Report from the "Law on aliens' rights" seminar

1. With the final instruments concerning the implementation of the second phase of the Common European Asylum System (CEAS) recently adopted and shortly to be transposed into the national law of the member states concerned, the seminar had a twofold aim based on acquired experience with the first phase of the implementation of the CEAS: firstly, to provide an overview of the difficulties encountered by the supreme administrative courts regarding the application of European rules concerning immigration and asylum and the incorporation of the case law both of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECHR);secondly, to illustrate by means of a few practical national examples, the manner in which individual decisions are handled by the administrative jurisdictions in cases involving foreigners.

2. In his introductory presentation, Vice President J.-M. Sauvé (Vice President of the Council of State of France) highlighted the consequences for national law both of the increasing power of European law on aliens' rights and the necessity to take full account of the protection of foreigners' fundamental rights, particularly in terms of asylum. For the first aspect, the emphasis was placed on the fact that if European law on aliens' rights is now fully governed by European Union law with regard to shared competence, the fact nevertheless remains that the concrete application of the first phase concerning asylum and the common immigration policy has shown that a certain number of "disparities" still remain, which have either led the supreme administrative jurisdictions to intervene in order to resolve a number of them or have required various modifications within national legislation. Concerning the second aspect, the importance of the ECHR's impetus has been demonstrated, particularly concerning the gradual recognition of an effective right of appeal with a suspensive effect, the requirement to observe a number of essential procedural guarantees or the need to take account of the specific situation of so-called "vulnerable" people such as children placed in detention centres. It is therefore by no means surprising that the instruments adopted for the second phase of the CEAS have sought, among other things, to strengthen European Union law in order to integrate the case law of both the ECHR and the CJEU within positive law. The emphasis has also been placed on the importance of the contacts between international and national judges, and dialogue between national judges in such matters.

3.Backed by examples, the President of the Chamber L. Bay Larsen (European Court of Justice) focused on the growing prevalence of law on aliens' rights disputes, more specifically concerning asylum, in the preliminary questions submitted to the Court of Justice, particularly following the gradual introduction of the first phase of the CEAS and the implementation of the Treaty of Lisbon. Concerning the application of the Dublin II Regulation, it should be remembered that this rule is based on the principle of mutual trust between the states which are party to this rule and the presumption that each state requested to take into its charge or retake into its charge an asylum seeker will guarantee certain and minimal protection with regard to the protection of fundamental rights, including those based on the Geneva Convention on refugees and on the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF). However, as both the ECHR and the CJEU have pointed out, this is a non-irrefutable presumption, and as such must be set aside when specific circumstances make it possible to establish that serious and systemic deficiencies exist concerning the protection of fundamental rights. When examining the question of the extent to which an asylum seeker can contest the correct application of the criteria set by the Dublin mechanism before a national judge with a view to determining the member state responsible for examining the application for international protection, the Court of Justice considered that the only thing that the asylum seeker could contest would be the fact that returning him to the member state responsible would constitute inhuman or degrading treatment under the terms of article 4 of the Charter of Fundamental Rights of the European Union (CFREU), due to the systemic deficiencies in the asylum procedure or the conditions for receiving asylum seekers which apply in this state. In conclusion, the President of the Chamber L. Bay Larsen reminded everyone that the Court of Justice is extremely reticent, even with regard to asylum, to issue obiter dicta in its judgements, given that the Court's rulings issued following a question submitted to seek a preliminary ruling are limited to describing –formulated in a very general manner–what is necessary to the national judge in order to resolve the case submitted to him. Thus, generally speaking, the breakdown of roles can be briefly described as follows: 1°) The court of justice provides a general interpretation of European Union law; 2°) the national judge applies this

interpretation in national law and to the facts before him; 3°) The Court of Justice consequently avoids condemning national legislation (if this appears to be contrary to European Union law) and leaves it to the national judge to pronounce this condemnation. However, this is a course of action which is sometimes waived in the case law of the court. The focus finally moved to the permanent dialogue existing between the CJEU and the ECHR, and on the interaction existing between the CJEU's activities and those of the Union's legislator: the court issues a general interpretation as best it can concerning an aspect of Union law submitted to it for a preliminary ruling, while it is the responsibility of the legislator to decide whether or not it accepts this interpretation and (should this not be the case) to modify the legislation in question in order to correct the disputed clauses.

4. The speech by Lord R. Carnwath (judge at the United Kingdom's Supreme Court) provided an opportunity to illustrate in a concrete manner the difficulties in interpretation occasionally facing national courts required to take account both of the case law of the CJEU and that of the ECHR. Faced with the question of deciding whether asylum seekers may be sent back to Italy in application of the Dublin II Regulation, the Court of Appeal considered that even if the ECHR appears to require only a simple failing in such cases, the case law of the CJEU should be preferred, which in effect requires, according to the Court of Appeal, a systemic failing, notably in the system for receiving asylum seekers. In view of this, the Court of Appeal applied the legislation of United Kingdom under the terms of which the decisions of the CJEU are binding on the English courts, while those of the ECHR must only be taken into consideration by them. After having agreed to hear the appeal, the Supreme Court nevertheless referred the four cases to the Court of Appeal in order for it to examine on a case-by-case basis whether the repatriation of the person to Italy may or may not constitute poor treatment in violation of article 3 CPHRFF. In this matter, the Supreme Court considered that the CJEU, in its *NS* ruling, should not have issued an opinion on the question of establishing whether the failings observed in the asylum system in Greece were "systemic" or otherwise, as this aspect of the question was considered as recognised by the CJEU in view of the case, but instead on the question of deciding whether or not the member states should be considered as having knowledge or otherwise of these failings. Consequently, the Court of Appeal could not simply base its decision on this *NS* ruling in order to consider that only systemic deficiencies may be taken into account with regard to an alleged violation of article 3 CPHRFF, regarding wich an equivalent protection is moreover provided by article 4 CFREU.

5. In his presentation, Mr Gauthier-Melleray (Extraordinary Master of petitions at the Council of State of France) highlighted the fact that the Council of State of France, as the supreme instance, had been required to issue a relatively high number of contentious rulings or opinions in a timescale of just two years regarding the application of the "Return" directive, the vast majority of which were intended to rule on delicate questions of interpretation with considerable implications in practice. Beginning first with the applicability of the "Return" directive, the Council of State considered that various articles in the directive have a direct effect and can consequently be directly raised by the justiciables. Among others, this concerns articles 7 and 8, regarding the entitlement to a voluntary return deadline, and article 12, concerning the obligation to justify an obligation to leave French territory. The Council of State has also taken great care not to extend the applicability perimeter of the directive beyond that imposed by its terms. It consequently considered that the directive does not apply, firstly to "Dublin" decisions and secondly to expulsion decisions based on grounds other than illegally staying in the country. Concerning the new obligations which may be incumbent on the national authorities in application of the directive, the Council of State firstly considered that the directive itself does not impose a requirement for these authorities to take a decision concerning expulsion against foreigners staying in the country illegally, but that on the contrary these authorities have a wide margin of discretion. It has similarly been ruled that although the directive requires that measures to place a person in detention could be subject to judicial control within a relatively short period of time, it does not require that the appeal must have a suspensive effect in the meantime. Concerning the obligation resulting from the directive to formally justify a decision in favour of removal from the country, the Council of State also qualified the scope of this obligation by considering that when the decision to remove a person is accompanied by a refusal of permission to stay, of which it is in fact a consequence, the grounds for the refusal of permission to stay may also constitute the justification for the expulsion. Concerning the issue of the relationship between the terms of the "Return" directive with those of other texts, this time, on numerous occasions, the Council of State reiterated that the

implementation of the directive does not free the national public authorities from their obligation to abide by the requirements of the other texts, notably international ones. Consequently, the authorities may only use the possibility opened up by the directive to combine the expulsion decision with a ban on returning after having considered if, with regard to article 8 CPHRFF, such a measure would not be likely to disproportionately adversely affect the alien's right to privacy and a family life. The emphasis was also placed on the fact that two practical aspects arising from this articulation have still not been totally resolved: firstly, the conditions under which illegal immigrant children (whether alone or with their families) in an administrative detention centre may be admitted with regard to the "Return" directive and to articles 3, 5 and 8 CPHRFF; the question of the precise articulation between the "Return" directive on one hand and the implications of the right to be heard as enshrined, on the other hand by article 41.2 CFREU are still to be addressed.

6.After having explained that the organisation of the legal procedure relating to disputes concerning asylum and immigration law in Greece had changed, as this matter had been assigned to the administrative courts (namely the Administrative Tribunal and the Administrative Court of Appeal) whose decisions can be appealed before the Council of State, which remains the only body with jurisdiction to hear appeals for misuse of power againstregulatory decisions, the Councillor of State I. Mazos (Council of State of Greece) demonstrated with the aid of supporting examples that although the case law of the ECHR has had a positive influence on the case law of the Council of State of Greece, the fact nevertheless remains that disparities are inevitable in the context of what is commonly referred to as the "dialogue" of the judges. Thus, concerning the doubts expressed by the ECHR in its *M.S.S.* ruling concerning the effectiveness of the Greek legal protection system in cases involving the alleged violation of article 3 CPHRFF, the Council of State recently specified that in exercising its jurisdiction as the appeal judge in cases of misuse of power, it may (through a consideration of the justification for the act) examine the interpretation of the law by the administrative authority in addition to all other pleas put forward including error of fact, the legal categorisation of the facts and the grievances concerning proportionality. It may therefore be considered that the appeal for misuse of power complies with article 13 of the Convention and article 39 of the "Asylum Procedure" directive. Similarly, the link established by the ECHR between the suspensive effect of an appeal and the grievances invoked by the plaintiff, depending on whether these are based on articles 2 and 3 of the Convention or on its article 8, may create problems with regard to the organisation of the Greek judicial protection system. Indeed, within this system, which the Council of State has considered as compliant vis-a-vis the conditions of article 13 of the Convention, a separate procedure must be undertaken with a view to obtaining a suspension of the enforcement of the act. More generally, it may be considered that the influence of the European directives on national Greek case law has not yet significantly made itself felt concerning asylum law and subsidiary protection. Most of the rulings issued by the Council of State and the Administrative Courts of Appeal concern three rather "conventional" subjects: a) administrative asylum proceedings; b) the interpretation of Greek law according to the Geneva Convention on refugees; and c) the verification of the justification for acts by the competent administrative authorities rejecting asylum applications

7.The speech by O. Bergeau (Unit B.1. "Immigration & integration" of the European Commission's "Internal affairs" DG) illustrated the influence that the case law of the CJEU has already exercised (rulings already handed down) or is liable to exercise (with pending cases) on various aspects concerning, firstly voluntary return or removal decisions (the form of and procedure for adopting these decisions; content; the right to an effective appeal and the suspensive nature of the appeal; access to justice) and, secondly, decisions to place a person in administrative detention (content of the decisions; adoption procedures and forms; extent of the verification performed by a judicial authority), taken under the terms of the "Return" directive. The audience's attention was also drawn to the fact that the European Commission is currently co-financing two projects aimed at boosting judicial cooperation with the implementation of the "Return" directive, namely the *CONTENTION*project (CONtrol of deTENTION) and the REDIAL (REturnDIALogue). These two projects should make it possible to establish a database detailing the main legal decisions issued with regard to the "Return" directive.

8. By carrying out an analysis of the manner in which immigration and asylum proceedings have gradually changed in Belgium, Prof D. Van Heule (Faculty of Law at Antwerp University) has shown how it is sometimes difficult to reconcile the substantive and procedural safeguards gradually imposed by European Union law and by the CPHRFF, as interpreted by the ECHR and by the Constitutional

Court of Belgium, with more traditional methods for examining cases based on the general principles of administrative law. An examination of the case law of the two courts has led the professor to identify four lessons from this. Firstly a suspensive effect should accompany the appeal (lesson number 1): such an effect must apply in all cases when expressly requested by the person and the procedure to be followed must be sufficiently accessible. When a violation of article 3 of the Convention is raised and the person has not yet been removed, expelled or refouled at the time when the court is to issue its opinion, the latter should carry out an "*ex nunc*" examination of the facts and the alleged items of proof supporting the application (lesson number 2): the court must take account of all items of information available at the time it takes its decision and it is therefore only if the expulsion measure has already been enforced at the time it issues a decision that it may limit itself to taking account of only information which was or should have been known by the administrative authority when enforcing the measure. Considering that an appeal must be examined "*ex nunc*", the parties must be able to present new proof to the court (lesson number 3). Finally, as the European Court of Human Rights clearly indicated in its recent *Jozef vs Belgium* ruling (par. 103, 104, 106 and 156), the legal proceedings introduced should not be complicated to the extent that they result in stripping the appeal of its effective nature. In his conclusion, the professor stated that the consideration of these four lessons by the Belgian legislator will probably result in the latter reviewing the currently planned procedures for challenging decisions. The case law of the ECHR concerning "defendable" complaints must also be taken to account, which does not prevent states from using a more expedient examination procedure for other types of complaints.

9.In his presentation, R. Decout-Paolini (rapporteur to the first litigation sub-section of the Council of State of France) focused on two very real consequences that the developments in European immigration and asylum law and the need to take account of the case law of the Court of Justice in this field have had on the organisation and operation of the French administrative courts. Concerning the organisational aspects of these courts, it has been necessary to provide extra staff and carry out structural reorganisations in order to enable these courts to be able to meet their obligation to provide a prior appeal against any removal, expulsion or refoulement decision. Concerning the operation of the court, it has also been necessary to ensure the "effective" nature of the appeal by incorporating not only the case law of the CJEU but also that of the ECHR. The gradual progression of a dispute from cancellation to full jurisdiction proceedings, the need to carry out an "*ex nunc*" examination of the appeal or the obligation to allow an appeal with a suspensive effect have all been highlighted.

10. Next, President E. Cihlárová (President of the Chamber at the Administrative Supreme Court of the Czech Republic) focused on the fact that there are not two separate types of court in the Czech Republic but rather a combined system. The result is that immigration and asylum cases are firstly heard by the administrative chambers within the regional courts and secondly, in the case of an appeal, by the Supreme Administrative Court. The submission of an application to the regional chamber automatically suspends the enforcement of the contested decision, with the appeal being a full review on the merits of a decision whereas the chamber issues its ruling "*ex tunc"* . The referral for appeal also automatically suspends the enforcement of the regional chamber's judgement while the proceedings are underway before the Supreme Administrative Court, with a written procedure. In 2005, the legislator also introduced a procedure governing the inadmissibility of an appeal to the highest instance: in the event that has already judged a similar case, subject to a brief justification the court can then refuse an appeal.

11. The Vice President of the Administrative Court of Luxembourg, Fr. Delaporte examined the development of the disputes procedure for asylum law cases in Luxembourg. Originally, in the absence of any legal text on the matter, the use of common law, i.e. an application for annulment, was available before the country's only administrative court, namely the Disputes Committee of the Council of State. An initial reform came with the adoption of a law in 1996 introducing an Administrative Tribunal as a court of first instance and the Administrative Court as the court of appeal ruling in the final instance, including the introduction of the application for a review, i.e. an appeal for which the court has unlimited jurisdiction to examine the merits of the case, against the vast majority of decisions taken in asylum cases; with the suspensive nature (in principle) of judicial appeals being enshrined. These latter two aspects of the reform in some way anticipated the requirements gradually expressed by the ECHR concerning the "effective" nature of the appeal. During a second reform which came with the law of May 5, 2006, the system was more or less maintained subject to the following

modifications: a fast-track procedure was introduced in certain cases with the only scope for appeal before the courts being, an application for annulment before the administrative court ruling in final instance; an appeal against an order to leave the country following a decision rejecting an application for recognition of refugee status or a request for international protection became a simple application for annulment which needed to be submitted in the same application as that concerning the application for review against a decision to refuse international protection adopted in accordance with the fast-track procedure; we have also gone from an appeal procedure to a "appeal to the highest instance" procedure before the Administrative Court, against the judgements of the Administrative Tribunal issued during so-called "normal" proceedings, which however in practice has not had the effect of limiting the number of appeals submitted to the Administrative Court. During a subsequent reform of proceedings, the procedure for appeals before the Administrative Court with a suspensive effect was finally reintroduced, with the result being that the number of appeals for international protection remains high to date even though very few of the Administrative Tribunal's judgements are modified on appeal. Rules for investigating appeals constituting derogations to the common law for the proceedings for administrative and fiscal disputes have also been drawn up in order to deal with both an "explosion" in the number of disputes concerning international protection and also to take account of the requirements to process appeals within a reasonable period of time: both for the fast-track procedure and for the normal procedure, only a counterstatement is used both in the first instance and on appeal, within a maximum period of one month. Even if it does not prevent a person from appearing in question, the judges (both in first instance and on appeal) usually rule on the case file. When the court is ruling as review judge, it takes account of all points of fact and law as these are presented at the time it is required to rule ("*ex nunc*"); on the other hand, when it rules on a matter of annulment under the fast-track procedure, the court takes into consideration all points of fact and law as presented at the time when the administrative authority issued its deferred decision, although it is nevertheless required to allow any items of proof subsequently submitted, on condition that these are related to facts having existed at the time when the administrative authority issued its ruling. Finally, in the case of the constitutional reform procedure currently being discussed, it is envisaged that a Supreme Court will be created which will encompass both the Supreme Court of appeal and the Constitutional Court, and before which it will also be possible to submit an appeal to the highest instance against the rulings of the Administrative Court, whereas at the moment the latter is the supreme administrative body in Luxembourg. The legislator must also consider where to place the emphasis, between on the one hand a large number of means of recourse and as a result greater possible rights for the justiciable, and on the other hand, the inevitable lengthening of legal proceedings, particularly in administrative disputes.

12. In his presentation, Judge J. Chlebny (judge at the Supreme Administrative Court of Poland– President of the Regional Administrative Court of Warsaw) discussed the changes which have recently occurred concerning the concrete implications of the right to the suspensive effect of a legal challenge introduced against a removal or refoulement decision. Alongside article 13 CPHRFF concerning the right to an "effective" appeal there are also now grounds for taking into account (whenever a measure concerning the enforcement of European law is in question) article 47 CFREU, which guarantees an effective right to an appeal before an independent and impartial court. On this point, a difference in appreciation can arise depending on whether we are talking about the CPHRFF or European Union law. Concerning the case law of the ECHR, it may be considered that the court has modified its requirements according to the article of the Convention for which a violation is alleged: if this concerns article 3 (the risk of inhumane or degrading treatment) or article 2 (the right to life) or article 4 of protocol number 4(the ban on collective expulsions), an automatic suspensive effect for the appeal is required, in as far as it must be specified by law and should not depend on an individual decision by the judge hearing the case; if it concerns article 8 (the right to privacy and family life), the simple possibility to request provisional protection from the judge hearing the case is sufficient. If it concerns European Union law, it may be considered that a distinction can be made according to the nature of the person submitting the appeal. With regard to persons demanding international protection, a significant change has occurred between the "Procedure" directive of 2005 and that (redrafted) of 2013:article 39 of the 2005 directive does not require a suspensive effect to automatically be associated with the appeal before the court but on the contrary leaves it to the states to ensure the "effective" nature of this appeal by meeting their international obligations in this field; On the other hand, article 46 (5) of the

2013 directive specifies an automatic suspensive effect with the appeal, until the completion of this appeal and subject to certain exceptions. However, even when it is found that an exception applies, an application to provisionally remain in the country may be submitted to the court and the applicant must be authorised to provisionally remain the country while awaiting the outcome of this case (article 46 (6) and (7) of the 2013 directive). Concerning illegally staying third country nationals, the "Return" directive does not in itself stipulate a right for the person to remain in the country during the appeal, but its article 13 (2) states that the authority or body with jurisdiction to examine the appeal may temporarily suspend the decision to expel the person, if a temporary suspension is not already applicable under the terms of the national legislation. Concerning citizens of the European Union and members of their family staying in a member state other than the state for which these citizens have nationality, the "Right to stay for citizens of the European Union and their family members" directive of 2004 also does not include an automatic suspensive effect regarding an appeal against a removal measure. However, under the terms of its article 31, when the appeal lodged against a removal decision is accompanied by an application for interim measures aimed at obtaining suspension of its enforcement, actual removal from the country cannot take place until an interim order has been issued, except: 1°) when the removal decision is based on a prior decision from the courts; 2°) when the person concerned has previously had access to an appeal before the courts; 3°) or when the removal decision is based on overriding grounds of public safety as provided for in article 28 (3) of the directive. Regarding this general framework, the emphasis was placed on the fact that the Polish legislation did not grant an automatic suspensive effect to an appeal submitted concerning law on aliens' rights. A provisional suspension of the enforcement of the contested decision may however be granted based on an application submitted to this effect and an individual examination of the request. To conclude, when we examine the level of protection provided by national law, it should always be kept in mind that due to the principle of subsidiarity, in each state concerned it is the responsibility of the national judge to ensure that this level of protection is not less than that required by the instruments of international law, which sometimes requires a certain degree of "activism" on the part of the judge.

13. In his conclusions, President Chr. Vigouroux (President of the Interior Section of the Council of State of France) focused on five guidelines. Firstly, the law, in which two aspects may be highlighted: on the one hand the need for the administrative judges to be able to take account of three legal bases (the Court of Justice of the European Union and the CFREU / the European Court of Human Rights and article 3 CPHRFF /the constitutional supreme court of each member state); on the other hand the absolute need to guarantee an effective appeal and the requirement in view of this to provide for a suspensive appeal. Secondly, the satisfactory management of the entire system in order to be able to continuously manage flows and to be of use. This means on the one hand avoiding congestion in the courts, including the appeal courts, and also guaranteeing compliance with the reception conditions for applicants for international protection. In this respect, the focus has been placed on the fact that both the CJEU and the ECHR leave the member states a margin of discretion which they should use appropriately, with their national judges then assuming significant responsibility. As demonstrated in the various presentations, the asylum system is constantly changing and constitutes something of a laboratory for the administrative procedures of tomorrow. Thirdly, the creation of trust between the states, especially in order to guarantee the effectiveness of the Dublin mechanism while keeping in mind the need for each of the member states to ensure that their legal system guarantees the fundamental primacy of a right to an effective appeal, with a suspensive effect where applicable. The fourth guideline: the quest for convergence in the practices employed by the member states, in the following fields: policies derived from case law, including by means of questions submitted to the court of justice for preliminary rulings; harmonization concerning the interpretation of the applicability of the regulations and directives of the European Union; the need to adopt common criteria in national procedures for examining applications for international protection, including in order to guarantee a certain degree of uniformity regarding constitutional proof and avoiding contradictions or incoherence in the application of common concepts such as that of the "safe countries of origin" . The search for this coherence is a vital aspect if we are to avoid the practice of "forum shopping" by the applicants and their "travels". Finally, the fifth guideline is that of the role to be played by the administrative judges in order to handle the tensions which may appear at numerous levels: between the law and the administrative authority; between the theoretical statement of common standards and their application in reality at a national level; between the duty of the judges to apply

national law ensuring as a minimum compliance with the requirements of both European Union and international law; and also between the member states. In this respect, a seminar such as this organised on May 9, 2014 once again provided an opportunity to highlight the importance of a union of European judges, including via ACA Europe.

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