- In asylum cases, Germany has already referred to decisions of the British Supreme Court and France's Council of State. Furthermore, it has also referred to the case law of other, non-member states, such as rulings by the US Supreme Court or the Supreme Court of Canada. The German report specifies that its Federal Administrative Court publishes important decisions concerning asylum or immigration law in order to establish a discourse between the Supreme Courts of the Member States.

- In a recent country guidance case on Iraq, the British Court has referred to French and Bulgarian rulings. The United Kingdom takes the view that in asylum-related cases reference to other national cases is of great importance as at this stage there is very little case law from the ECJ/CJEU. French case law on immigration that refers to decisions by other Member States does not exist. Although the case law of other EU Member States and even of third countries is gaining importance in the eyes of French judges as a contextual element - taken into account the difficulties attached to research in the area of comparative law,- this foreign case law is only used when matters of principle are at stake. France would like to draw attention to the fact that the public can find the case law of EU and other countries that has influenced a judge's reasoning by consulting the conclusions of the government's rapporteur. In matters of asylum, France does not refer to rulings by other jurisdictions, but does take into account the solutions proposed by these jurisdictions at a comparative law level. In one case, a French judge was inspired by a ruling by the High Court of Justice – Queen's Bench Administrative Court (UK).

- Sweden has occasionally referred to the case law of other Member States, e.g. rulings by the Asylum and Immigration Tribunal of the United Kingdom and Germany's Bundesverwaltungsgericht.

- Belgium has no case law in which the Belgian Council of State refers to rulings by jurisdictions in other Member States. However, the Belgian Council for Alien Law Litigation has referred to a ruling by the Rechtbank van 's-Gravenhage (The Hague) and the Council of State of the Netherlands.

- In Greece, there are several examples of asylum- and immigration-related cases in which reference was made to the case law of other Member States, e.g. the French Council of State and the Bordeaux Administrative Court of Appeal (France).

- Norway notes that known case law from other Member States is sometimes referred to in judgments, that case law from other Scandinavian countries is referred to more often than case law of other Member States as the legislation in the Scandinavian countries are quite similar and as Scandinavian law is more known by and available to

Norwegian judges. In some cases, prior to the main hearing, the Supreme Court of Norway instructs lawyers to prepare and give a presentation of European case law and relevant case law from Member States.

- In the Czech Republic, in certain complex cases, the case law of other countries is examined to provide inspiration, and in such case, where relevant, it is referred to in judgements.

- There are no legal obstacles in Poland to refer to the case law of other Member States. References are often made, e.g. the references to the British judgement Islam v. Secretary of State for the Home Department and R. v. Immigration Appeal Tribunal and Secretary of State for the Home Department (House of Lords).

- Italy states that although it is not excluded that Italian judges refer to the case law of other Member States, this is rather uncommon. More frequently, an Italian judgement can cite a decision of another Member State's judge requesting the Court of Justice of the European Union to make a preliminary ruling on the interpretation of Union law or the validity of acts adopted by the institutions

→ It can be concluded from the above that in most European countries administrative judges are already used to referring to EU case law in their rulings. Moreover, another trend is developing in which judges refer to or draw inspiration from rulings in other European countries.

II. AUTONOMOUS INTERPRETATION OF ARTICLE 1(A) TO (F) OF THE GENEVA CONVENTION OF 28 JULY 1951

Can the national court autonomously interpret Article 1(A) to (F) of the Geneva Convention of 28 July 1951; specifically when abstracting information from Directive 2004/83/EC (the so-called Qualification Directive)? Has a conflict ever arisen between the two standards (e.g. in terms of their criteria of attachment or exclusionary clauses)? What solution(s) did the national court adopt, if any?

In most European countries (Austria, Cyprus, Estonia, Italy, Sweden, Belgium, the Netherlands, Lithuania, Luxemburg, Latvia, Greece, Slovakia, Finland, Slovenia, Ireland, Portugal, France and Malta), this issue has never arisen.

A number of European countries do, however, explain that provision has been made in their national legislation so that such conflicts can never arise. For instance, Germany reports that the article containing the criteria and standards to be fulfilled to obtain the refugee status "in application of the Geneva Convention" also stipulates that in assessing any such application Articles 7 to 10 of the Qualification Directive are to be applied.

The United Kingdom notes that its national judges are well aware of the potential difference between international law standards of interpretation (Vienna Convention on Law of Treaties) as applied to the Geneva Convention and the much more teleological approach to interpretation adopted by the Court of Justice of the European Union in the context of interpreting the Qualification Directive.

To illustrate this interaction between Article 1 of the Geneva Convention and the Qualification Directive, the Belgian Council for Alien Law Litigation draws attention to a number of regulations which may be taken into consideration: the TFEU, the Charter of Fundamental Rights of the European Union and the preamble of the Qualification Directive. Moreover, the Council also refers to the preamble of the Salahadin Abdulla judgment of 2 March 2010 by the Court of Justice of the EU (CJEU, 2 March 2010, Salahadin Abdulla et al., C-175/08, C-176/08, C-178/08 and C-179/08, 51-54).

The Netherlands also point to the preamble and legal basis for the Qualification Directive to conclude that it is assumed that the Qualification Directive should be interpreted in accordance with the Geneva Convention. Lithuania notes that it should be borne in mind that Article 3 of the Qualification Directive provides that Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive. The Lithuanian administrative courts interpret and apply asylum law in a non-restrictive manner, in order to ensure the right to effective judicial protection.

Moreover, as far as the relationship between Article 1 of the Geneva Convention and the Qualification Directive is concerned, the reports show that in a number of European countries (Poland, Croatia and the United Kingdom) the courts may interpret Article 1 of the Geneva Convention autonomously. Others state that although their courts may interpret Article 1 of the Geneva Convention autonomously, they are always bound to take the Qualification Directive into account (Austria), or others may even interpret and apply the Geneva Convention (Spain) and simultaneously apply the Qualification Directive (Cyprus, Finland).

Latvia, Slovakia and France specify that their courts interpret the Geneva Convention in light of the Qualification Directive. Italy notes that since the passing of the Qualification Directive and its transposition into national legislation, the Italian courts have been applying the Directive as well as the transposing national legislation, and that as a result there are no decisions that have applied the Geneva Convention. Finally, as the Qualification Directive is not included in the EEA agreement, the Norwegian courts are free to interpret the provisions of the Geneva Convention autonomously.

Only the Czech Supreme Administrative Court has already issued a ruling on the relationship between the Geneva Convention, the ECHR and the Qualification Directive. It came to the conclusion that the highest common denominator must be applied. Thus, “although the Act on Asylum is construed so as to reflect the Geneva Convention, the ECHR and also the Qualification Directive (after amendment of the Act on Asylum by Act No. 165/2006 Coll.), in some cases protection of asylum-seekers is contained only in one of these. For decision-making it follows from this that the Geneva Convention, ECHR, Qualification Directive and Act on Asylum represent diverse layers of protection guaranteed to asylum-seekers. The final protection provided to asylum-seekers in the Czech Republic is represented by the “highest common denominator” of protection of rights guaranteed in these four layers. One “layer” of

protection cannot thus be interpreted as a reason to diminish level of protection by another layer (…)." (Supreme Administrative Court, Judgment No. 4 Azs 60/2007-119 of 7 September 2010, http://www.nssoud.cz/main.aspx?cls=anonymZneni&id=23827&mark).

It would seem that Portugal support a similar approach. It seems that the national judge may interpret the Geneva Convention autonomously when they conclude that the protection afforded by the Qualification Directive is less extensive. However, when the provisions of the Qualification Directive are more favourable, this interpretation is prohibited.

→ ***According to the foregoing, it can be seen that few countries have thus far been required to deal with the issue of interaction between Article 1 of the Geneva Convention and the Qualification Directive. Nevertheless, the national reports do supply an idea of the points of view and arguments on which an initial principle debate might be based.***

III. LEVEL OF IMPORTANCE ATTACHED BY THE COURTS TO PROVISIONS WHICH DO NOT REQUIRE TRANSPOSITION

Some European Directives contain provisions which do not have to be transposed, including Articles 5(3), 8(1), 8(3), and 17(3) of Council Directive 2004/83/EC (the so-called Qualification Directive), Articles 26 and 27 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (the so-called Procedure Directive) and Articles 4(2) and (3), and 7(1) and (2) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. Where these provisions have not been transposed, does the national court attach a level of importance to them anyway (soft law, minimal standards, etc.)?

In addition to the provisions which require transposition into the national legislation of the Member States, sometimes the EU directives also contains "optional provisions" which the Member States are not obliged to transpose into their national legislation. The purpose of the above question is therefore to assess the value which may be accorded by national courts to such provisions when they have not been transposed into national legislation.

The analysis of the country reports shows that some countries (e.g. Bulgaria) transpose the directives in full, so that the "option" is used and that the provisions listed in the question are now included in their national legislation.

In other European countries, although not all the provisions listed have been transposed, so that it is appropriate to refer to them as "untransposed" optional provisions, the issue has not yet arisen (Italy and Luxemburg). As the above directives are not included in the EEA agreement, this issue has never arisen in Norway. Denmark is not bound by these directives either.

The national reports show that a number of countries do, nevertheless, attach a special value to the optional provisions which have not been transposed into national legislation. Examples include the following:

- In Austria, these provisions are seen as a "guideline" for the interpretation of the transposed law.

- Finland is of the opinion that the directives must be taken into account as "minimum standards".

- In Estonia, such provisions may sometimes be used as "additional interpretation arguments". In a ruling of 13 December 2007, an Estonian jurisdiction laid down that "although Directive 2003/86 is not applicable to the family members of citizens of the European Union, the provisions of the Directive (Art. 15 (3) and 17) are also relevant in the case of a spouse who is a citizen of Estonia when it comes to the assessment of the absence in the Aliens Act of such regulation that would allow for granting a residence permit in exceptional circumstances (…)".

- In Sweden, the MCA attaches importance to the provisions of the above-mentioned Directives, even when not transposed. Moreover, the Swedish report lays emphasis on the fact that in several rulings the MCA has referred to the preamble of these directives.

- Lithuanian jurisdictions use "untransposed" provisions usually as supplementary means to facilitate the interpretation of particular legal norms. The Lithuanian report notes however that it must be borne in mind that these provisions do not have a legally binding force and do not set rules of conduct for individuals. Although the courts may refer to certain provisions despite the fact that they have not been transposed, they do not constitute a decisive source of information and may only be viewed as a source of additional information (to be referred to) in order to show the wider context of an issue, especially in cases where a court's decision may have broader implications.

- Slovakia and Slovenia both report that provisions of European directives which have not been transposed into national legislation are taken into account in rulings by their courts.

- Malta specifies that where EU directives have not been transposed into Maltese law, the Court may still take them into account for the purpose of interpreting and applying Maltese legislation, which is to be interpreted and applied consistently with the said Directives to the extent that the language of the laws so allows.

The country reports also discuss a number of interesting issues, for instance:

- In the Czech Republic, Articles 8(1) and (3) were not fully transposed into national law, and for this reason the Czech Supreme Administrative Court created a test applying the indirect effect of directive: (1) whether another part of the country is accessible; (2) whether moving to this other part of country is an effective solution to persecution / serious harm in the original part of the country; (3) whether there is a risk of "refoulement" to the original place of residence; (4) whether a minimum standard of human rights is applied in this other part of the country. These conditions are applied consecutively and cumulatively. Should any of these conditions not apply, there is no internal flight alternative (IFA) (Judgment No. 4 Azs 99/2007-93 of 24 January 2008).

- The United Kingdom has transposed all the EU instruments in asylum (and immigration in the free movement of person's sense) to which it has signed up. But if as happens from time to time there is a question of interpretation over the meaning of a national law provision intended to implement EU law, the United Kingdom applies the doctrines of direct effect and indirect effect depending on the nature of the EU instrument. There is an interesting question as to the status in UK law of EU instruments to which the United Kingdom has not signed up. Although to date there have been no decided cases, there is a respectable argument that they have or should have a significant soft law impact.

- France has already transposed most provisions of the abovementioned directives into its national legislation, and draws attention to the fact that it has already applied the concept of "internal asylum" as per Article 8 of the Qualification Directive to determine whether or not an asylum seeker was or was not able to reside in another part of her country of origin. Moreover, France emphasizes that the Cour nationale du droit d'asile had already taken the political activities of an asylum seeker into account before the Qualification Directive was adopted.

- Cyprus points out that European law has supremacy over any national law and that in 2006, the Cypriot Constitution, which was considered the supreme law, was amended so that European law has supremacy even over the Constitution.

Moreover, a number of European countries are disinclined to accord any value whatsoever to the directives' optional provisions when they have not been transposed into national legislation, for instance:

- In Belgium, although some of the abovementioned optional provisions have not been transposed into national legislation, they have been invoked by parties before the Council for Alien Law Litigation, e.g. Articles 26 and 27 of the Procedure Directive. The jurisdiction ruled that these provisions had not been transposed into Belgian law and had no direct effect. Otherwise, the Council for Alien Law Litigation has not as yet been required to issue a ruling concerning the value which must be accorded to the "optional provisions" of EU directives.

- As yet, Article 5(3) and Article 17(3) of the Qualification Directive have not been implemented in Dutch law as their provisions are incompatible with the Dutch Aliens Act of 2000. In these circumstances, no importance is attached to these provisions.

- Luxembourg has not had to deal with this issue, either in asylum- or immigration-related cases. The report notes that Luxembourg's administrative judges in immigration-related cases usually act as annulment courts, and that it is difficult to conceive that such courts may criticize the administration for non-compliance with an optional provision.

- Latvia merely reports that to date its courts have not accorded any importance to these provisions, which have not been transposed into national legislation.

- Ireland notes that in the absence of direct effect or national implementing laws, these rules or principles would not be applied by an Irish court.

→ ***There is little consensus in Europe as to the value which might or should be accorded to the "untransposed" "optional provisions" of the EU directives.***