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## Some Personal Remarks on the Preliminary Rulings of the CJEU in Cases concerning the Dublin II Regulation

### Introduction.

Dear Friends and Colleagues, I have been given the privilege to address you this morning where we may recall some of the words from the (Robert) Schumann Declaration of 9 May 1950, 64 years ago today:

*"Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity."*

It is not bad to **perceive slow** and **gradual developments** in one or another area in this constructive, far reaching perspective – although sometimes in real difficult times, you may tend to focus more on the immediate situation: "When you are going through hell, keep going", as Winston Churchill expressed it.

Let us not forget that Asylum law is also connected to ***"blood, toil, sweat and tears",*** obviously in particular through the **tears and tragedies experienced by refugees**, although occasionally **also the sweat of politicians and judges** may come to our mind in this area.

I have chosen to speak to you about the jurisprudence of my Court, the CJEU, in preliminary rulings on the Dublin II Regulation. And I will make an effort not to exceed the 30 minutes allocated to me. I stress that the observations I make are personal. This implies that they do not necessarily reflect the views of my Court or of my colleagues.

### The Gradual Integration of Justice and Home Affairs.

As you know, the Dublin regime stems from the Dublin Convention, signed on 15 June 1990 by 11 of the then 12 Member States at the Dublin Castle, but was actually carved out/copy-pasted from the (draft) Schengen Implementing

Convention negotiated in parallel by the then more limited number of Schengen countries.

It was at a time when Justice and Home Affairs Cooperation took place completely outside the Treaties. It was only by the Maastricht Treaty as supplemented by the Edinburgh Agreement in 1992 (into force in the autumn of 1993) that Justice and Home Affairs, including Asylum law, made its way into the "third pillar". And that a (limited) possibility for judicial review at EC level was first opened.

The Treaty of Amsterdam meant that subjects like Immigration, **Asylum** and Border-controls in 1999 were transferred from the intergovernmental third pillar into a special chapter of the supra-national first pillar.

The Treaty of Amsterdam also brought the integration of the Schengen *Acquis* in the European Union. This implied that a legal base was found in the various parts and pillars of EU law for each element of the Schengen *Acquis*.

It also implied that the **ECJ in Luxembourg** became competent in the areas covered by the Schengen *Acquis* – whether this meant a competence under (a special chapter of) the **first** (supranational) pillar or a more limited competence under the **third** (intergovernmental) pillar of the Amsterdam Treaty.

The Lisbon Treaty ended the third pillar, and in less than 6 months, when the **transitional 5-year period** laid down by the Lisbon Treaty will expire on 1 December 2014, we will finally have not a full-fledged "one-shop for all solution", but at least something that comes much closer to it.

**The Role of the CJEU in General and in the Field of Asylum Law.**

It is not for judges and courts – not even the CJEU – to make the laws, but to interpret them. I say this not just to pay tribute to **Montesquieu** (1689-1755) – another great (French) European – and the division of State powers, but also because we are sometimes accused of forgetting this fact at the ECJ, that is for **taking the legislator's role** and developing the Union law **too dynamically**, rather than just interpreting it. We, on the other hand, may be **tempted** to blame the law-makers in Brussels for their use of **"constructive ambiguity"** in the drafting of secondary Union law, and by leaving it to the CJEU to "sort out the mess". Thus, the EU legislator in a sense (indirectly) delegates legislative power to the Court.

**Unlike the US Supreme Court,** the ECJ does not choose its cases itself. On the contrary, we have basically to deal with everything that comes in through our

doors in Luxembourg. So, as preliminary rulings count for more than 60 percent of our cases**, most of the picking is done by national judges**, who, in any case, are those that by way of volume have to deal with the biggest bulk of cases involving Union law, including the Dublin regime.

Especially periods **when secondary Union law** has recently been introduced or revised and then implemented by the Member States tend to coincide with/ precede periods, when these areas of law are brought up by requests for preliminary rulings.

It is thus, in my view, not merely the late conferral of competences to the EU Commission and the CJEU, but also the slow, step by step development of the common EU Asylum Policy which has implied that, only in recent years, such successive waves of jurisprudence can also be identified in areas of Asylum law.

Unfortunately – and much more importantly – this has also implied that those Member States, who for essentially geographical reasons have had to handle the largest numbers of asylum seekers under the Dublin regime, have also had to wait a rather long time for the gradual development of the more substantive elements of a common EU Asylum Policy.

But **back to my small clusters** or waves of ECJ jurisprudence in the area of Asylum law.

In recent years, I can point to a number of cases (some still pending) on **substantive Asylum law**, notably the Qualification Directive. Let me just mention a few cases on the right to **asylum**:

- Cases C-57/09 and C-101/09, ***B and D*** (exclusion clauses of the Qualification Directive; PKK-related - aftermath of 11/9 2001)
- Cases C-71/11 and C-99/11, ***Y and Z*** (Qualification Directive; Ahmadiyya - persecution for religious practices)
- Cases C-199/12 to C-201/12, ***X,Y and Z*** (Qualification Directive; Homosexuals – persecution for sexual orientation)

Let me also mention two cases on **subsidiary protection** – interpreting elements of art. 15 C of the Qualification Directive:

- Case C-465/07, ***Elgafaji*** (interpreting "indiscriminate violence")

- Case, C-285/12, ***Diakite*** (interpreting the notion "armed conflict")

Likewise, we have recently – and are still very much in the process of doing so – developed a **case-law on asylum procedures**. This has coincided with a period, where some of the preconditions to the whole Dublin system have been challenged by the economic crisis.

I am thinking of cases on the **Dublin II Regulation** like:

- Case C-411/09, *NS* – see also *MSS* of the ECtHR in Strasbourg
- Case C-4/11, *Puid* (Individual right?)
- Case C-394/12, *Abdullahi* (Individual right?)
- Case C-648/11, *MA* (Minors)
- Case C-620/10, *Kastrati* (Withdrawal of asylum application)
- Case C-245/11, *K* (Humanitarian clause)

As well as **other procedural cases** such as:

- Cases C-148/13-150/13, *A and Others,* (**pending!)** (Permissible elements of proof in asylum cases concerning persecution for homosexuality)
- Case C-604/12, *HN* (The Irish separate procedures for asylum and subsidiary protection)

Time does not allow me to go in-depth with a great many of these cases, so I will limit myself mainly to some remarks on the delicate relationship between **mutual trust and mutual recognition in judicial cooperation**, in particular in respect of the **protection of fundamental rights**.

This is a matter which is of some practical importance in international **law enforcement cooperation** (extradition cases, (fast) sharing of sensitive information, legal assistance in the investigation of criminal cases), but not exclusively there. Also when it comes to international judicial cooperation in **civil law** or in **asylum cases**, it may pose an important dilemma –and notably so to judges.

**The legal dilemma being**: How far can authorities and courts in the requested Member State rely on the requesting Member State respecting fundamental rights?

To this legal dilemma adds **a political squeeze**: It is politically sensitive to turn down a request for (further) controls of fundamental rights. After all, who can be against protection of fundamental rights? Or just being **perceived** to be against the effective protection of fundamental rights?

It is perhaps tempting to follow the logic: "Mutual trust is good, but controls are better". However, before following this kind of "logic", there are perhaps reasons to think at least twice, as we, as judges, should do.

Because mutual recognition of foreign judgments and decisions rely on mutual trust, and if we substitute this mutual trust with a rigid system of double controls, it may be argued that we will have rolled back important elements of the last 50 years of progress in administrative and judicial cooperation.

**Enhancing cooperation through mutual recognition** is naturally based on the idea and the **assumption that all parties to the EU or international agreement in question do in fact provide a certain and necessary minimum protection of fundamental rights.**

But it is often **argued** that this is an **unfounded assumption if not a complete fiction**. And that the authorities – including the judicial authorities – of the requested Member State should carry out its own assessment of whether the fundamental rights of for instance a person wanted for extradition have been respected by the requesting Member State. Or the fundamental rights of an asylum seeker awaiting transfer under the Dublin regime are likely to be respected by the receiving Member State.

The CJEU has – in my view wisely – been reluctant to accept such suggestions, and has repeatedly stressed that instruments such as the EAW and the Dublin Regulation are **instruments founded on mutual trust** and essentially stating that, in such cases, the wider j**udicial control of fundamental rights is basically a matter for the courts of the requesting/receiving Member State**.

Between privileged States, that share the same basic values and fundamental legal traditions and have committed themselves to the protection of the same or similar notions of fundamental rights, it must **generally be justified to presume** that the requesting State lives up to the necessary minimum standards of protection of fundamental rights.

Still, it is **just a presumption** – and as such **open to falsification**. Or it may – due to unfortunate developments in a State – disappear altogether.

This has been demonstrated by the European Court of Human Rights in Strasbourg, when it passed its judgment in **MSS v Belgium and Greece** on 21 January 2011, on the **Dublin II Regulation** determining the Member State responsible for examining an asylum application lodged on one of the Member States by a third country national.

In this judgment, **Greece** was condemned by the ECtHR for lack of respect for the fundamental rights of the asylum seekers present in Greece, including those returned from other EU Member States in conformity with the Dublin Regulation.

Secondly, **Belgium** was condemned for returning asylum seekers to Greece in spite of the treatment the returned third country nationals were given in Greece. Belgium submitted essentially that it had been justified to assume that another Member State, here Greece, would honour its obligations under the ECHR and comply with the EU legislation on asylum.

This argument did not convince the judges at the ECtHR in Strasbourg. Their judgment must be read to imply that **although such a presumption of respect of fundamental rights in another Member State does exist**, it had *in concreto* disappeared in the case of the treatment of returned asylum seekers in Greece. The indications of the insufficient treatment of returned asylum seekers in Greece were numerous and of such a serious nature that Belgium could no longer ignore them and continue to return asylum seekers under the Dublin Regulation without effectively addressing the issue of fundamental rights.

In other words, the presumption of compliance with fundamental rights may be valid at the outset, **but if specific circumstances indicate a serious and systemic deterioration of the protection of fundamental rights**, then a situation might develop where the executing Member State cannot pretend not to see the problem. I have often used the image, that the requested Member State **does not have the right**, which the British Admiral Lord Nelson claimed at the occasion of the naval battle at Copenhagen on 2 April 1801, **"to turn a blind eye"**, in Nelson's case turning his blind eye – acquired at a battle near Calvi seven years earlier in his naval career (10 July1794) – to the British signal to stop the bombardment of the Danish navy.

My Court, the CJEU, has later followed the MSS line in its ***NS* judgment, Case C-411/09**, which in reality has implied a temporary exclusion of Greece from the Dublin regime, while the Greek authorities on top of other pressing problems are struggling in close cooperation notably with the Commission to remedy the situation.

The most interesting legal question for national judges in this area is perhaps not to know what currently to do vis-à-vis Greece. At least for a while that has been rather clear, although one may legitimately ask when the situation will have sufficiently improved in Greece, in order to once again apply the Dublin regime as far as Greece is concerned.

T**he more difficult question is rather** for the national judge to know when – or in respect to which other Member States – will he or she have **"to take out the fundamental rights tool-box from the cupboard"** in order to examine more in-depth **an *alleged* systemic failure** in the protection of fundamental rights in a specific Member State. What is the **threshold** for doing so, or what is the threshold for making a quicker ruling not doing so, as it may seem manifestly clear that there is not such a systemic failure in the protection of fundamental rights in a specific Member State. In other words, when must the national judge seek at least some more detailed information through embassies, EU Agencies, UNHCR, NGO's (Amnesty International, Human Rights Watch etc.) before he or she may eventually dismiss the allegation?

Another linked issue is **whether and eventually to what extent – apart from fundamental rights – the individual asylum seeker has the right to challenge the application by the individual Member States of the Dublin regime before national courts.**

This has recently been at stake in two cases, namely **Case C-4/11, *Puid,*** and **Case C-394/12, *Abdullahi*.** Both cases were judged by the Grand Chamber (15 judges) – but in different formations.

Let us first go back to the MSS judgment from Strasbourg and the subsequent ruling of the CJEU in NS.

It follows from NS, that when it is impossible to transfer an applicant to Greece, although that State was identified as the Member State responsible in accordance with the criteria set out in "Dublin II", then the Member State which should carry out that transfer must continue to examine the criteria set out in the Dublin II Regulation in order to establish **whether** one of the following criteria (Articles 6-13 of the Regulation) enables another Member State to be identified as responsible for the examination of the asylum application.

Subsequently, when, eventually, a new Member State has been designated, the question arises whether the asylum seeker has a right to challenge the decision to transfer him to the responsible State.

In the situation where no Member State can be identified as responsible under the "Dublin II" criteria, it is clear that the Member State where the asylum seeker is present becomes "responsible", and the legal ground for this "responsibility" has now been clarified.

In **Case C-4/11, *Puid***, the German judge was seeking clarification of the position of an asylum seeker, who lodged an application for asylum in Germany, which was not the Member State of first entry into the Union – but only the second Member State after Greece , whereto it (following NS) was excluded to transfer him.

In this case, where Germany had accepted to examine the application under the **clause of discretion (article 3 (2) of Dublin II)**, Puid argued that Germany was not "**free"** to decide whether to examine his application. Due to his subjective right to see his case examined, Germany was "responsible" under the rules of "Dublin II" and he claimed damages due to the attempt to send him to Greece.

The ECJ replied by confirming the essential elements of the NS Judgment (paragraphs 94-98 and 106-108 of NS), and stressing that article 3 (2) of Dublin II is a faculty, not an obligation for the Member State, although the Member State in any case must ensure that the Dublin procedure does not take ***"an unreasonably length of time"*** (Puid paragraph 35) and then summing up the procedure to be followed in this way:

> *36 ... where the Member States **cannot be unaware** that **systemic deficiencies** in the asylum procedure and in the conditions for the reception of asylum seekers in the Member State initially identified as responsible in accordance with the criteria set out in Chapter III of the Regulation provide **substantial grounds for believing** that the asylum seeker concerned **would face a real risk** of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, which is a matter for the referring court to verify, the Member State which is determining the Member State responsible **is required not to transfer** the asylum seeker to the Member State initially identified as responsible and, subject to the exercise of the right itself to examine the application, **to continue to examine the criteria set out in that chapter**, in order to establish whether **another Member State** can be identified as responsible in accordance with one of those criteria or, **if it cannot, under Article 13** of the Regulation.*
>
> *37 Conversely, in such a situation, a finding that it is impossible to transfer an asylum seeker to the Member State initially identified as*

*responsible does not in itself mean that the Member State which is determining the Member State responsible is required itself, under Article 3(2) of the Regulation, to examine the application for asylum.*

In **Case C-394/12, *Abdullahi*,** a somewhat similar question arose. Mrs. Abdullahi, Somalian citizen, arrived illegally in Greece in July 2011. After having travelled through several third countries and Hungary, she arrived in Austria, where she was arrested. She then asked for asylum in Austria. The Austrian authorities requested Hungary to take charge over Mrs Abdullahi in accordance with the rules of the Dublin II Regulation.

Hungary having accepted this request, one would perhaps think that the question of responsibility had been solved.

However, Mrs Abdullahi was not willing to leave for Hungary. She challenged the decision to her being transferred there.

In her view, she was entitled to stay in Austria. She argued (I know it is not simple) that, in reality, Greece, and not Hungary, was the first responsible Member State according to the Regulation. On this basis she argued that, impossible to send her back to Greece, she should stay in Austria.

The question, – slightly similar to the one raised in Puid, – was to what extent the asylum seeker must be entitled, by means of a case before a national court, to have a judicial control verifying that the Dublin II criteria are applied correctly by the Member State that is going to transfer the asylumseeker.

In answering this question, the CJEU stressed the importance of the Principle of Mutual Trust on which the Dublin regime is founded, and the obligation for all Member States to respect fundamental rights, including those founded on the Geneva Convention and on the ECHR (paragraphs 52 and 53 of Abdullahi). It further stressed the harmonization of both procedural and material Asylum law at EU level as well as the importance of avoiding forum shopping (paragraphs 54 and 55 of Abdullahi).

The CJEU then went on to conclude (paragraph 62 and dispositive) that

*"in circumstances **where a Member State has agreed** to take charge of an applicant for asylum on the basis of the criterion laid down in **Article 10(1)** of that regulation – namely, as the Member State of the first entry of the applicant for asylum into the European Union – **the only way** in which the applicant for asylum can call into question the choice of that criterion*

> ***is by pleading systemic deficiencies*** *in the asylum procedure and in the conditions for the reception of applicants for asylum in that Member State,* ***which provide substantial grounds for believing*** *that the applicant for asylum would face a real risk of being subjected to* ***inhuman or degrading treatment*** *within the meaning of* ***Article 4 of the Charter."***

One could say that an underlying issue in both the Puid case and the Abdullahi case was the general **Principle of National Procedural Autonomy**, according to which the Member States remain competent to independently legislate on procedural issues so long as this possibility has not been pre-empted by the EU legislator.

This principle was "taken to the front of the stage" in the judgment delivered yesterday (8 May 2014) in the Irish case, ***HN***, **C-604/12**, where the question was whether the Irish system – obliging applicants seeking international protection to first apply for refugee status, even if the applicant in question only wishes to submit an autonomous request for subsidiary protection – was compatible with the Qualification Directive, 2004/83/EC, as interpreted in the light of the Principles of Effectiveness and Good Administration.

In this case, the Applicant – a Pakistani citizen, studying in Ireland – had introduced a demand for subsidiary protection, which was rejected by the Irish authorities on the ground that no application for refugee status had ever been made. According to the Irish authorities, the Qualification Directive did not allow for a "stand alone" application for subsidiary protection, since the granting of such protection presupposes that the applicant does not qualify as a refugee. The Applicant argued, among others, that the requirement to first introduce a demand for refugee status, and then await the exhaustion of the administrative procedures related hereto, was contrary to in particular the **Principle of Good Administration** – at least in a situation where the applicant has accepted that he or she is not entitled to, and does not claim to be entitled to, refugee status.

The ECJ found that, **in principle**, the Qualification Directive **does not oppose to the "double procedure"** laid down in the Irish legislation. Due to the fact that the status as a refugee implies more protection for the individual than the subsidiary protection, national authorities have to first examine, whether the applicant fulfills the conditions for refugee status. Only when this is not the case, can the national authorities continue to examine whether the applicant is eligible for **subsidiary** protection.

Hereafter, the ECJ added a caveat, specifying that in the organization of their national procedural rules, Member States **must ensure** that the **Principles of**

**Effectiveness and Good Administration are complied with**. Therefore, the Member States **must allow for the simultaneous submission of applications** for asylum status and subsidiary protection. In that regard, the Member States must ensure that the examination of the request for subsidiary protection is initiated within a reasonable time.

**Conclusions?**

As illustrated by the case-law I have mentioned, the ECJ is – also in this area (Asylum law) – very **reluctant** to broaden its judgments with **obiter dicta** statements of a general nature. Normally, the preliminary rulings of the ECJ only contain – on a general formula - what is needed for the national judge to resolve the pending national case. Both *Puid* and *Abdullahi* are examples of hopefully clear, but also rather **targeted answers**.

Occasionally this leads the ECJ to overstep the level of general interpretation of EU law and also applying it. Like the ECJ in a sense did – for reasons of clarity, I believe – in Abdullahi (paragraph 61). Sometimes such "trespassing" is done because it allows the Court **not** to answer further questions that are no longer relevant.

Still **the normal separation** is that

- The **ECJ** gives the general interpretation of EU law.
- The **National Court** applies this on the national facts and the national law of the case.
- This implies that the ECJ generally tries to avoid to condemn a national legislation (although it **seems** to be contrary to EU law), but leaves this application to the national judge. Contrary to what happens in an infringement case. But as we know also this is **only a general rule** – with exceptions in the jurisprudence of the ECJ.

**The Dublin regime,** which essentially has been carried on by the new Dublin III Regulation, relies – like so many instruments of m**utual recognition** – on **mutual trust**, and this requires a presumption that all Member States respect fundamental rights, including the Charter and the ECHR.

This presumption is **recognized both by the ECJ** in Luxembourg **and the ECtHR** in Strasbourg.

It is, however, **only a presumption** which may be falsified.

There is a dialogue **between the two European Courts –** even when this does not lead to a direct quotation in a judgment.

There is also a **dialogue – or perhaps rather a certain interaction - between the ECJ and the European legislator(s)**, although one that normally develops at a more moderate pace.

Take the **K-case** as an example. In its judgment of 6 November 2012, the ECJ interpreted the rather unclear provision of article 15 (the so-called "humanitarian clause") of the Dublin II regulation dating back to 2003 – in order to give the referring Austrian judge an answer, he could use to resolve the Austrian/Polish asylum-case before him.

When the **Dublin III Regulation** was then finalized last year, scholars were quick to notice that the EU legislators far from codifying the K-jurisprudence had resolved the lack of clarity of the Dublin II Regulation on this point in a different way. By **simply deleting the "humanitarian clause".**

Although some **academics have expressed regret** at the solution preferred by the EU legislator, **this is in my view exactly as it should be**: We only gave our interpretation in the first place, because the text of Dublin II did not seem clear on this point – at least not to the ECJ and to the Austrian judge, who referred the case to us. It is then, of course, for the lawmaker to decide whether to live with the interpretation given by us – or rather "set things right" by amending the legislation, as the EU legislator chose to do in this case.

But this is **exactly how things should be** – then we have done our job and so has the legislator. Consequently, we are **back to Montesquieu**, who **should be happy** – and **so should you**, because I am finally going to conclude by **thanking you for your patience and attention.**