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3rd INTERNATIONAL CONFERENCE ON HUMAN SECURITY

HUMAN SECURITY RESEARCH CENTER
УНИВЕРЗИТЕТ У БЕОГРАДУ ФАКУЛТЕТ БЕЗБЕДНОСТИ
UNIVERSITY OF BELGRADE FACULTY OF SECURITY STUDIES
Claim! CITIZEN'S NETWORK FOR PEACE, RECONCILIATION AND HUMAN SECURITY
This project is supported by the European Commission

2017.

3rd International Conference on Human Security
Belgrade, May 2017

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Publisher
University of Belgrade – Faculty of Security Studies
Human Research Center

For The Publisher
Ivica Radović PhD, Dean of the Faculty of Security Studies

Proofreading
Danijela Nejković, Faculty of Security Studies

Prepress
Birograf COMP
Zemun

Print
Birograf COMP
Zemun

Edition
200 copies

ISBN 978-86-80144-09-2

Note

UDK 341.215.4-054.72:341.6 (4)

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9. "THE INTERPRETATION OF THE LAW, RATHER THAN THE LAW ITSELF, IS WHAT MATTERS MOST IN ASYLUM CASES"[36] – HOW TO IMPROVE THE ROLES OF EUROPEAN COURTS IN THE INTERPRETATION AND APPLICATION OF THE ASYLUM LAW?

Abstract: The plurality of sources is explicitly incorporated in the existing EU's asylum regulatory framework, which makes it quite complex and multi-layered. In addition to various specific EU instruments, more precisely pieces of primary and secondary EU legislation, the European asylum system also encompasses regional and international instruments regulating refugee protection and human rights, such as the Geneva Convention on Refugees and the European Convention on Human Rights. The Court of Justice of the European Union, together with the European Court of Human Rights, have made significant contribution to the development of the Common European Asylum System in the course of last two decades. The pivotal role played by the European courts in this regard is explained by the words of Professor Connie Oxford, who says that the interpretation of the law, rather that the law itself, is what matters most in asylum cases. However, regardless of the developments achieved both through the legislative and judicial actions, the key shortcomings of the existing framework are still apparent, and have been highlighted by the ongoing migration crisis, showing an evident need for reconceptualization. The paper will critically examine the case laws of two European courts in order to assess whether their approaches are consistent when it comes to asylum cases. The paper will further assess to what extent have their roles progressively contributed to the development of the asylum framework as well as it will identify weaknesses of their current approaches. Following this assessment, the authors will try to determine whether consistent approaches between two courts when it comes to the interpretation and application of the European asylum framework necessarily result in the full achievement of human security and strengthening of the human rights protection in this regard. Finally, the authors will explore additional measures which should be undertaken by these courts and offer concrete proposals aimed at strengthening the asylum protection in Europe.

Keywords: *asylum framework, European Court of Human Rights, Court of Justice of the European Union, human rights, human security*

36 Statement of Connie Oxfordin: "Follow-up to NYU JILP Symposium on LGBT Asylum and Refugee Law" (NYU Journal of International Law and Politics, March 2012) available at: http://opiniojuris.org/2012/03/29/follow-up-to-nyu-jilp-symposium-on-lgbt-asylum-and-refugee-law/ (last accesed on 24thNovember 2016).

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1. INTRODUCTION

The Court of Justice of the European Union (hereinafter referred to as"CJEU"), together with the European Court of Human Rights (hereinafter referred to as"ECtHR"), have made significant contribution to the development of the Common European Asylum System during the last two decades. Gradually, jurisdictions of these two supranational courts have started to overlap in the field of asylum law**.**

At the very beginning of the European Economic Community (hereinafter referred to as "EEC") the asylum matters were exclusively under the competence of its Member States. Namely, asylum related procedures are primarily state's international obligation, as it was laid down in the Geneva Convention on Refugees.[37] The European Court of Justice (hereinafter referred to as "ECJ") began to make rulings on the issues falling under the Common European Asylum System (hereinafter referred to as "CEAS") after the Treaty of Amsterdam, when migration and asylum issues were transferred from the third to the first pillar of the EU. Finally, with the Treaty of Lisbon, the three pillar structure was abolished, while the EU institutions, including the ECJ, gained even more powers in the field of migrations (Vosyliute, 2011, p. 3).

The ECtHR also has a word on asylum issues within the EU although it is not explicitly empowered to rule on this type of cases. First, contrary to the Charter of Fundamental Rights of the EU[38], the European Convention on Human Rights (hereinafter referred to as "ECHR") does not guarantee the right to asylum as such. Second, the EU has not yet acceded to the ECHR. Nevertheless, since all the EU Member States have ratified the ECHR, human rights violations which occur while implementing the CEAS fall within jurisdiction of the ECtHR.

In addition, the specific EU framework, which includes the Treaty on the Functioning of the EU (hereinafter referred to as "TFEU"),[39] the Charter of Fundamental Rights of the EU and the Hague programme[40], does highlight that the EU secondary legislation in asylum matters, as well as the interpretation given to it by the CJEU, must comply with the ECHR (Wijnkoop, 2014, p. 44). Furthermore, both the EU primary and secondary legal sources do stipulate that the Charter of Fundamental Rights of the EU and the Geneva Convention on Refugees must be fully observed in the implementation of the CEAS.

The existing EU asylum framework is thus multi-layered due to the plurality of sources explicitly incorporated into it. This plurality of sources explains the complex tasks of the CJEU, together with the ECtHR, when it comes to the interpretation and adjudication of the European asylum law. Their overlapping jurisdictions gave rise to mutual interactions which were occasionally very fruitful, while in other cases they failed to contribute to the development of the CEAS.

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37 Convention relating to the Status of Refugees 1951, 606 UNTS, and Protocol relating to the Status of Refugees 1967 606 UNTS, at 267.

38 See Article 18, Charter of Fundamanetal Rights of the EU (2007/C 303/01).

39 Article 78 (1) of the TFEU reads: "The Union shall develop a common policy on asylum, subsidiary protection andtemporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.", **Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal C 326 , 26/10/2012 P. 0001 – 0390,** http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT**, 10. 08. 2016.**

40 The Presidency Conclusions of the Brussels European Council (4/5 November 2004), 14292/1/04 REV 1 ANNEX I, pp. 14-15.

In the following sections, the analysis will focus on the selected case laws of two European courts related to the interpretation and implementation of the Dublin II Regulation[41] and Qualification Directive[42] respectively. The authors argue that while the examined cases that involve the issues covered by the Dublin II Regulation represent positive examples of the harmonized approaches taken by two courts, the other group of cases analysed in the paper, which are dealing with the issues regulated by the Qualification Directive, go in the opposite direction.

M. S. S. vs. Belgium and Greece[43] and Joined Cases C-411/10 N. S. vs. Secretary of State for the Home Department and C-493/10 M. E. and Others vs. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform

The decisions passed in these two cases show the positive effects of consistent and harmonized approaches taken by the two courts. Their joint efforts have supported the creation of a uniform European regime for the protection of human rights.

The *M.S.S.* case concerned an asylum seeker from Afghanistan who lodged an asylum application in Belgium. Invoking the rules of Article 10, paragraph 1 of the Council Regulation 2003/343/CE (the Dublin II Regulation), Belgium submitted a request to the Greek authorities to handle the asylum request. Belgian authorities considered they were not under the obligation to apply the derogation clause provided in Article 3, paragraph 2 of the Dublin Regulation, whereby each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility – the so-called "sovereignty clause".

The applicant's repeated appeals against the order were not sustained, he was transferred to Greece where he was twice placed in detention and therein subjected to degrading detention circumstances. The applicant claimed that in his case both Greece and Belgium had violated Article 3 of the ECHR.

While examining the relevant legislation, the evidence provided by the applicant as well the reports of various NGOs and IGOs, such as the UN High Commissioner for Refugees and the European Committee for the Prevention of Torture, the ECtHR found that the conditions of detention experienced by the applicant had been unacceptable.[44] According to the court, the feeling of arbitrariness, inferiority and anxiety and the effectswhich the conditions of detention might have onperson's dignity, taken together, constituted degrading treatment contrary to Article 3 of the ECHR. The ECtHR also found that the applicant's distress had been aggravated by the vulnerability inherent to his position of an asylum seeker.[45] With regards to Belgium, the ECtHR found that, under the Dublin Regulation, the Belgian authorities could have refrained from transferring the applicant if they had considered that the receiving country was not fulfilling its obligations under the ECHR, in light of its Article

41 Dublin II Regulation contains a hierarchical list of criteria to determine which EU member state is responsible for the examination of the asylum application. If an asylum-seeker has irregularly crossed the border into a Member State having come from a third country, the Member State thus entered is responsible for examining the application for asylum.

42 Directive 2011/95/EC on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ [2011] L337/9.

43 Application No. 30696/09.

44 Paragraph 233, Judgment.

45 Ibid.

3, which prohibits the expulsion of an alien to a country where he or she runs a real risk of being subjected to torture or to an inhuman or degrading treatment or punishment.[46] Belgian authorities knew or ought to have known that he had had no guarantee that his asylum application would be seriously examined by the Greek authorities, and had the means of refusing to transfer him, but failed to exercise them, and this constituted a violation of Article 3 of the ECHR.[47]

According to Lavrysen (2011, p. 2), the judgment constituted "the end of mutual trust in the EU Asylum Law". It means that the transferring states may not just presume that other Member States comply with their international obligations, but need to ensure that the receiving states are meeting the EU and internationally agreed standards (Vosyliute, 2011, p.6).

The judgement in this case has paved the way for a multi-faceted approach to asylum law, one in which the relevant national authorities have to take into consideration a wide array of legal instruments and also rely on their interpretation by the relevant courts. Some commentators speculated that, had this case been brought before the CJEU, this court would have been even more robust about the non-compliance with the Charter of Fundamental Rights (Vosyliute, 2011, p. 10). The opportunity for the CJEU to rule on the matter presented itself shortly thereafter.

The joined cases *N.S. vs. Secretary of the State for the Home Department* and *M. E. and Others vs. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* were raised before the CJEU in a preliminary reference procedure before the ECtHR passed its judgment in *M.S.S.* case. Legal scholars expected the decision in these two cases to be affected by the Strasbourg case law, since propagation of separate human rights regimes for the Union and the Member States would create confusion as to the scope of the Member States' obligations and may provide them with a pretext for ignoring their international undertakings in the areas in which they have transferred powers to the Union (Butler, Schutter, 2009, p. 282). This assumption has proven to be correct.

The facts of both cases were very similar to that in the *M.S.S.* case – nationals of third countries had illegally entered the territory of EU through Greece, and had subsequently applied for asylum in the United Kingdom and Ireland. By applying the provisions of Article 10 of the Dublin II Regulation, both countries planned to transfer the asylum seekers back to Greece, and initiated the preliminary reference procedure with regards to appeals against such decisions brought by the applicants. In its judgment,the CJEU underlined that the entire body of the EU law applicable in the asylum cases needed to comply with the fundamental rights and principles recognized by the Charter of Fundamental Rights of the EU.[48] Even though the CEAS is built on the principle of mutual confidence, which is based on an assumption that all the participating states observe fundamental rights, this assumption may be rebutted where, in practice, there are major operational problems in a given state, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights.[49] The

46 Paragraph 340. See Cruz Varas and Others v. Sweden, Application No. 15576/89, Saadi v. Italy, Application No. 37201/06, T. I. v. The United Kingdom, Application no. 43844/98.

47 Paragraph 358.

48 Paragraph 76.

49 Paragraph 81, Paragraph 94.

Court directly linked the awareness of such systemic deficiencies to the information cited by the ECtHR i.e. reports of international organizations, the UNHCR and the European Commission. The judgment confirmed that the Member States were responsible for implementing the provisions of the EU asylum law to a suitable human rights standard and that failure to do so would be a breach of not only the EU law, but also of their obligations under the Geneva Convention and the ECHR.[50] The CJEU did not directly rule on the question whether the scope of protection conferred by the rights set out in Articles 18 (right to asylum) and 47 (right to effective remedy) of the Charter were wider than the protection conferred by Article 3 of the ECHR. As Costello (2012, p. 88) points out, the court did not examine whether the right to asylum was a free-standing right.

The decisions in these cases triggered the recasting of the Dublin II Regulation in order to reflect the Charter of Fundamental Rights and the ECHR.This presents a great achievement attributable to harmonized approaches taken by two courts. Namely, the Dublin III Regulation[51] was amended to include a new provision requiring that all persons subject to the Dublin system have the right to an effective remedy, which should cover both the examination of the issue of whether the Regulation is applicable in the given case as well the need to scrutinize the factual situation in the Member State to which the applicant is to be transferred.

2. THE FEDERAL REPUBLIC OF GERMANY VS. Y AND Z[52] ANDN. K. VS. FRANCE[53]

The decisions passed in these two cases will show that consistent approaches taken by the two supranational European courts occasionally may also have negative effects on further development of the European Union system of the asylum protection.

The case law of the CJEU was reasonably criticized for its restrictive approach to the interpretation of the notion of persecution,leading to a strong reliance on the ECHR and ECtHR case law, while ignoring the wording of Geneva Convention in that respect (Taylor, 2014, pp. 81-83). Such CJEU approach ignores the fact that the notion of persecution was directly transposed into the Qualification Directive from the Geneva Convention.

Although the CJEU has used the same approach ina number of cases,[54] the analysis will be limited to the CJEU judgment in *Germany vs. Y and Z* as thiswas its first case on the interpretation of the notion of persecution as laid down in the Qualification Directive. In addition, the ECtHR judgment in the case *N.K. vs. France* will be also examined because it shows that the ECtHR took the same line of reasoning in that respect.

The case of the Federal Republic of Germany vs. Y and Z was raised before the CJEU in a preliminary reference procedure by the German Federal Administrative Court. The German

50 Paragraph 75 of the Judgment.

51 Regulation (EU) No. 604/2013.

52 CJEU - C-71/11 and C-99/11 Germany v. Y and Z, Judgment of the Court (Grand Chamber) of 5 September 2012, http://curia.europa.eu/juris/liste.jsf?num=C-71/11, 29. May 2016.

53 European Court of Human Rights, N. K v. France, Application No. 7974/11, 2013.

54 See also CJEU, Case C-199/12 to C-201/12, Minister voor Immigratie en Asiel v. X (Case C-199/12) and Y (Case C-2000/12) and Z v. Minister voor Immigratie en Asiel (C-201/12), Judgment of the Court (Fourth Chamber) of 7 November 2013.

Federal Administrative Court had to adjudicate an appeal brought against the judgment of the first-instance court (*Bundesamt*) by two Pakistani citizens who claimed that their membership in Ahmadiyya religious community had forced them to leave Pakistan (Taylor, 2014, p. 81).

In order to clarify whether the threat of persecution for belonging to certain religious minorityfall within the ambit of the Qualification Directive, the German Federal Administrative Court asked*inter alia* the CJEU to clarify whether all restrictions of the freedom of religion, as outlined in Article 9 of the ECHR and Article 10 of the Charter of Fundamental Rights, amount to the persecution within the meaning of the Qualification Directive, or only those restrictions which affect the core of the right. The competent first-instance German court distinguished between private and public sphere of freedom of religion, holding that the right to manifest one's faith in private was covered by its private sphere and as such did not fall within the core area of the freedom of religion (Ippolito, 2013, p. 277). In response to the aforementioned question, the CJEU rightly concluded that all kind of acts which interfere with the right of freedom of religion are eligible to amount to persecution, regardless of whether the act affects the *forum internum* or *forum externum* of the right (Ippolito, 2013, p. 277, Gerstenberg, 2013, p. 232).

However, the CJEU in its further reasoning switched to a very restrictive approach which limited the concept of persecution set by the Qualification Directive in two important ways. It stated thatin order to constitute an act of persecution, an interference with the freedom of religion should be as serious as to be comparable to a violation of an EHCR non-derogable right listed in Article 15 of the ECHR, as well that it should produce a significant effect on the person.[55] Furthermore, the court also added to its conclusion that an act amounts to persecution where the subject, as a consequence of exercising his right to religious freedom, runs a real risk of *inter alia* being subject to torture, inhuman or degrading treatment or persecution (Velluti, 2014, p. 95).

This practice failed to take into account guidance from both the UNHCR and Human Rights Committee which lists persecution for reasons of religion as discrimination, including restrictions and limitations on religious belief, forced conversion, and forced compliance with religious practices.[56] Apparently, all these grounds do not belong to the list of non-derogable rights which is referred to in the aforementioned Article 15 of the ECHR. Furthermore, this restricted notion of persecution is not in line with the wording of the Qualification Directive sincethe directive defines persecution in much broader manner. In addition, the CJEU introduced a consequential test, which places emphasis on the concrete consequences resulting from the exercise of religious freedom rather than on a need to assess when interference with the enjoyment of the right becomes an act of persecution itself (Taylor, 2014, p. 83). By doing so, the CJEU actually gave a strong focus on the degree of sanctions as a marker of persecution, while skipping the assessment of the particular aspect of religious freedom that was being restricted.

The analysed CJEU ruling is very reminiscent of the ECtHR judgment in *N. K. vs. France*. The ECtHR judgment in this case came one year after the CJEU judgment in *Federal Republic of*

55 Paras. 57-58 of the Judgment.

56 See UN High Commission for Refugees (UNHCR), 'Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Art. 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees', HCR/GIP/04/06 (28 April 2004), http://www.refworld.org/docid/4090f9794.html, 11.08.2016.

Germany vs. Y and Z, for whichreason the CJEU in its judgment could neither refer to the ECtHR judgment, nor couldit be argued that it "borrowed" its approach from the ECtHR case law.

The *N. K. case* concerned an asylum seeker from Pakistan who lodged an asylum application in France. The facts of the case were to some extent similar to those found in *Germany vs. Y and Z*, as in both cases the applicationswerefiled by Pakistani nationals belonging to the Ahmadiyya religious communitywho were rejected by national authorities in spite of their allegations that they had been victims of persecution due to their religious beliefs. While in the case of *Germany vs. Y and Z* case the preliminary reference was submitted by the second-instance court, in the *N.K* case the applicant submitted the application to the ECtHR, after his claim had been refused by the French authorities.

The ECtHR held in this case that return of N.K. to his country of origin would expose him to a risk of ill-treatment in breach of Article 3 of the ECHR.[57] Whilst this finding is a logical conclusion when assessing Article 3 breaches under the ECHR, application of the same Article 3 yardstick by the CJEU for assessing persecution in the EU asylum claims seems to reflect a very narrow approach to the definition of persecution in comparison to the one contained in the Qualification Directive.

Apparently, the CJEU has chosen to apply an Article 3 ECHR threshold for assessing when a violation of the right to freedom of religion amounts to persecution in the Qualification Directive, whilst failing to recognize that persecution in international refugee law is not limited solely to Article 3 violations. The clear trend of the CJEU to follow exclusively the "isolated mindset" of the ECtHR which, as different from the former, has a task to ensure adequate interpretation and application of only one single instrument, is not beneficial to asylum protection in Europe. Thus harmonized judicial approaches of two courts in *Federal Republic of Germany vs.* Y *and* Z[58] *and N.K. vs. France* case sapparently constitute an illustrative evidence of a judicial practice which strongly contradictsmulti-faceted nature of the European asylum law.

3. CONCLUSION

The cases examined in this article have shown that the CJEU has not still taken a clear stand on the major adjudicative and interpretative questions that have arisen in the field of asylum law. Nevertheless, the EU regulatory framework has significantly developed in this area, in part owing to the jurisprudence of the ECtHR and the CJEU. It establishes that the EU secondary legislation in asylum matters, as well as the interpretation given to it by the CJEU must comply with what can be denominated as the "three pillars" of the EU asylum system, consisting of the Geneva Convention, the ECHR and the Charter of Fundamental Rights of the EU. The CJEU should treat each of these pillars as "the first among the equals" in order to achieve a well-balanced, comprehensive and effective asylum system in Europe.

57 ECtHR Decision in *N. K. v. France*, Application No.7974/11 [Article 3], 19 December 2013, *http://www.asylumlawdatabase.eu/en/content/ecthr-decision-nk-v-france-application-no797411-article-3-19-december-2013*. 15.07.2016.

58 CJEU - C-71/11 and C-99/11 Germany v. Y and Z, Judgment of the Court (Grand Chamber) of 5 September 2012, http://curia.europa.eu/juris/liste.jsf?num=C-71/11, 29. May 2016.

The main mandate of the CJEU is not to achieve a consistent and harmonized approach with the ECtHR rulings, although this approach thus far has contributed to the development of the CEAS in cases such as *M.S.S.* and joined cases *N.S.* and *M.E.*

On the opposite, the judicial approach of the CJEU must take into account the plurality of sources which are incorporated in the existing EU's asylum framework. Without giving equal attention to all "pillars" of the European asylum law, the CJEU runs the risk of failing to take into account the specificities of refugee law and to disconnect human rights from the refugee law, as it already happened in the case of *theFederal Republic of Germany vs. Y and Z*.

The CJEU is in much better position regarding the competences pertaining to the CEAS issues in comparison to the ECtHR, as the latter applies only the ECHR, which does not include the right to asylum. Therefore, the CJEU should take lead on the given issues in future in order to contribute to the further development of CEAS.Without a balanced interpretation and implementation of the entire body of the asylum law, the CJEU cannot build its credibility nor maintain its image of the "guardian of the EU law".

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