Would the European Union Benefit from a Centralised Asylum Court System? A Critical Study Considering the Current Legal Situation and with an Eye to the Future.

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ABSTRACT

This present study sets out to consider whether the European Union would benefit from a centralised asylum court system, particularly in the final instance or appeal stage. The Common European Asylum System as it now is permits a lot of divergences in asylum determination both at the initial sages and when cases come to appeal. This study will argue that this is because of both the lack of harmonisation in regard to asylum procedures and status determination on the one hand and differences in the judicial approach of Member States on the other. The study will put forward the premise that by harmonising the judicial process, an Asylum Seeker would have their claim scrutinised under the same procedure and approach to the evidence throughout the European Union. While it is acknowledged that this would not lead to an end of discrepancies (one always has to allow for the human factor) it will at least make sure that the same process is applied uniformly.

The European Union legal order, especially concerning the Court of Justice of the European Union is extremely rigid however and it is not an easy task to slot ina new Court system into that Legal Order. To do this the study looks at other instances where there has been an attempt to set up common specialist courts within the EU legal order and examines whether the processes followed inthese attempts can be adapted to accommodate such a court system in the area of Asylum.

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INTRODUCTION

The aim of this thesis is to consider two research questions. The first asks whether the European Union would benefit from a centralised appeal court system and secondly would such a court be dependent on the full harmonisation of asylum law within the European Union? These questions are asked as the development of European Union asylum policy has not been a smooth process and there are both differences of judicial approach and application of the law among the Member States despite the European Union spending over 20 years endeavouring to create commonality in asylum law and policy. This is because both the assessment of refugee (and subsidiary protection) status and asylum procedures are governed by Directives.

The reasons why this is the case will be discussed more fully in the first chapter but essentially it means that the Directives set a common standard which the Member State to which the Member States must adhere. What it also means is that these Member States in so far as such changes are compatible with the provisions of these Directives.

The Treaty basis for European Union Asylum Policy is contained in Article 78 TFEU which states that the European Union shall develop a common policy on asylum, subsidiary protection and temporary protection and that these measures will include a uniform asylum status for third country nationals valid throughout the Union, a uniform subsidiary protection status for the same, a common temporary protection system in the event of massive inflow, common procedures for the granting and withdrawing of asylum and subsidiary protection status, criteria and mechanisms for determining which Member State is responsible for considering the asylum/subsidiary/ temporary protection claim, standards concerning the conditions for reception of applicants and finally partnership with third countries for managing the inflows of people applying for asylum/subsidiary protection status.

What the above means in simple terms is that the European Union has committed itself to the formation of a fully integrated asylum system with a common procedure for determining refugee/

subsidiary protection status throughout the European Union and crucially single European Union asylum status rather than such as status being confined to the Member State which grants it. As will be seen below this ambitious agenda was set down by the European Council over 20 years ago. However the legislation in its present form does not come anywhere near the standard contained in Article 78 TFEU.

The reasons why this is the case are diverse and are made up of political policy issues, legal issues and practical issues and the inability for the Member States to agree in the intervening years despite stating in the conclusions to the Council meeting at Tampere in 1999 the intent to create a common European asylum system with both a common procedure and a common asylum status.[1]

This study will have to take into account the attempts to forge a common European Asylum system in the years following the Tampere conclusions but it will seek to add to the discussion by considering how decision making among Member States with diverse legal traditions can contribute diverging recognition rates for asylum seekers within the European Union and how the possibility of a central appeal court system against last instance decisions from the Member State immigration authorities could reduce this together with providing equal treatment of asylum seekers at the appeal level regardless of where they make their asylum claim in the European Union.
To provide context and background the study will examine the development process of European Union asylum legislation and the difficulties that it has faced. Perhaps the greatest difficulty has been the political pressure from the individual Member States in the European Council who have battled to retain as much control of asylum policy as they could at the national level.

This study acknowledges that there is a European Union asylum policy as legislation has been put into place. It will however argue that this legislation is still a long way off the aims that the European Union has now enshrined in in the Treaty of Lisbon. The development of European Union asylum policy is still

[1] Tampere Council Presidency Conclusions: 15th & 16th October 1999 paragraphs 14-15 https://www.europarl.europa.eu/summits/tam_en.htm (accessed 3.06.2022)

ongoing with the main legislation having already been recast once with further major revision planned with the latest proposals for this contained in a collection of documented proposals referred to as the Asylum Pact which was launched by the Commission in September 2020. In order to set the scene for the study there follows a short overview of the background to the development of asylum policy and the challenges it has faced in the course of this development.

SOME BACKGROUND

The start of the process towards the development of a Common European Asylum System began with the Treaty of Maastricht as part of its third pillar encompassing justice and home affairs law which acknowledged that the Member States needed to cooperate on aspects of immigration an asylum which it regarded as a matter of "common interest."[2] Prior to this the Schengen Agreement had been agreed in 1985 with the Dublin Convention relating to the Member State responsible for determining and asylum claim being signed on the 15th June 1990 and coming into force on the 1st September 1997. The Single European Act of 1986, which contained the remit to eliminate the final barriers to the internal market, can also be said to have provided and impetus for the creation of a Common European Asylum Policy. This is because one of the "four freedoms" on which the Internal Market is based is that concerning the free movement of people. As a result of this the Member States agreed that "in order to protect the free movement of persons the Member States shall cooperate without prejudice to the powers of the Community, in particular as regards entry, movement and residence of third country nationals."[3] At the same time the Member States wanted to retain as much control of their own immigration and asylum policy as possible as this was considered to be a matter of national sovereignty and security. [4]

Differences in approach to how far this policy needed to be integrated between the Member States

[2] Treaty on European Union (92/C 191/01) 29.7.92 Title VI Article K2

[3] [3] 'Political Declaration by the Governments of the Member States on the Free Movement of Persons: Single European Act 1986' Official Journal of the European Communities L 169 Vol 30 29th June 1987 p27

[4] A Niemann: 'The Dynamics of EU Migration Policy: From Maastricht to Lisbon' in *Constructing a Policy Making State: Policy Dynamics in the EU* Jeremy Richardson ed (Oxford University Press 2012)

made themselves manifest from the outset with the Benelux countries favouring "full communitarisation of the Justice and Home affairs domain." France and Germany were in favour of creating a comprehensive new legal base for Justice and Home Affairs but saw full communitarisation as beyond Immigration and Asylum Policy." The United Kingdom, Ireland, Denmark and Greece argued strongly for a minimalist approach.[5]

This is termed in the political science literature as the intergovernmental approach. This principle essentially means that the Member States are the drivers of the pace of integration via a process of bargaining which is based on their own national interests with policy in this regard being "the domain of the Member States acting through the Justice and Home Affairs Council and the K.4 Committee (though the latter did have a Commission member)[6] The Palma Document, a report to the European Council by the Coordinators group in 1989 stating that

> "a set of legal, administrative and technical instruments should be established, as criteria would need to be harmonised on treatment of non- Community citizens."[7]

The document states that asylum policy is one of the areas where such intervention would be needed focusing on the determination of the Member State responsible for the application (later to be set down in the Dublin Regulation), a priority system for dealing with applications which are considered manifestly unfounded and policies dealing with the movement of applicants between the Member States.

The first steps towards the harmonisation of European Asylum Law came with the Treaty of

[5] J.Monar 'Justice and Home Affairs: The Treaty of Maastricht as a Decisive Intergovernmental Gate Opener'(2012) 34 (7) Journal of European Integration p717 -734 at 721

[6] 'Creating an Area of Freedom Security and Justice: From Intergovernmental Cooperation to a Common Asylum and Migration Policy: UNHCR Toolbox 1 The Fundamentals Part 2 November 2003' p92 https://www.unhcr.org/uk/406a8aa11.pdf (accessed 10.10.2021)

[7] "The Palma Document": Free Movement of Persons. A Report to the European Council by the Regulators Group (Madrid June 1989 Section III B https://docentes.fd.unl.pt/docentes_docs/ma/np_MA_25758.pdf (accessed 20.7.2022)

Amsterdam. This consolidated the Schengen Acquis into the European Union Treaties and the Justice and Home Affairs pillar was moved to the first or community pillar. This gave shared initiative between the commission and the Member States regarding the initiative in putting forward new legislative instruments with the Council retaining sole decision making powers in relation to immigration and asylum.

The Treaty of Amsterdam came into force on the first of May 1999 and the Council met at Tampere Finland in the October of that year where, as mentioned they presented an ambitious agenda for the development of a fully fledged Common European Asylum system. This ambition is now contained in article 78 TFEU and as such is legally binding.

The first round of European Union Asylum Legislation was complete by 2005 with the Directive dealing with Asylum procedures being subject to particularly lengthy and difficult negotiations due to the fact that individual Member States wanted to retain elements of their own asylum procedural process. The result of these negotiations resulted in an Asylum Procedures Directive and Qualification Directive (status determination) which set down minimum standards and which gave Member States considerable flexibility to implement higher standards if they desired. These initial Directives were the subject of criticism by both the UNHCR and civil society institutions due to the potential for divergence the flexibility of the provisions allowed. Cathryn Costello in a UNHCR paper comments on the first Asylum Procedures Directive that:

> "It reflects many controversial domestic practices and appears to permit widespread acceleration and differentiation of procedures, conflating notions of admissibility and unfoundedness"[8]

She goes on to say that:

[8] C.Costello: "The European Asylum Procedures Directive in Legal Context" UNHCR New Issues In Refugee Research Research Paper No 134 November 2006 https://www.refworld.org/pdfid/4ff14e932.pdf

"The highly qualified and differentiated procedural guarantees…demonstrate a reluctance to commit to unequivocal procedural standards or maintain access to asylum within the EU."[9]

Vincent Chatail in his introduction to a collection of essays on the introduction of the second phase of policy documents that were to follow lambasts the system stating that:

"… minimum standards have become double standards diverging from one State to another. The huge disparities between the Member States as to the rate of refugee status recognition Provide the most concrete manifestation of the failure to establish a truly common asylum System."[10]

Further important Council conclusions officially affirmed the desire of the Council for a fully harmonised Common European Asylum System despite the difficult gestation of the first suite of asylum legislation especially regarding procedures. The Hague Convention of 2005 declared that "the aims of the Common European Asylum System in its second phase will be the establishment of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection." The Stockholm Council Conclusions of 2009 state that the objective to create a Common European Asylum system in 2012 remains and people in need of protection must be ensured access to legally safe and efficient asylum procedures." The Lisbon Treaty was to be ratified a month after the Council released its conclusions in October 2012. However the ambition for the creation of a Common European Asylum system was not met by 2012 and as will be discussed further throughout the course of this study the aims set down in Article 78 TFEU have still not been achieved

The years 2011 to 2013 saw the rolling out of a 'recast' set of European Union asylum legislation. It is this legislation that is in force at the time of writing. Despite the ambitions reiterated in the Hague and

[9] Ibid 31

[10] V.Chetail 'The Common European Asylum System: Bric a Brac or a System? In *Reforming the Common European Asylum System: The New European Refugee Law* V.Chetail et al (ed) ch1 p16 (Brill Nijhoff 2016)

Stockholm Conclusions, this legislation does not come close to forming a Common European Asylum System neither is there a uniform asylum status. The negotiations again were difficult and have resulted in a light revision of the previous legislation that has been criticised by both academics and civil society organisations alike. Vincent Chetail and Celine Bauloz in a European University Institute research paper have criticised the current system for continuing to be governed by Directives (with the exception of the Dublin Regulation dealing with allocation with the processing of claims and Regulations on Eurodac and the EU Asylum Agency which leave considerable discretion to the Member States. Although minimum standards have now become common standards there is still the ability for Member States to implement higher standards than those contained in a Directive should they so wish again subject to compatibility with the provisions of Directives. A Directive as a piece of European Union legislation is "binding as to the results to be achieved" and takes effect by having its provisions set down in Member State legislation where there is the possibility of misinterpretation either by error or by design which, as will be seen, has led to infringement proceedings and litigation with Member States. Chetail and Bauloz argue that:

> "The recurrent fear of abuse has undermined harmonisation because of the adoption of vague and general standards has been aimed, above all, at ensuring a substantial amount of discretion for the Member States rather than elaborating a truly common system of asylum."[11]

Chetail and Bauloz put forward two approaches as the way forward in their paper: what they call the minimalist and the maximalist positions. The first, they argue, would involve improving the system as it now stands. In term of asylum procedures they argue that accelerated claims for asylum seekers whose claims are manifestly unfounded should be the exception rather than the rule, ensuring a full right to personal interviews and free judicial assistance in the first administrative instance, and suspensive effect of return decisions pending appeals, In terms of both the Qualification Directive and the

[11] V. Chetail & C Bauloz: 'The European Union and the Challenges of Forced Migration: from Economic Crisis to Protection Crisis p29 European University Institute Research Report Background Paper EU-US Immigration Systems July 2011 https://cadmus.eui.eu/handle/1814/17837?show=full (accessed 4.08.2022).

Reception Conditions Directive they state that these Directives' key provisions should be put in more defined terms "with less discretion given to the Member States in their implementation."[12] Certain features mentioned here in regard to legal aid and suspensive effect have been included in the recast Asylum Procedures Directive. However their main sympathy is weighted towards the maximalist approach where they state that this should be made of three complementary components:

" The creation of a two-steps communitarian procedure of asylum exclusively managed by the EU as the best guarantee for the equitable and prompt treatment of all asylum applications and for securing true harmonization.

The case of *Gnandi* which was handed down after the above article where the CJEU stated that a return decision may be adopted together with or immediately after the rejection of an asylum application but return decision must be given suspensive effect while the appeal is ongoing. The CJEU stated that following the rejection of an asylum application the stay of the applicant becomes classified as an illegal stayer but is nevertheless authorised to remain. The same would be the case if the Member State postponed the return of the applicant due to the non refoulement principle which is dealt with in Articles 5 & 9 of the Return Directive. The CJEU made clear that such a person who has authorisation to stay is entitled to rights that are due to them under the Reception Conditions Directive. [13]

The Union should create and administrative authority to undertake examinations of all asylum claims within the EU.

Appeals to decisions should be addressed to a specialized jurisdiction created especially for the

[12] P36
[13] C-181/16 *Sadikou Gnandi v Etat Belge* ECLI:EU:C:2018:465 19th June 2018 para 63ff

occasion."[14]

This last point is what this study aims to explore in greater depth. As will be seen in the following chapters there has been ongoing attempts to reform the European Union asylum legislation. The European Asylum Support Office has been transformed into an Agency which has wider supervisory powers and both the Qualification Directive and Procedures Directive are proposed to be replaced with Regulations which are directly applicable and binding in their entirety on the Member States without the need for them to be implemented into domestic legislation first.

This process has been ongoing since 2015 where the European Commission published a paper called "A European Agenda on Migration" setting out policy proposals following the strain that mass migration from those fleeing the middle east following the Arab Spring and the civil war in Syria placed on the borders of the European Union. This document again sets down the aim of "a single asylum status valid throughout the union" together with "a longer term reflection towards establishing as single asylum decision making process will also be part of the debate aiming to guarantee equal treatment of asylum seekers throughout Europe."[15]

This third phase of the reform of the Common European Asylum System is still in process with only the setting up of the European Union Agency for Asylum being seen through to completion so far. The legislative programme underwent a reset in the Autumn of 2020 when the European Commission launched its European Union Asylum Pact which revised the previous draft legislation which was again struggling to gain consensus within the European Institutions. This will be discussed further in chapter two.

[14] Above p37

[15] Communication from the Commission to the European Parliament, The Council, The European Social Committee and the Committee of the Regions: A European Agenda on Migration p17 COM (2015) 240 Final https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0240&from=EN

The main thrust of this study is to consider whether the European Union would benefit from centralised asylum appeal court (or in the words of Chetail and Bauloz, a specialised jurisdiction) and secondly whether this could possibly operate outside a fully harmonised Common European Asylum System which, though a legal requirement contained in the Treaties, looks a remote prospect for the foreseeable future. This issue is important as the different Member States have different legal traditions in terms of how court proceedings and approaches to evidence operate. The question that will be asked here is would the creation a centralised procedure at appeal help to even out disparities in recognition in a European Union Legislative Framework which is not completely harmonised and dependent on the Member States initially processing asylum applications. Of course with the maximalist approach of the European Union taking over the asylum seeker applications from the Member States it would be essential for there to be a centralised appeal system as well. What this study proposes is to analyse the possibilities that Chetail and Bauloz moot in more depth.

METHODOLOGY

This study is based around doctrinal desk-based research and will be drawing from primary materials in the form of case law (from both the Court of Justice of the European Union, the European Court of Human rights, Member State and Specialist Courts as necessary). European Union legislation together with policy and advisory papers and the official European Union statistics relating to asylum and provided by Eurostat will also be drawn upon. Secondary sources include academic literature together with commentaries and advisory papers from the UNHCR and other NGOs as necessary. The latter is necessary because NGOs and Human Rights organisations have provided commentary and often critique throughout the development period of European Union asylum legislation. An example of this can be seen for example in the paper by Cathryn Costello cited above.

The study will involve firstly a critical overview of the Common European Asylum System as it now is and attempt to provide some detailed analysis of how divergences and different interpretations have

the possibility to develop from different interpretations of the current legislation, political pushback and also, in terms of the appeal stage by different approaches to evidence and different legal cultures and attitudes using some examples from selected Member States. This will endeavour to show that a centralised European Union Asylum Court could possibly help to add some stability and complement a system which is moving towards greater harmonisation with the replacement of the Qualification and Procedures Directives for Regulations.

The setting up of a European Union asylum appeals court outside of the fully integrated model or the larger vision of Chetail and Bauloz presents some problems however. The European Union has a very tightly defined legal order. This is set down in Article 267 TFEU which states that Member State courts can, and Courts of Last Instance must, make a preliminary reference to the Court of Justice of the European Union as the final authority on EU law when there is any uncertainty in the interpretation of a provision in European Union Law. As will be seen in chapter 3 of this study the criteria a "Court of a Member State" (and hence able to make such a reference) has been defined by the CJEU. They are that the body is:

> "…established on a permanent basis, its members offer guarantees of full independence, Its jurisdiction is compulsory, it applies rules of law and a procedure comparable to that followed in the ordinary courts which meets the requirement that its procedure should be inter partes."[16]

The Court of Justice of the European Union jealously guards its position as the sole interpreter of European Union law. What this has meant is that the creation of specialist courts and tribunals have encountered trouble when the Court of Justice of the European Union has ruled that they may challenge its pre-eminence in this area.

[16] C-196/09 *Paul Miles & Others v European Schools* ECLI:EU:C:2011:388 14th June 2011 para

This has led to issues in the past that have that have affected the setting up of specialist Courts and Tribunals. It has also created difficulties for the European Union meeting its Lisbon Treaty pledge to accede to the European Convention on Human Rights. This is due to the Court of Justice expressing fears in a formal opinion that the ECtHR could encroach on its exclusive mandate to interpret European Union Law.[17] This again will be dealt with in detail in chapter 3. For the purposes of this study two court system ideas in particular will be used for comparative purposes to show the attempts to integrate a specialist court system into the European Union Legal Order.

The first of these will be the attempts to form a Unified Patent Court in the European Union (still ongoing) and secondly the Benelux Court of Justice: a last instance court dealing with matters arising under shared legislation among the Benelux Union. Although these structures deal with very different legal areas to immigration and asylum, they represent in the first case, an ongoing attempt to create a specialist court system (and one which has been fraught with difficulties) whilst the second has been held up by the Court of Justice of the European Union as model when it was adjudicating upon the legality of the first plans for a Unified Patent Court. As will be seen in further detail in chapter 3 the architects of the Unified Patent Court plan had to revise their plans for the UPC significantly taking into account of the Opinion handed down by the Court of Justice of the European Union.[18]

Chapter summaries.

Chapter one will examine in detail the attempts at overhauling the European Union Asylum System up to the present day along with the current plans contained in the European Pact on Migration legislative proposals that have been briefly set out above. This chapter will serve as the first attempt to see if it is possible to "square the circle." It will examine the potential models for reducing the discrepancies which currently exist by both critically examining other areas of harmonization of policy within the European Union and using these as a comparative model, to see if the methods of oversight which they employ could be used in the harmonization of European Union Asylum Law, particularly now that the

[17] Opinion 2/13:Accession to the ECHR ECLI:EU:C:2014:2454 14th December 2014

[18] Opinion 01/09 Creation of a European Patent Litigation System-European and Community Patent Court-Compatibility of Draft Agreement with the Treaties ECLI:EU:C:2011:123 8TH March 2011

European Union Agency for Asylum is now operational. This new agency has greater powers to overview Member State asylum procedures and over time its auditing of these systems and its feedback could help to align Member State procedures closer together even with the legal situation as it now is if the good will is there from the Member States to abide by its reporting.

This will lead into the consideration of whether these at the appeal stage of any asylum application in a centralised European Union asylum appeal Court could fit into the plans for the Common European Asylum System which are currently being considered.

In terms of comparative models, the chapter will consider the drive to a European Patent with Unitary Effect and its accompanying European Patent Court System. While patent policy seems far removed from that of asylum policy, the rationale behind the development of the European Patent and a Common European Asylum System are similar with a drive for single rules and application across the Member States to counter discrepancies in application. The aim to create a unified patent system in the EU has been longstanding in order to avoid the expense of registering a patent in every Member State

To help enforcement of this unitary patent plans have been put in place to create a unified patent court which will deal with litigation regarding the patents in the post grant phase. As will be seen the plans for implementing this court have not been smooth and are still to be implemented. Therefore though there is a difference in subject matter in European Patents and Asylum, the ultimate aim is for common systems. The Patent Court aims to address the coherent implementation of the unitary patent throughout the Member States and what this study aims to examine is could some similar unifying of the judicial procedure work in the realm of asylum law.

One of the major problems that faced the plans for the Unified Patent Court has been the rejection of the first plans for the court by the CJEU and the struggle to fit the system into the European Union legal order. One of the most important reasons for the CJEU reaching the negative decision did was due to the fact that it considered that there was the possibility of the Courts of the Member States not complying with their obligation to refer matters to the CJEU as set down under Article 267 of the Treaty.

Chapter two of this study will examine how divergences manifest themselves in the different Member States asylum processes. It will examine the reasons for this by looking at the approach of individual Member States and considering their differences. The chapter will also examine the reluctance of Member States to surrender sovereign power to grant asylum or subsidiary protection.

The chapter will then go on to consider the differences in judicial approach between Member States. These differences have led to scholars such as Jurgen Bast commenting that refugees have different chances of success depending on where they claim asylum.[19] It is this which leads to secondary movements where refugees move on to other Member States where they perceive they will get more favourable treatment in their claim for protection. This chapter sets the scene for the rest of the study as it outlines the problem that the study aims to address.

Chapter 3 takes a look at the challenges that are faced when trying to introduce a new court system into the European Union Legal Order, particularly in the light of the Patent Court but also examining other forms of adjudication such as regarding international trade agreements such as CETA and Bilateral Trade Agreements where necessary.

One can again ask the question of how this is relevant but this chapter is important as it considers the legal boundaries that any type of future Asylum Court would have to operate in. The CJEU has been very tough in defending its position under the Treaties as the ultimate arbiter of European Union Law and has not been afraid to challenge even the influence of the European Court of Human Rights in an Opinion negating the EU accession to the European Convention on Human Rights. This chapter therefore sets out the legal rules that any future court must follow by illustrating the pitfalls that attempts at creating specialist courts have fallen into in the past.

Having done the above chapter four will look at models of centralized adjudication that have been found acceptable to the CJEU and how a Common European Asylum Court might be modelled structured. These revolve around three basic models. The first is a softer system such as the system of European Trade mark Courts. A system where a designated national court of a Member State is

[19] See J.Bast 'Deepening Supranational Integration: Interstate Solidarity in EU Migration Law' European Public Law (2016) no 2 289-304 at p 298

assigned a status where it can rule on a European Trade mark Issue and this decision is binding throughout the European Union, the second option and one that the CJEU referred to in its Opinion on the first model for a Unified Patent Court is that of the Benelux Court of Justice.

This Court as will be seen was set up to give preliminary rulings on the shared laws of the Benelux Economic Union though as will be seen recent revision have seen it given powers to oversee shared copyright and trade mark law between the Benelux Countries. It must of course refer to the CJEU on any point of EU law for interpretation under Article 267 TFEU.

The last main model is of course the Unified Patent Court. Since the CJEU's 2009 Opinion the Unified Patent Court has attempted to use the Benelux Court of Justice as a model for itself. Signatories of the Unified Patent Court Convention can now only be Member States of the European Union and the policy makers behind the plans for the Unified Patent Court have referred to the Benelux Court of Justice as a model. As will be seen the two have marked differences. However what this chapter aims to analyse is whether the approach and methodology behind these three models of centralized adjudication could be applied to the field of asylum adjudication in the European Union or whether elements of them could be adapted to create a model for centralized asylum adjudication within the European Union

CHAPTER ONE

THE POLITICAL BACKGROUND OF THE COMMON EUROPEAN ASYLUM SYSTEM

Although this study is legal and not political, when looking at the development of European Union Law, and its negotiations the political ramifications of getting 27 Member States with differing legal approaches and political leanings have to be considered. The purpose of this study is to consider the possibility of further harmonisation of judicial decision making in the Common European Asylum system in the form of a European Union asylum court. In order to consider the viability of such a project it is useful to consider some of the political challenges such a court could face and those challenges that further harmonisation of the Common European Asylum System do face.

The closer integration of policy towards the centre of the European Union or what is known as neofunctionalism a controversial theoretical framework. A simple overview of this is that focuses on the role of supranational actors in the European Union such as interest groups, the workings of the Commission and political parties. The concept has its origins in a book by Ernest Haas called the *Uniting of Europe:Political, Social and Economic Forces 1950-1957:*

> "Political integration is the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities towards a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states. The end result of a process of political integration is a new political community superimposed the existing ones.[22]

[22] *The Uniting of Europe:Political, Social and Economic Forces 1950-1957* E.B Haas (Stanford University Press 1958) ch 1 p16

Neofunctionalism has also been described as an analysis of the process of integration without a definite focus on the end result. The key concept of this doctrine is that of spillover which will be explained further below.[23] It has its critics not just in the academic literature but also among some Member States who prefer to negotiate on the basis of the interests of their own sovereignty.

This tension between the pull of the interests of the individual Member States and the drive for further integration in relation to immigration and Asylum now set down in the Treaty of Lisbon can explain the long and fragmented process in the development of what is known as the Common European Asylum System. What follows below is a brief overview of the political developments of immigration and asylum Policy from Maastricht through to the current Treaty of Lisbon.

As has been mentioned in the introduction of the plans for the creation of the Common European Asylum System were first set down at the Tampere European Council shortly after the Treaty of Amsterdam was ratified on the 1st May 1999.

The aims put forward were very ambitious and the Common European Asylum System having been through one overhaul and currently undergoing a second is still nowhere near the aims set down first at Tampere in 2000 and which now have legally binding status through Article 78 of the TFEU as amended by the Lisbon Treaty.

Following this the negotiation of these policy areas there is the tension between the Member States endeavouring to retain as much of their own power to legislate against the drive to greater harmonisation. Looking at analysis this can move from one policy area to another due to the knock on effects of that policy on another. This is referred to by proponents of the neo-functionalist or supranational advocates as spillover.

The definition of spillover in simple terms is that elements of European Union Law which have beenharmonized and governed on a supranational level will lead to effects in areas which are

[23] C Stroby-Jensen: "Neofunctionalism" in *European Union Politics* M. Chini et al ch 4 p82 (Oxford University Press 7th Edition 2022)

not harmonised which ultimately leads to the need for them in turn to be harmonised. An example of this study would be the law surrounding the free movement of persons and the Schengen system ascan be seen in the quote below from Turnbull and Sandholz:

"Furthermore the Single Market and Schengen provoked policy makers and segments of the public to link issues that had previously been unconnected. The removal of border controls within the European Community, would, in the view of many, make it easier for illegal immigrants and Criminals to move from country to country and harder for public authorities to apprehend them."[24]

This therefore led on to the development of border policy and the following development of the border agency. It is a theory that where one area has been harmonised then others will have to be harmonised to make the first policy effective such as free movement law ostensibly allowing a doctor or nurse to seek employment in another European Union State but being stymied due to differing laws relating to qualification in different Member States. This would lead to a spillover policy from the area of health into that of education by the necessity of harmonizing a common standard of recognition of education requirements to allow the practical implementation of the first policy. This is referred to as functional spillover.[25]

The need arises because with the abolishing of internal borders came the pressing need to protect the external borders of the European Union from unauthorised migrants getting into the Schengen zone and then moving freely between the Member States. There was a concern in the enlargement of the EU in 2004 that many of the new Member States led to the creation of FRONTEX through

[24] P.Turnbull & W. Sandholtz: ' Policing and Immigration: The Creation of New Policy Spaces' in *The Institutionalization of Europe* A: Stone-Sweet et al Ed (Oxfor
d University Press 2001) ch 10 p199

[25] C.S Jensen: 'Neofunctionalist Theories and the Development of European Social and Labour Market Policy" Journal of Common Market Studies [2005] 38 (1) p 72-91

Regulation (EC) 2007/2004 which in Article 2 states that the purpose of the agency was "to co-ordinate operational cooperation to assist Member States in training, technical equipment and joint return operations, to follow up on technical evaluation and to conduct risk analysis."[26]

This organisation was amended three years later by a Regulation which created Rapid Border Intervention Teams (RABITS) which consisted of "multinational teams of border guards that can be deployed at short notice to support the technical and operational capacities of a State facing a crisis at its borders."[27] Frontex faced a further overhaul to become the European Border and Coast Guard Agency by Regulation EU 2019/1896.

BEGINNINGS

The first step towards a European Union asylum policy was brought about by the Maastricht Treaty as part of the Third Pillar encompassing Justice and Home Affairs law. The Member States accepted the need at the time for the need to cooperate on aspects of immigration and Aylum. Prior to this came the Schengen Agreement which was agreed in 1985 along with the Dublin Convention relating to the Member State responsible for processing an asylum claim which followed on the 15th June 1990. One of the "four freedoms" that make up the internal market was the free movement of people. As result of this the Member States agreed that "in order to protect the free movement of persons the Member States shall cooperate without prejudice to the powers of the Community, in particular as regards entry, movement and residence of Third Country Nationals." [28]

[26] A. Niemann & J.Speyer 'A Neofunctionalist Perspective on the European Refugee Crisis: The Case of the European Border and Coast Guard' 2018 Journal of Common Market Studies 56 (1) 23-43 at p26
[27] Regulation (EC) 863/2007 of the European parliament and of the Council of 11th July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers.
[28] 'Political Declaration by the Governments of the Member States on the Free Movement of Persons: Single European Act 1986' Official Journal of the European Communities L 169 Vol 30 29th June 1987 p27

At the same time however the Member States wanted to retain control of their own immigration and asylum policy as much as possible as this was considered by them to be a matter of national sovereignty and security. Under the Maastricht Treaty, the Member States agreed to work together in this area of policy but in an article written by a Commission Member who was present at the initial negotiations of the first round of asylum legislation, it is clear that Member States also wanted to keep key policies of their own national immigration and asylum systems for example:

> "…the drafting of an EC legislative instrument on 'minimum standards for granting refugee status' was perceived in several capitals as an exercise which could not amount to giving up tried and tested effective restrictive practices. Member States were not willing to trade known national certainties for unknown policy tools in the name of a vague ideal of harmonisation."[29]

Differences in approach to how far this policy need to be integrated between the Member States made themselves manifest from the outset with the Benelux countries favouring "full communitarisation of the Justice and Home affairs domain." France and Germany were in favour of creating a comprehensive new legal base for Justice and Home Affairs but saw full communitarisation as beyond immigration and asylum policy." The United Kingdom, Ireland, Denmark and Greece argued strongly for a minimalist approach.[30]

This is termed in the political science literature as the intergovernmental approach. This principle essentially means that the Member States are the drivers of the pace of integration via a process of bargaining which is based on their own national interests with policy in this regard being "the

[29] D. Ackers: 'The Negotiations on the Asylum Procedures Directive' (2005) (7) European Journal of Migration and Law 1-33 at p2

[30] J.Monar 'Justice and Home Affairs: The Treaty of Maastricht as a Decisive Intergovernmental Gate Opener'(2012) 34 (7) Journal of European Integration p717 -734 at 721

domain of the Member States acting through the Justice and Home Affairs Council and the K.4 Committee (though the latter did have a Commission member)[31]

The literature in this area paints a picture of international politics as "the interaction of self-states in an anarchic environment", an environment where "no global authority is capable of maintaining order." What this leads to is such States fighting as hard as they can to maintain their own interests while having to concede that negotiation and compromise is essential in some areas. Those who advocate this intergovernmental (also termed neo realist) approach accept that international institutions are necessary to reduce the level of anarchy in the state system and see the European Union "as an example of this kind of institution albeit with within a highly institutionalised setting."[32]

The Amsterdam Treaty also allowed the Council, the Commission or any Member State to refer matters relating to Title IIIa of the Treaty to the Court of Justice of the European Union for interpretation although the Treaty stipulated that such interpretations were not to be applied to cases which were *res judicata* which have already been litigated and settled.[33]

In providing an overview of the negotiations to the Treaty of Amsterdam, Moravcsik and Nicolaides show the differing viewpoints regarding immigration and asylum at this early stage in the foundations of common European Union immigration and asylum policy with Germany "the most adamant promotor EU involvement" with "governments with stronger control of their borders such Britain and Ireland most strongly opposed to greater supranational involvement."[34]

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[31] 'Creating an Area of Freedom Security and Justice: From Intergovernmental Cooperation to a Common Asylum and Migration Policy: UNHCR Toolbox 1 The Fundamentals Part 2 November 2003' p92 https://www.unhcr.org/uk/406a8aa11.pdf (accessed 10.10.2021)

[32] M. Cini: 'Intergovernmentalism' in *European Union Politics* M. Cini & N. Perez-Solorzao-Borragan (eds) (Oxford University Press 7th ed 2022) ch 5 p68

[33] Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and Certain Related Acts OJ C 340 10.11.1997 p1-144 Art 7

[34] 'Explaining the Treaty of Amsterdam: Interests, Influence, Institutions' A Moravscik & K Nicolaides' Journal of Common Market Studies Vol 37 No 1 pp59-85 at p62

Indeed Germany had always had the right to asylum embedded in its Constitution and had a very generous asylum system.[35] By the 1990s the numbers claiming asylum in Germany were high and it became a political issue which caused considerable conflict between and even the various political parties in Germany at the time.[36]

This meant that the two thirds majority that was needed in the Bundestag and Bundesrat to change the Constitution was in effect impossible. Therefore Chancellor Helmut Kohl at the time looked to have the issue legislated at a European Union level which, due to the supremacy and direct effect of European Union law would be binding on Germany over national law.[37]

On the other hand there was the situation involving Britain, Ireland and Denmark which had negotiated opt outs in relation to Justice and Home Affairs issues in this Treaty with Denmark securing an opt out of all rules saving that relating to the implementation of the Schengen Agreement, the Dublin Regulation and Eurodac Regulation.[38] The United Kingdom ended up choosing to opt out of the second stage re-cast qualification, asylum procedures and reception condition directives[39] while Ireland chose not to adopt the recast legislation on asylum procedures and qualification (refugee/subsidiary protection status determination)[40]

The Treaty of Amsterdam stipulated that legislation putting the aims of Title 4IV Immigration and asylum should take place within five years and the period following ratification was one of intense legislative activity involving the drafting of the legislation dealing with qualification, asylum

[35] Article 16a The Constitution of the Federal Republic of Germany.
[36] M.Bosche: 'Trapped Inside a European Fortress? Germany and European Union Asylum and Refugee Policy' in *Germany's EU Policy on Asylum and Defence: De-Europeanisation by Default?* G. Hellmann ed (Palgrave McMillan 2006) ch2 p29ff
[37] 'Policing and Immigration: The Creation of New Policy Spaces' P.Turnbull & W. Sandholz in *The Institutionalization of Europe* A. Stone-Sweet et al (eds) ch10 p 209 (Oxford University Press 2001)
[38] Protocol (No 22) on the Position of Denmark annexed to Treaty of Lisbon amending the Treaty of thr European Union and the Treaty establishing the European Community OJ C 306 17.12.2007
[39] Written Statement to Parliament of Damien Green: European Opt In Decision: amended asylum procedures and reception conditions directives. 13th October 2011 https://www.gov.uk/government/speeches/european-union-opt-in-decision-amended-asylum-procedures-and-reception-conditions-directives (https://asylumineurope.org/reports/country/republic-ireland/annex-transposition-ceas-national-legislation (accessed 27.09.2022)
[40] AIDA Annex: The Transposition of the CEAS into National Legislation-Republic of Ireland

procedure, reception conditions and return although only some of these policy areas were decided in this five year period. As will be seen further on in this study the negotiation of the asylum procedures directive in particular proved difficult with the Member States wanting to retain as much of their own national procedures as possible.

As we have seen the Treaty of Lisbon introduced and legally entrenched the aim of a single European asylum status and a single procedure. The asylum legislation underwent a recasting between 2011 and 2013 but this did not come close to achieving a single uniform procedure because it still retained the Directive as the legal instrument of implementation. This meant that the Member States had to implement the legislation into their own system before it took effect. This recast legislation is current at the time of writing despite long running efforts to introduce a second revision of the legislation which would have asylum qualification and procedures legislated by Regulations which are directly applicable and do not have to be transferred into national legislation.

The tensions between intergovernmentalism are the basis of much discussion within the political science literature. In terms of European Union Asylum policy, especially since the influx of refugees resulting from the Arab Spring and the Syrian Civil War began to put pressure, there has arguably been an intergovernmental shift.

This can be seen perhaps not only in the strong stance some Member States are taking to protect their own borders as discussed but also in the wider problems of a lack of solidarity and burden sharing and the easing of the burden shouldered by those Member States at the external borders. The European Union Commission responded to this problem by not only focusing on the issue of border security in its 2015 Agenda on Migration[41] but also made clear its desire to "co-opt non EU Member States and regions into its asylum framework"[42] in a bid to ease pressure by tackling issues

[41] Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration COM (2015) 240 Final 13.5.2015

[42] *Migration and Mobility in the European Union* A Geddes et al (Bloomsbury 2020) ch 6 p104

relating to irregular migrants before they arrive and cross the EU external border. This has been something that the Commission has returned to in its 2020 Asylum Pact stating that "migration is central to the EU's overall relationships with key partner countries of origin and transit."[43]

The conflict between these two theories of governance at the European Union Level are very important to this study as the struggle between those who favour further supranational harmonisation of policy an intergovernmental level and those who want to deal with immigration policy at national level with the desire to protect as much as possible their own national interest has led to the wide gap between what is legally down now in Article 78 TFEU (Lisbon Treaty) and what is currently legally in force. This is because the tension that manifests itself in the two different approaches to European Union governance and integration can be seen to play out in the negotiations surrounding the Common European Asylum System.

It is important to be aware of this tension between those Member States who favour a more intergovernmentalist approach to policy and those who take the opposing neo functionalist approach which focuses on an emphasis towards more supranational centralised policy making from the European Union. This is because these differences in policy approach have been present throughout the development of European Union asylum legislation causing delays, the watering down of policy objectives and fractured development with the aforementioned 2020 "European Pact" suite of legislative measures being a revision what was planned as a second major revision of European Union Asylum Policy after the initial package was mildly recast at the end of the first decade of the century.

The Court of Justice of the European Union has also played a part in developing European Union competences through its judgments has been the creator of such vital doctrines such as supremacy

[43] Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Immigration and Asylum p17 Brussels 23.9.2020 COM (2020) 609 FInal

and direct effect of EU law. This has led to the court being accused of engaging in federalist judicial activism by some:

> " The EU Treaties empower the CJEU to issue authoritative decisions on all aspects involving the interpretation of EU law. Once the CJEU has interpreted an EU Treaty or legislative provision its interpretation of the written law cannot be challenged, it effectively replaces the apparent meaning of the underlying written law until the CJEU changes its opinion in a future case…the CJEU as a consequence operates in a political environment which is extremely permissive and which vis a vis the Member States places the Court in a much more powerful position than national courts including supreme courts."[44]

Its judgments have also clarified and expanded the law relating to the internal market. As will be seen as this study progresses the Court has also made its mark in the field of immigration and asylum now that Justice and Home Affairs has been brought completely into EU competence after the Treaty of Lisbon. This study will also feature many other examples of the CJEU shaping European Union Law and this power cannot be ignored. As Stone-Sweet and Wayne Sandholtz wrote in 1997: "the ECJ has interpreted the Treaty so as to permit the expansion of supranational policy domains."[45]

In order to do this the Court of Justice has been willing to interpret European Union Law in a teleological manner or "ascertain the purpose of the provision and interpret it to give effect to that purpose."[46] This is what the Court of Justice has done from the very earliest days in the seminal

[44] G.Beck: 'Judicial Activism in the Court of Justice of the EU' (2017) 36 U Queensland LJ 333 at 334.
[45] A Stone-Sweet & W Sandholtz 'European Integration and Supranational governance' Journal of European Public Policy 4:3 1997 297-317 p 31
[46] *Constitutional Problems of the European Union* T.C Hartley ch4 p 45 (Hart Publishing 1999)

cases of *Van Gend* and *Costa* in the 1960s (direct effect and supremacy respectively)[47] though the argument against this is that when the Member States signed the Treaties "they agreed to transfer only certain powers to the community; If the court, an institution of the Community , takes additional powers for itself of for the Community in general it could be regarded as taking more from the Member States than they agreed to give."[48]

With the ratification of the Treaty of Lisbon on the 13 November 2009 there is now a legal basis for the creation of a Common European Asylum System and a uniform status and the matter coming under full European Union competence and thus coming under the full oversight of the CJEU. Indeed since Lisbon there has been a multitude of cases decided by the CJEU on Immigration and Asylum matters as will be seen in the text of the study to come.

However, as touched upon above, since the signature of the Lisbon Treaty there has already been a recasting of the initial first wave of legislation which was put into place between 2011 and 2013 together with two attempts to launch the third phase which was re launched by the Von Der Leyen Commission in October 2020. Therefore the situation is still very much in a state of flux at the moment and therefore this study will have to not only cast an eye on the law as it currently is but look towards possible developments in the future. However the political tension which has been briefly outlined in this subsection will be borne in mind throughout the study. It is never far from the surface.

ISSUES OF DIFFERENCE

From the very first negotiations on the Common European Asylum System individual Member States were keen to maintain as much control of the asylum decision making process as possible domestically. One reason for this is that the development of the harmonization of EU asylum policies

[47] C-26/62 *Van Gend den Loos v Netherlands Revenue administration* ECLI:EU:1963:1 5th February 1963, *Costa v E.N.E.L* ECLI:EU:C:1964:66 15th July 1964,
[48] ibid

has been developed by a "step by step construction."[49] The first step as laid down at Tampere was the aim to develop common minimum standards in the field of asylum over a five year period.

As was touched upon in the introduction issues arose the negotiations around deciding what these minimum standards should be. The negotiations in dealing with Asylum Procedures Directive were particularly difficult. During the course of the negotiations various Member States were determined to keep intact as much as possible elements of their own domestic asylum procedures.

As was also touched on in the introduction there was division between Member States from the very beginnings of discussions on common European Union asylum policy on the scale of how far harmonization in this area was to go with some wanting more integrationist, neo-functionalist approach while others were very keen to carry on with an intergovernmental approach with lighter touch legislation. The negotiations lasted over three years and as an official who worked behind the scenes reported:

> "The points of departure of Member States were too different from one another to come to more than an agreement on domestic principles. The administrative framework for decisions on asylum applications in each Member State had been developing purely within a domestic context."[50]

To get some idea of the context of these negotiations it is perhaps helpful to consider the background to the political attitudes surrounding asylum policy that existed at the time.

[49] *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System* C. Bauloz et al (Brill Nijhoff 2015) intro p5
[50] D'Ackers: 'The Negotiations on the Asylum Procedures Directive.' European Journal of Migration and Law 7 1-33 2005 at p2

Migration policy throughout the world, particularly in the last 30 years has become more political and more restrictive with western nations taking a much tougher line on immigration. The language and policy direction relating to asylum seekers in relation to Europe especially since the refugee crisis has hardened and become increasingly political which has given rise to "an unfortunate shared experience across Europe of the criminalisation of humanitarian provision by civil society groups and individuals and the normalisation of negative discourse of refugees on European Societies".[51]

Satvinder Juss has suggested that European harmonization has had an effect on migration standards stating that Europeanisation "helped to limit the liberal regimes intraditional refugee receiving countries in the grant of refugee status to newcomers" he goes on to say that "the present concern in Western Europe is traceable to the increase of new arrivals in the mid 1980s which is related to geo political changes in the world. This was interpreted as a threat to national security and this in turn emphasised the securitarian approach both within individual Member States and Europe generally."[52] This article was written in 2005 as the first legislative instruments were being put into place but it is fair to say that the same securitisation approach applies today.

This is not to deny that the current legislation with its minimum standards (now termed common standards) have raised standards in some Member States. However Member States are also free at the moment to set higher standards which leads to the argument Member State asylum systems are more favourable than others.

There is also the issue of the securitisation of asylum policy among Member States. An example of this can be seen in the case of Hungary and its hard line approach to asylum seekers at its borders.

[51] T. Thieme et al 'Refugees as New Europeans and the Fragile Line Between Crisis and Solidarity' Journal of the British Academy 8 (s1) 19-25 at p21 24th February 2020 https://www.thebritishacademy.ac.uk/documents/908/JBA-8s1-04-Thieme-Kovacs-Ramakrishnan.pdf (accessed 29.4.2022)

[52] 'The Decline and Decay of European Refugee Policy' S.Juss (2005) 25 (4) Oxford Journal of Legal Studies 749-792 at p 75

At the time of writing these issues are in the hands of the European Commission which has launched formal infringement proceedings against the Hungarian government.[53]

Other issues relating to the securitisation of EU asylum policy involve that of the European Union Border and Coast Guard Agency (FRONTEX). The institution has been under investigation by the EU Fraud Agency OLAF in relation to alleged pushback operations in relation to the Greek/Turkish border which has led to the resignation of its chief official following the release of the OLAF report which has not been made public.[54]

The organisation has also been condemned for falling short of human rights standards by a European Parliament Scrutiny Group.[55] Examples of the organisation's work that have a security element can be shown from virtually the time of the organisation's inception with an operation aimed at tackling illegal immigrants in the Canary Islands at the request of the Spanish government.

The operation named Hera was commenced in 2006 and deployed experts from other Member States to help Spanish border employees establish identity and country of origin information as well as further operation that involved joint aerial and naval patrols. As a commentator has said "such

[53] European Commission Press release Migration: Commission refers Hungary to the Court of Justice of the European Union over its failure to comply with Court judgment 12th November 2021 https://ec.europa.eu/commission/presscorner/detail/en/IP_21_581 (accessed 29.09.2022) See also https://www.euractiv.com/section/non-discrimination/news/european-commission-goes-after-hungary-in-salvo-of-proceedings/ (accessed 25.11.2022)

[54] 'Frontex Under Scrutiny: Inquiries and Investigations 2020 onwards (Statewatch) https://www.statewatch.org/observatories/frontex/frontex-under-scrutiny-inquiries-and-investigations-november-2020-onwards/ (accessed 06.01.2022) See also https://www.euronews.com/2022/04/29/frontex-chief-resigns-over-misconduct-and-human-rights-violations-probe (accessed 29.04.2022)

[55]'Report on the Fact Finding Investigation into Frontex Concerning Alleged Fundamental Rights Violations.' 14.7.2021 LIBE Committee on Civil Liberties, Justice and Home Affairs: European Parliament https://www.statewatch.org/media/2590/ep-frontex-scrutiny-group-final-report-14-7-21.pdf (accessed 06.01.2022) and https://www.statewatch.org/media/2599/16072021-draft-annex-to-report-fswg-clean.pdf (accessed 06.01.2022)

joint operations are arguably securitising practices in the sense that their enactment suggests that migrant flows to Europe represent a security threat which needs to be addressed."[56]

These issues relating to the securitisation of refugee policy are not only prevalent in the European Union. There is a trend that commentators have identified throughout the developed world with "western security agencies, supranational global bodies (such as the EU), international agencies and national governments mobilise against over populated and socially insecure countries with weak economies…those seeking asylum are demonised as bogus, illegal immigrants, and economic migrants scrounging at capital's gate and threatening capital's culture."[57]

Though the above quote is expressed in highly charged language, it does present one of the issues that the European Union has to face in dealing with those who present themselves at its external borders. This is the separation of those who are seeking asylum due to fear of persecution under the 1951 Convention and those who are economic migrants who are seeking a better life in the European Union. As will be seen in the next chapter the latest legislative proposals from the European Union aim to introduce a screening process at the border to deal with situations such as this.

The rising numbers of asylum seekers since the 1980s together with public concern has driven the Member States to make life very difficult for those seeking asylum by adopting measures seeking to reduce their attractiveness as a destination country. These measures include the restriction of the right to work, limitations or removal of right to claim welfare benefits and the prospect of detention.[58] Again this type of policy is not something that can be solely levelled at the European Union. There is literature to suggest hard line attitudes to refugees have been prevalent in Canada

[56] Sarah Leonard and Kristian Kaunert (2020) The Securitisation of Migration in the European Union and its Evolving security Practices Journal of Ethnic and Migration Studies vol oo no 00 p7 DOI: 10.1080/1369183X.20201146985 http://doi.org/10.1080/1369183X.2020.1851469
[57] L.Fekete 'The Emergence of Xeno Racism' (2001) 43(2)Race and Class Vol 23-40 at P23
[58] M. Gibney: 'Beyond the Bounds of Responsibility: Western States and Measures to Prevent the Arrival of Refugees." Global Migration Perspectives No 22 January 2005 -2 (Global Commission on International Migration)

for example since the 1990s particularly in relation to Somalis who became "indelibly tainted with allegations of welfare abuse, criminality and asylum shopping."[59] Australia has also become well known for its tough policy on asylum seekers especially regarding offshore detention and processing.[60]

Since the Lisbon Treaty however the CJEU has had greater powers of oversight on issues of asylum policy (the ability to make a preliminary ruling to the CJEU on these matters had been limited to last instance national courts only).[61] With its greater powers has come greater scrutiny of that Court as a result of both preliminary rulings on asylum matters and infringement proceedings when a Member State has been found to be in breach of European Union asylum legislation. Hungary as discussed above is probably the most high profile country that has come under the scrutiny of the CJEU for this though this defiance has been tempered by Hungary's Constitutional Court who made it clear that they were not prepared to get involved in a disagreement over the primacy of European Union Law over Hungarian national law stating that it had:

> ".., already reviewed the relationship between EU law and national law in a number of its previous decisions…the Constitutional Court points out that the assessment of the relationship between EU law and national law is not the subject of this constitutional interpretation and accordingly, the Constitutional Court does not take a position on this in this Decision."[62]

[59] From Deserving Victims to Masters of Confusion: Redefining Refugees in the 1990s A. Pratt & V. Valverde (2002) 27 (2) Canadian Journal of Sociology p135 -161 at p154
[60] 'The New Criminals: Refugees and Asylum Seekers S Pickering in *The Critical Criminology Companion* T Anthony et al (eds) ch 14 p169f (Federation Press 2008)
[61] S.Peers 'Mission Accomplished: EU Justice and Home Affairs Law after the Treaty of Lisbon' (2011) 48 (3) Common Market Law Review p661-693 at 662
[62] Ibid p 21

Nevertheless the position of the Constitutional Court of Hungary declaring that European Union measures, in particular readmission agreements, were not being applied (meaning that migrants were potentially able to remain on Hungarian soil for an indefinite period) allowed the Hungarian government to take measures under its own national law provisions to alleviate this. The Hungarian Constitutional Court went on to say that the institutions of the Hungarian state have a duty when drawing up legislation relating to asylum applications and asylum seekers to respect the principles of solidarity and sincerity as laid down in Article 4 (3) TFEU. [20] However at the same time it had to take into account measures under Article 4 (2) relating to maintenance of public order and national security and that the "interpretation of the relationship between national and EU law in the light of the constitutional identity of each states is also before the constitutional courts of European Countries."[63]

This is perhaps as said the most high profile disagreement between a Member State and the CJEU relating to asylum policy but the issue of a tough policy on migrants at the borders with accusations of illegal pushbacks of refugees have not only involved FRONTEX but an investigation by the Guardian newspaper found that Malta, Croatia, Greece, Italy and Spain have been involved in the pushback of migrant with an NGO report giving evidence of worrying incidents of violence occurring in pushbacks from Croatia and Greece.[64]

The following chapter will go over the divergences that occur between Member States in relation to their asylum policy. However what must be considered in relation to the above is that some Member States want to maintain their own national systems and are zealous in exercising their national sovereignty in the protection of their borders. Therefore though the European Union is pushing for greater convergence and harmonisation of asylum law with its latest round of measures this is bound to meet the same challenges from individual Member States who are unwilling to cede

[63] Above p28

[20] See Application of the Minster of Justice for interpretation of Article E (2) and Article XIV (2) of the fundamental Law (judgment of the Court of Justice of the European Union in Case C-808/ asylum exercise of EU Powers X/477/2021 https://hunconcourt.hu/decisions/decision-32-2021-on-the-joint-excercise-of-powers/ (accessed 3rd December 2023

[64] See: 'Revealed: 200 Refugee Deaths Linked to Illegal EU Pushbacks' 5th May 2021 See also Border Violence Monitoring Network: Annual Torture Report 2020 https://www.borderviolence.eu/wp-content/uploads/Annual-Torture-Report-2020-BVMN.pdf (accessed 29.04.2022)

powers to the European Union. It is likely therefore that the delays and difficulties that have plagued the development of European Union asylum policy from the beginning will continue. The nature of this political balancing act will be discussed further below.

Political Bargaining in European Union Immigration and Asylum Law.

There has been comment in the political science journals relating to European Integration that the attitude of the Council is that they would like to pursue a policy of Integration without Supranationalisation. What this analysis has stated is that even with the coming of the Lisbon Treaty and the fact that there has been a greater push towards integration, there is the fact that the European Council still has considerable control over the policy making agenda and this comes especially to the fore in a crisis situation where:

> " Heads of the Member State will only dedicate time to JHA under extraordinary circumstances not every issue arrives here because if it did there would be signs that the machinery is not working. Only Items that spontaneously arrive on the agenda (for meetings) like terrorist attacks, the surveillance scandal or the refugee crisis, are discussed within the meetings of the European Council with conclusions written down in the room." [65]

The article above states that these responses to crisis situations that have come up in the European Council can have the effect of reversing EU legal rules in a time of crisis and goes on to give the example of a request by both France and Italy to temporarily reintroduce border control between

[65] A. Maricut: 'With and Without Supranationalisation: The Post Lisbon Roles of the European Council and the Council in Justice and Home Affairs Governance.' (2016) Journal of European Integration 38:5 541-555 at p545

the two countries. This is to be found in the Schengen Border Code Article 25 which states that a Member State may reintroduce border control for 30 days (or for the foreseeable duration) if that Member State faces a serious threat to public policy or internal security.[66]

Asylum policy is an area that Maricut has declared is a key area that Member States prefer a policy of integration without supranationalisation when it comes to legislating. Sometimes consensus has not been able to be achieved whereby situations have developed in which for example Austria led a coalition of 10 Member States in planning to organise an "intergovernmental response" in 2015 in working towards closing the Balkan refugee route and therefore hindering the arrival of refugees in Greece.[67]

These are political questions that are beyond the scope of this study but it is perhaps fair to say that asylum and refugee policy since the Lisbon Treaty was ratified especially has been driven by a sense of crisis due to the large numbers arriving at the borders of the European Union. (911000 in 2015) Perhaps that can help explain the circumstances that have found both the current state of EU asylum and refugee law and proposals that have been put forward towards its reform not coming close to those provisions that were agreed at the Council meeting at Tampere and later given legally binding effect in the Lisbon Treaty.

This is somewhat a legal paradox, although extending the jurisdiction of the Court of Justice of the European Union over these matters has given the Court the ability to scrutinise this area independently, for example the notable case of *NS*[68] which facilitated a block on returns under the Dublin Regulation to Greece when that country was suffering a severe breakdown in its asylum system due to large numbers of refugees arriving on its territory.

[66] Regulation (EU) 2016/399 on a Union Code on the Rules Governing Movement of Persons across Borders (Schengen Borders Code) Art 25
[67] Footnote 58 at P546
[68] C-411/10 *N.S v Secretary of State for the Home Department* 21st December 2011 ECLI:EU:C:2011:865

Seventeen years after the of publication of the first Asylum Procedures Directive in the Official Journal and on the back of the refugee crisis, the situation remains the same with the Member States endeavouring to negotiate legislation which the Commission hopes will help bring more uniformity to European Union Asylum law by replacing the Asylum Procedures and Qualification Directives with Regulations.

If the pattern of previous negotiations dealing with asylum procedures and status determination are to go by this is bound to be a challenging process. Indeed as stated this attempt at a second revision of European Union Asylum Law has been going on since 2016 with the 2020 Asylum Pact revisions acting as an attempt at a reset by the Commission of an agenda that has become bogged down, though the coming into being of the European Union Agency on Asylum can be regarded as one success.

One cannot guess why the Member States agreed to expand EU Competence in this area in the Treaty of Lisbon and then fail to agree to put measures in place which come far short of the obligations set down in Article 78 TFEU. From the reading both legal and political science literature though it is clear that it is the influx of refugees from the unrest in the Middle East together with asylum seekers/ migrants from North Africa has led to considerable concern and the desire in the case of some Member States to act to control the situation unilaterally. Particularly those Member States at the borders of the European Union which are the first place of entry for many migrants and who under the Dublin Regulation are responsible for processing their applications. This was particularly in evidence after the failure of the Member States to agree to a redistribution mechanism which mainly involved such Member States closing its borders:

> "In late August 2015 when the Hungarian government decided to close its borders and Austria introduced tighter border controls. Germany once again took over political leadership from the weakened European Commission by stating that without an agreement on the fair distribution

between EU Countries the future of the Schengen area of free movement would be threatened."[69]

These Member States feeling themselves put under pressure from migrants found that the solidarity from other Member States in reducing the pressure has not been as willing as it could be. Legislation passed by the European Council which set redistribution targets for Member States was wound up with Member States taking far fewer refugees than they were required to do with some Member States, taking on bigger quota than others. A report states that of the 27 Member states that took part in the European Relocation system only two met their targets and only Latvia and Sweden came close to meeting theirs.[70]

The current CEAS negotiations had progressing slowly by the European Parliament's "legislative train" website for some time and this perhaps illustrates the difficulty is in reaching consensus within the European Council.[71] This is was the reason for the Commission re-launching its legislative proposals in the form of the 2020 Asylum Pact. Redistribution of responsibility for dealing with irregular migrants are contained in the proposed Regulation on Asylum and Migration Management which include both a distribution key based on state GNP and the ability for Member States to

[69] E.Heldt 'European Policy Failure During the Refugee Crisis: Partial Empowerment, Reluctant Agents, a Cacophony of Voices and Unilateral Action' EUI Working Paper RSCAS 2018/36 July 2018 p 7 https://cadmus.eui.eu/bitstream/handle/1814/56404/RSCAS_2018_36.pdf?sequence=4&isAllowed=y (accessed 24.11.2022)

[70] G.Shiel 'The Emergency Relocation Mechanism: A Burden Sharing Failure' NEXTEUK Policy Paper Series Working Paper No 3 March 2021 p 18 https://www.qmul.ac.uk/nexteuk/media/nexteuk/documents/NEXTEUK-Griffin-MAR21-(Fusionn%C3%83%C2%A9)-copie.pdf (accessed 10.01.2021)

[71] See https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-jd-reform-of-the-asylum-procedures-directive (accessed 10.05.2022)

sponsor the return of failed asylum seekers from other Member States as an alternative to actually taking in migrants under a redistribution scheme.[72]

There are also long running concerns regarding the revision of the Dublin Regulation. At the time of writing there have been calls from those Member States of the EU most affected (i.e. those at the borders) for a fairer solidarity mechanism and the reform of the controversial responsibility mechanism.[73] This principle of the first Member State of landing being responsible for processing of asylum claims remains in the revised regulation proposal with the addition of a complicated redistribution mechanism where asylum seekers can be re-allocated in times of pressure from a large influx of asylum seekers.[74]

In the preamble to the proposed Regulation on Asylum and Migration Management, the Commission admits that progress has been slow in regard to both the reform of this piece of legislation and on asylum procedures due to diverging views in the Council and, perhaps more significantly that there was not significant support for agreeing only on some of the asylum reform proposals ahead of agreement on the whole reform.[75]

This draft legislation continues with the default of the first country of asylum being responsible for the examination of asylum claims where no other conditions apply and continues to have provisions which provide for Member States being responsible where a minor has family member living there, where a state has issued residence documents or visas or when a Member State has issued a diploma to the applicant. There is also a complicated redistribution method in the document which

[72] Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) XXX/XXX (Asylum & Migration Fund Brussels 23.9.2020 COM (2020) 610 Final Arts 54-55

[73] Non Paper on the Reform of the Common European Asylum System in the Perspective of EU Asylum and Migration Policy CY EL ES IT MT. https://www.statewatch.org/media/documents/news/2020/apr/eu-ceas-cy-el-es-it-mt-non-paper-4-20.pdf

[74] Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation EU XXX/XXX [Asylum and Migration Fund COM (2020) 610 final 2020/0279 (COD) https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020PC0610&from=EN (accessed 10.01.2022)

[75] See Footnote 75 p3

is an attempt to enshrine solidarity measures into the Regulation which will operate when in a situation of particular pressure which is based on a key taking into account the Member State population and its GDP each with a 50/50 weighting between the two. The draft Regulation also includes plans for Member States to collaborate in sponsoring returns for failed asylum seekers as well as solidarity measures directed at search and rescue operations.

These measures are intended to be overseen by a solidarity forum comprised of all the Member States which will be convened by the Commission.[76] Whether these solidarity measures will be agreed to by the Member States in the Council remains to be seen but the Regulation proposal does show that the European Commission is keen to introduce solidarity measures into the new legislation. Given the patchy success of solidarity measures within the European Union however it may be difficult to get these measures agreed with the Visegrad countries again being particularly opposed to the implementation of any distribution mechanism in the negotiations on the previous revised draft of a recast Dublin Regulation.[77]

DIFFICULTY OF LEGALLY ENTERING THE EUROPEAN UNION AS A REFUGEE

The EU in its agenda setting document "A European Agenda on Migration" maintains the right for refugees to seek asylum."[78] However legally entering the EU to claim asylum is nigh on impossible by those from countries where there is civil unrest with potential asylum seekers being unable to qualify for a visa to the EU Schengen area. This means that those refugees find it impossible to enter the EU legally to make an asylum claim and so therefore have no choice but to enter EU territory This is due to a number of factors including the lack of the presence of relevant diplomatic representation in countries experiencing armed conflict

Even in those countries where there is a presence, the European Agency for Fundamental Rights notes that these diplomatic missions are based in areas which are difficult to access due to the

[76] Ibid Section 4 chapter 1.
[77] N. Zaun 'Why is the EU Unable to Adopt a Binding Solidarity Mechanism for the Distribution of Asylum Seekers?' LSE Blog February 8th 2019 https://blogs.lse.ac.uk/europpblog/2019/02/08/why-is-the-eu-unable-to-adopt-a-binding-solidarity-mechanism-for-the-distribution-of-asylum-seekers/ (accessed 13.05.2022)

[78] 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee for the Regions: A European Agenda on Migration' Brussels 13.5.2015 COM (2015)240 Final p 2

presence of security forces. Added to this is the requirement in many cases for refugees from these countries needing to obtain transit visas even to pass through EU Member States even if they were given asylum at the relevant consulate.[79] The European Agency for Fundamental Rights note that the numbers of Schengen visas granted to Syrian Nationals fell from 30,000 in 2010 to almost zero in 2015.

Should such refugees reach a mission there is no guarantee that they will be granted a humanitarian visa. The CJEU case of *X & X v Etat Belge* involved an Orthodox Christian Syrian couple who managed to make their way to Beirut and then to the Belgian consulate and apply for a humanitarian visa which was refused.[21] The Belgian authorities stated that Article 3 of the ECHR did not require signatory states to admit to their territory "victims of a catastrophic situation" and that the diplomatic mission itself did not come under the relevant authorities to which a party could claim asylum. The issuing of such a visa for the purposes of claiming asylum in Belgium amounted to such an application.

The applicants counter argued Article 18 of the European Charter of Fundamental Rights and Freedoms and that the granting of international protection was the only way of preventing Article 3 ECHR and Article 4 of the European Charter being infringed. The CJEU noted that that at the time of the hearing there had been no measure adopted under Article 79 (2)(a) TFEU with regard to the granting of humanitarian visas and that the case was a matter concerning national law.

These barriers give some asylum seekers no option but to seek entry by illegal means.[80] The issue is that while the Qualification Directive states that it respects the 1951 Convention which states that refugees should not be penalized because of their method of entry (Article 31) in reality there have been cases where such refugees have not had a chance to make such a claim on European Union soil due to the securitization of the external borders of the European Union which has resulted in pushbacks. Criminal penalties have also been implemented by Member States for irregular entry or stay into their territory which is potentially at odds with the Article 31 of the

[21] C-638/16 *X & X v Etat Belge* ECLI:EU:C:2017:173 7th March 2017

Refugee Convention as well as detention in inadequate conditions at the border which has been discussed elsewhere in this study. Austria and Denmark have also announced that considering a scheme to send refugees to have their refugees processed offshore. This inspired by the Post Brexit United Kingdom government's controversial outsourcing of refugee determination to Rwanda. Austria has also called for the European Union adopt the same approach. Austria has announced that it has signed a migration and security agreement with the UK government on the 2nd November 2023. [22] It is very important to stress though that the intention behind the Austrian policy would allow refugees to settle in Austria should their asylum claim be successful whereas the United Kingdom plans involve a total transfer of responsibility to Rwanda to host even successful claimants. The issuing of EU humanitarian visas would go some way to addressing this issue of refugees having to enter EU territory. The European Council's policy leaning in recent times has however been more towards that of securing borders:

[79] Legal entry to the EU for Persons in Need of International Protection: A Toolbox European Agency for Fundamental Rights 2/2015 p 2 https://fra.europa.eu/sites/default/files/fra-focus_02-2015_legal-entry-to-the-eu.pdf (accessed 26.8.2020)
[80] EU Agency on Fundamental Rights (2014) The Handbook on European Law Relating to Asylum Borders and Immigration para 1.6

[22] "Austria to Work With United Kingdom on Rwanda Style Plan for Asylum Seekers" The Guardian 2nd November 2023 https://www.theguardian.com/world/2023/nov/02/austria-seeks-to-adopt-uk-rwanda-style-plan-for-asylum-seekers (accessed 2.11.2023)

working with both countries of origin and transit.[81] There does seem to be some conflict between the European Institutions here with the European Parliament calling for the use of existing EU measures to issue more humanitarian visas which contrasts with the Council's security minded approach.[82]

The European Parliament put forth recommendations for an amendment to include the provision of humanitarian Visas in the proposal for a recast Visa Code but this was unable to be agreed between the Parliament, Council and Commission. This resulted in the provision being dropped. However it stands to reason that refugees will continue to seek to cross into the EU by illegal means if regular means continue to be restricted and this will in turn put pressure on those Member States at the external borders of the European Union which have to deal with them.[83]

ASYLUM DETERMINATION.

Additional complexity is added by the process of asylum determination itself. Gregor Noll states what determines persecution and what determines a human rights breach is itself something that is subjective and interpreted in different ways by different people: "being persecuted is but an empty signifier and hinges on the subjective choice by doctrinal writers, judges and decision makers."[84] Added to this are the differing procedures adopted by the Member States together with different country of origin information. This means that protection applications are measured to different standards and using different research. The European Council of Refugees and Exiles have said that:

[81] See footnote number 5 at p 10
[82] See U. Iben-Jensen 'Humanitarian Visas:Option or Obligation' CEPS Paper on Liberty and Security in Europe No 68/ October 2014
[83] See Proposal for a Regulation of the European Parliament and Council on the Union Code for Visas Com(2014) 164 final 1.4.2014 https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/borders-and-visas/visa-policy/docs/proposal_regulation_union_code_on_visas_en.pdf (accessed 30.8.20) and https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-humanitarian-visas-%E2%80%93-amendment-of-the-eu-visa-code (accessed 30.8.20)
[84] G.Noll ' Asylum Claims and the Translation of Culture into politics' (2006) Texas Intl L J 491 p494

"The concept of "general and systematic" absence of persecution and serious harm has been Interpreted differently by different national legislatures. By way of example, France states that the absence of persecution and serious harm must be "established generally and uniformly" for both men and women while this is not the case in the UK (then an EU Member State)."[8]

On looking at the response to the ad hoc request from the European Migration Network one can see that some countries such as Sweden, Greece, Lithuania do not have safe country lists at all but in theory will consider each case for asylum made on its individual merits which AIDA in their briefing say is more in the spirit of the Refugee Convention. The UNHCR handbook on Refugee Status states the need for flexibility saying that there is no universally accepted definition of persecution. It notes in particular that:

"an applicant may have been subject to various measures not in themselves amounting to persecution (e.g discrimination in different forms) in some cases combined with other averse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations the various elements involved, may If taken together, produce an effect on the mind of the applicant that can reasonably justify a claim of well founded fear of persecution on cumulative grounds. Needless to say it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim for refugee status."[86]

[85] 'Safe Countries of Origin: A Safe Concept?" AIDA Briefing No 3 September 2015 p4 See also Ad Hoc Query on Safe Countries of Origin European Migration Network 22 November 2014 https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/return/2014.615_emn_ahq_list_of_safe_countries_of_origin_%28wider_diss%29.pdf (accessed 5.5.2020

The UNHCR, in a report examining credibility assessment in the European Union, elaborates at length on how trauma especially can affect details of the narrative of an asylum seeker and that often a lot of the story cannot be backed up by solid evidence but needs to be taken on trust. It is in a situation like this that training and detailed knowledge of the current situation in the country of origin is needed but also on whether a principle is established to give the applicant the benefit of the doubt or not. Although the principle is alluded in the Qualification Directive in Article 4 (5) It is elaborated in some Member State law explicitly such as that of the Netherlands but not in others such as Belgium. The UNHCR also found that some decision makers were not applying the principle at all.[87]

A situation where material facts may be very thin on the ground can mean that asylum decision making can be very subjective when it comes to assessing the credibility of the asylum seeker. This leads on to other factors which are very difficult to factor into a legal discussion and regulate for. Other factors need to be taken into account also such as the personal world views of the decision maker, and the fact that very often the decision maker is part of a government department that is under political pressure to cut migration into the country and which may be operating a system of targets or exerting other pressure on the decision maker. Although the United Kingdom is no longer Member State is it worth looking its behaviour leading up to the Brexit Referendum.

Under the David Cameron administration when Theresa May's(then Home Secretary) "hostile environment" for migrants was at its height, the department of the home office which was responsible for dealing with asylum claims was notorious for its poor working conditions and its

[86] Handbook on Procedures and criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng Rev 1 Reedited Geneva January 1992 UNHCR 1979 para 53 https://www.unhcr.org/4d93528a9.pdf (accessed 5.5.20)
[87] Beyond Proof: Credibility Assessments in EU Asylum Systems: UNHCR May 2013 p232. https://www.unhcr.org/uk/protection/operations/51a8a08a9/full-report-beyond-proof-credibility-assessment-eu-asylum-systems.html (accessed 13.05.22)

target driven culture within the Home Office itself.[88] The difference between the equality of arms between the two parties when you have an asylum seeker who very often speaks little or any of the native language of the country in which they are trying to claim asylum means that they are dependent on interpreters who may or may not be skillful enough to narrate a complex narrative.[89] This is particularly the case under a common law system where all the evidence which is pertinent to a claim is collected at the initial interview stage and the appeals process is an adversarial testing of the evidence gathered. This is the case in the Republic of Ireland whose system closely resembles that of the United Kingdom and so its consideration is useful.

A study into asylum determination in Ireland by the Irish refugee council states: "lawyers and judges are well practiced at evaluating what is reasonable. The familiar concept of the reasonable man breaks down however in the case of asylum seekers when a decision maker has only his or her perspective from which to assess the actions of an applicant[90]This being so means that the argument for the asylum seeker to have access to a thorough and detailed appeal examination is a strong one. To make this possible it is desirable for there to be detailed training for asylum judges together with detailed and uniform country of origin information available to them which will enablethem to make informed decisions.

The new European Union Agency for Asylum has a remit to provide education for decision makers and this does include the asylum judiciary and tribunal members which aims to "ensure the effective and consistent application of the Common European Asylum System." The Agency not only produces briefing documents but also organizes judicial workshops and expert panels. Looking at the relevant pages of the website in in 2022, the former offers briefings in issues including detention,

[88] 'Toxic Atmosphere: The Home Office Department Everybody Wants to Leave." The Guardian 28th April 2019 https://www.theguardian.com/uk-news/2019/apr/28/toxic-atmosphere-the-home-office-unit-everybody-wants-to-leave

[89] See *Anthropology and Expertise in the Asylum Courts* A. Good (Routledge- Cavendish 2007) ch 7

[90] 'Difficult to Believe: The Assessment of Asylum Claims in Ireland' Sue Conlon et al Irish Refugee Council 2012 3.2 p 18 https://www.irishrefugeecouncil.ie/wp-content/uploads/2011/08/Difficult-to-Believe-The-assessment-of-asylum-claims-in-Ireland.pdf

the interpretation of Article 15 (c) of the Qualification Directive, country of origin information, vulnerability and applications for international protection and credibility and evidence assessment. The latter issue as will be seen is an area which can be prone to divergence due to the differing legal traditions and approach to evidence in the Member States.[91]

The differences in legal traditions among the Member States mean very different approaches to the appeal process. As seen above the Republic of Ireland has an adversarial system of appeal whereby all of the evidence has been gathered at the initial interview of the applicant. This is then used by the authorities to make the initial decision. That evidence is tested at the immigration appeal tribunal. There is no duty on the tribunal to fact find and to further research the applicant's situation as is the case in an inquisitorial system such as that in place in Germany. The applicant is cross examined on their story by a government official known as a presenting officer on the statement that they have given on their application for asylum and their legal representative, should they have one, will put forward their case in turn.

If the evidence provided by the applicant is incomplete, incorrect or not fully communicated at the interview stage due to the applicant not successfully getting his details across due to interpretation issues, the case could be compromised as a result. Germany on the other hand has an inquisitorial system whereby the appeal judges are presented with the applicant's case and then they and their assistants will research and establish evidence and facts for themselves to establish whether the case has any merit.[92]

The difference in interpretation of the criteria for granting protection both under the Refugee Convention and subsidiary protection under the Qualification Directive also can lead to divergences. The UNHCR has strived to provide detailed guidance to interpretation in its Handbook in applying

[91] See EUAA Judicial Workshops in the English Language 2022 https://euaa.europa.eu/sites/default/files/2022-03/EUAA_Calendar_Activities_2022.pdf
[92] '*Evidence in Asylum Procedures'* Ida Staffens (Brill Nijhoff 2012) p119

Convention criteria. The International Association of Immigration Law judges also publish detailed guidance on how to adjudicate an asylum claim but differences still abound.[93]

To build the case for a more harmonized system in chapter 2 this chapter aims to highlight the difficulties involved in holding out a system as a common one when so many different interpretations and legal practices exist within the European Union. The aim of this chapter is to give a concise overview of these variations within the European Union before getting into the main substance of study looking at how the current system could be remedied by policy coordination and harmonization under the ambit of the European Asylum Agency and how perhaps a centralized asylum court system at the appeal stage could ensure fairness by applying the same methodology and practice in terms of procedure throughout the European Union.

All these factors contribute to the sense of an unequal playing field in terms of asylum adjudication throughout the European Union at the present time where success in adjudication as well a reception conditions are the "luck of the draw" depending on the Member State where the asylum seeker makes a claim.

AN ILLUSTRATION OF DIFFERENCE IN RECOGNITION RATES BETWEEN MEMBER STATES.

A look at the asylum statistics from Eurostat for the second quarter of 2020 it shows that there are some wide differences divergences in recognition rates. The biggest disparities are those relating to Syrian refugees. In this period Germany had the most applications: 4540 with a recognition rate of 59% at first instance. The next highest number of applications was in Greece with 1115 applicants with a recognition rate of 15 % at first instance followed by Austria with 665 applications of which only 8% were successful at first instance. The numbers are more polarized for Iraqi applicants with

[93] 'A Structured Approach to the Decision Making Process in Refugee and Other International Protection Claims A.Mackey et al International Association of Immigration Law Judges 10th June 2016 https://www.iarmj.org/iarlj-documents/general/IARLJ_Guidance_RSD_paper_and_chart.pdf (accessed 30.8.2020)

seeing 1230 first time applicants in the second quarter of 2020 with a 63% first instance positive decision rate.

The next greatest number of applicants is Sweden with only 170 applicants with a 9% first instance success rate. Other points of interest show that applicants with linguistic and cultural ties to a Member State are, perhaps not surprisingly drawn to them to make an application but their success rate is higher there too. With Columbians in Spain for example the numbers are 2290 and the first instance success rate is 89% with Italy receiving the second highest numbers of applications at 90 with a first instance recognition rate of just 3%. In the case of the Cote D' Ivoire, France received 575 applications with a 75% success rate at first instance with Italy being in second place with 85 applicants and just an 11% first instance success rate.[94] ECRE in their comments on these figures state the following:

> "Low recognition rates don't automatically point to the conclusion that an individual or particular Group is not in need of international protection. Decision making across Europe continues to be an "asylum lottery"…some countries' decision making is marred by gaps in quality which expose individuals to risk of *refoulemen*t."[95]

ECRE expands on these comments in in a policy note relating to the Dublin system published in November 2018:

[94]Eurostat Asylum Quarterly Report Second Quarter 2020 Data Extracted 16th September 2020 https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report#Decisions_on_asylum_applications (accessed 24.09.2020)
[95] ECRE: Asylum Statistics in Europe Fact Sheet June 2020 p3 https://www.ecre.org/wp-content/uploads/2020/06/Statistics-Briefing-ECRE.pdf (accessed 23.9.20)

"As of October 2018 first instance recognition rates for nationals of Afghanistan ranged from 98% in Italy, 72% in Greece to 51% in Germany, 32% in Sweden and 7% in Bulgaria…Similarly Iraqi nationals have a 95% chance of recognition at first instance in Italy but no more than 26% in Sweden and 7% in Bulgaria. As there is no evidence to indicate variations in the profiles of applicants from these countries, the conclusion has to be that the extreme disparities of recognition rates are to an extent the product of conscious policy choices. For example in some countries authorities are instructed to refuse protection based on the "internal protection alternative" or even on a presumption of "manifest unfoundedness" for countries such Afghanistan and Iraq, while others do not systematically apply such concepts."[96]

The need to tackle inequalities of recognition rates is sharpened by the provisions of the latest overhaul of the Asylum Procedures Regulation which comes as part of a suite of changes in the European Union's so called New Asylum Pact which was launched at the end of September 2020 in a bid to make the asylum process more efficient together with an intention to streamline the procedure aspect by sifting through initial applications for asylum and fast tracking those applications from individuals from first countries that have a recognition rate average of 20% or less within the EU.[97] This policy plan has drawn criticism from the Robert Schumann foundation because "it pre-supposes a high homogeneity of profiles which is not always the case with the same nationality."

[96] [96] 'To Dublin or Not to Dublin:Ecre's Assessment of the Policy Choices undermining the Functioning of the Dublin Regulation with Recommendations for Rights Based Compliance" Policy Note #16 2016 p 2 https://www.ecre.org/wp-content/uploads/2018/11/Policy-Note-16.pdf (accessed 23.9.20)

[97] C de Wenden 'Can the New Asylum Pact on Immigration and Asylum Respond to Future Migration" Challenges?' Foundation Robert Schumann European Issues No 609 https://www.robert-schuman.eu/en/european-issues/0609-can-the-new-european-pact-on-immigration-and-asylum-respond-to-future-migration-challenges (accessed 15.5.2022)

That average figure would benefit from Member State recognition rates being brought closer together by the pooling of research as to country of origin information being provided by a European Union Agency replacing individual Member State research. The European Union Asylum Agency is now fully operational and one of its key tasks is to carry out such research in relation to country of origin information. With the Agency providing this centralised research as well as training and coordinating and where necessary intervention, this should lead to lessening the disparity between recognition rates across the Member States. The Agency states that:

> "The EUAA Country of Origin Information gathers information and draws up reports providing Accurate, reliable and up to date information on third countries to support EU + asylum and Immigration authorities in reaching accurate and fair decisions in asylum procedures and to support policy making."[23]

The Agency states on its website that it has gone on to establish dedicated country of origin networks to provide not only general country of origin networks but also specialized information on medical conditions in these countries. These reports are available freely on the Agency website as well as a document detailing the methodology the Agency employs in researching and writing these reports. It is worth looking at the latter more closely.

[24] The EUAA methodology is keen to emphasise that it does not set out to reach a particular outcome but aims to "draw from a "well balanced range of sources in order to reflect different perspectives." The Agency is also keen to state that it sets out to be objective, be fact based and not influenced by

[23] https://euaa.europa.eu/country-origin-information#:~:text=The%20EUAA%20Country%20of%20Origin (accessed 23rd November 2023)

[24] See EUAA: Country of Origin (COI) Report Methodology (EU Publications Feb 2023) https://euaa.europa.eu/publications/euaa-coi-report-methodology#:~:text=The%20EUAA%20COI%20report%20methodology,Origin%20Information%20(2013%20Edition) (accessed 9th December 2023)

emotions, speculation, personal or group based interests or biases. The Agency stresses that any evidence that it finds which is contrary to the overall gist of their reports is clearly presented in them to enable the reader to get a grasp of all opinions. The reports are peer reviewed and they also have possibility of being passed to the UNHCR for the carrying out of a quality review.

THE ROBUST DEFENCE OF NATIONAL ASYLUM PROCEDURES

This section seeks to address in more detail the difficulties that have been raised by the Member States in the Council in attempting to bring greater uniformity to the actual European legislation dealing with asylum and immigration matters and this is something that is ongoing with the current negotiations dealing with the most recent changes. Such difficulties are not new and this was a particular problem with the implementation of the first Asylum Procedures Directive 2003. As Ackers says in her overview of the negotiations asylum procedures "being embedded in general administrative law, national administrative traditions and constitutional arrangements" are by nature difficult to harmonize and that the Asylum Procedures Directive was "one of the first instruments on procedural law affecting national procedural law at the EU level.[98] Therefore although the Member States in the European Council knew the policy direction that they themselves had given the nod towards at Tampere they went on to resist it when it came to putting it into legislation.

Ackers' article is particularly useful for its "fly on the wall" nature being written by an official who was involved in the entirety of the negotiations. Member States pressed hard to retain aspects of their own procedure. Spain for example had issues with applicants having the right to an initial

[98]See footnote No 2 a p34

personal interview as under its system asylum seekers applied via a written questionnaire. Further debate surrounded the provision of legal aid with Greece unwilling to consider it as there was no provision for it in their national legislation.

Other Member States such as Germany and Austria wanted any form of legal aid to be subject to a judicial merits test as per their legislation. On the issue of the automatic suspensory effect for appeals there were difficulties with Spain again wanting to keep provisions in their legislation due to the fact that power to suspend the execution of an administrative decision lay with the judiciary and had to be applied for by the applicant.

The United Kingdom had concerns about appellants remaining in the territory while their appeals were heard. Other concerns involved the time of three months for accelerated procedures being too long and whether there should be different procedures for those seeking refugee status and those seeking subsidiary protection status.[99]

Ultimately when the Implementation of the policy came around the result was more a setting of a baseline rather than providing common harmonized Standards due to the compromises that were needed to reach agreement. This remained the case after the recasting of the legislation in 2013. Although what were referred to as minimum standards became common standards in the relevant Directives, these were still a baseline with Member States having the option of introducing more favorable standards should they desire to subject to compatibility with the Directive.

> "EU law only sets a threshold which national legislation must meet. This explains for example why Sweden could immediately grant permanent residence to Syrian Refugees, even though EU law merely requires granting residence for three years and why in Sweden a refugee is allowed

[99] Ibid p16-18

to work immediately on applying for asylum, in Germany after three months, in the Netherlands after six months and in France after 9 months."[100]

It is worth looking at the opt outs to European Union Immigration and Asylum Policy too. Denmark has an opt out from the entire freedom, security and justice arena dealing with the EU in these matters on an intergovernmental basis. Ireland has a more flexible opt out policy.

It has chosen to exercise its opt out in the area of immigration and asylum in regard to the Schengen area. It has opted out of the recast Qualification Directive and the Recast Procedures Directive and It also chose to opt out of the recast Reception Conditions Directive until adopting it on 6th July 2018.[101]

There have also been problems with some Member States failing to implement or mis-implementing the Common European Asylum System instruments into their national law with the infringement proceedings being issued on the 6th July 2020 against Greece, Hungary, Italy and Croatia for failing to fully and properly implement the Asylum Procedures Directive, the Reception Conditions Directive and the Eurodac Regulation. The communication dealing with the above mentions that there are 34 pending cases of actual or potential infringements of EU aylum legislation.[102]

When the system came to be tested with the mass arrival of migrants as a result of the Arab Spring and the Syrian Civil War, the deficiencies of the Common European Asylum System were made manifest, both in relation to the Dublin System and also in terms of reception conditions. This is something that the Spanish jurist Augustin Jose Menendez commented on in an extended editorial article in the European Law Journal. He stated that:

[100] 'Coercion, Prohibition and Great Expectations: The Continuing Failure of the Common European Asylum System' M Den Heijer et al 53 (3) Common Market Law Review June 2016 607 -642 p609
[101] https://www.asylumineurope.org/news/08-07-2018/ireland-new-reception-rules-following-opt-eu-directive
[102] https://ec.europa.eu/commission/presscorner/detail/FI/IP_15_6276

"By April 2015 massive first movements into Greece and Italy were resulting in equally massive secondary movements towards Northern Europe as the overloading of the Italian asylum system and the breakdown of the the Greek asylum system left refugees no option but to wave through. The Dublin System collapsed under its own weight."[103]

In order to enforce the Dublin Regulation provision of the first EU country of entry being responsible for the asylum claim, the Eurodac Regulation established a fingerprint database of all asylum seekers who enter the territory. If these asylum seekers then move on to another Member State their prints can be checked and the asylum seeker can be returned to first country of entry to have his claim processed assuming that it is responsible under the Dublin Regulation Criteria

However due to the pressures that resulted from the refugee crisis the authorities in border Member States such as Greece and Italy were having problems meeting their obligations under the Regulation and these Member States were allowing Refugees to make secondary movements without having their fingerprints taken and so could not be traced back to their initial entry into the European Union in those States.

The pressure of large number of arrivals also meant that these countries could not meet their obligations under the Reception Conditions Directive. These problems continue with the latest Country Report update on Greece reporting not only on the suspension of the making available of the asylum procedure in 2020 by virtue of an emergency government order but also very poor

[103] A.J Menendez 'The Refugee Crisis: Between Human Tragedy and Symptom of the Structural Crisis of European Integration.': European Law Journal Vol 22 No 4 July 2016 p388-416 at 397

detention conditions, especially on the Aegean Islands of Lesbos and Chios with reports of 93 people in one room without access to sanitation or water and detention on board a naval vessel. [104]

There have also been reports of the local authorities lacking the man power and or the equipment to enforce registration of large numbers of refugees leading to backlogs (58726 refugees arrived by sea in Greece in 2019. This number dropped to 9714 in 2020 and 4330 in 2020 according to UNHCR data[105]) This in turn affected the refugees as without registration documents they were unable to access reception conditions. This led to a situation where refugees were living destitute on the streets of major cities and it was this breakdown of asylum processing which led both the European Court of Human Rights and the Court of Justice to declare (with different reasoning) the transfer of asylum seekers back to Greece to be suspended due to human rights concerns. These cases will be considered in greater detail later in this study. [106]

The reality of refugees both having a greater chance of gaining asylum and better reception/living conditions in some countries than others while claims are being heard is the driving factor for secondary movements. In this age of the internet it is straightforward for refugees to do their research on Member States to see where, based on their nationality, they would have more chance of gaining asylum. There are other factors which influence the decision on where to claim asylum such as family reunification and the existence of members of their community in the destination country to offer them support. There is also of course the ability and speed in which the asylum seeker is able to enter the labour market and or the existence and generosity of welfare benefits.

This difficulty in getting 25 Member States to agree to completely harmonized asylum procedure and uniform positive recognition of asylum claims leads this study on to the suggestion that the playing

[104] AIDA Country Report: Greece 2020 update June 2021 p47 https://asylumineurope.org/wp-content/uploads/2021/06/AIDA-GR_2020update.pdf
[105] https://data.unhcr.org/en/situations/mediterranean/location/5179
[106] 'Cracked Foundatioinsm Uncertain future: Structural Weaknesses in the Common European Asylum System' H Beriens Migration Policy Institute March 2018 p 6-8 https://www.migrationpolicy.org/research/structural-weaknesses-common-european-asylum-system (accessed 30.8.2020)

field could be evened out at the later stage by introducing a common appeals process of some kind. The argument that this study will attempt to put forward is that having such a common appeals system could act as a balancing measure even in the situation where there are still divergences in Member States asylum systems. The premise being that a system following one set of court regulations whereby the approach to evidence and the procedure followed would mean that the same process would be followed under the same system no matter where the appeal hearing was held and the nationality of the judge.

The aim of this part of the study is to provide some evidence that such a system is needed by highlighting a sample of differences in Member States asylum systems from procedures to appeals through to assessing credibility and the and how the issues of safe countries of origin are dealt with by the differing Member States.

DIFFERENCES IN THE INTERPRETATION OF THE LAW

A factor that plays a significant part in the divergence of success rates in both the granting of asylum under the Refugee Convention and subsidiary protection status as set down in the Qualification Directive is the differing interpretations of these provisions by the Member States. In particular the definition or what counts as a member of a "particular group" under the Refugee Convention has been debated by scholars intensely as to what can and cannot be included under the terminology.

The rather clumsily worded "serious and individual threat to a civilian's life or person by reasons of indiscriminate violence in situations or internal or international armed conflict" of Article 15 (c) of the Qualification Directive a regards to Subsidiary Protection also caused difficulty in interpretation. It should be noted that the vagueness of the language of both these terms are the result of political compromise. This is the case with Article 15 (c). It has fallen to the Court of Justice of the European Union to deal with the vagueness of the terminology with the case of *Diakite* judgment defining the meaning of internal armed conflict as follows:

"If the States armed forces confront one or more armed groups or if two or more armed groups confront each other." [107]

This is notable as it differs from that of international humanitarian law which is more detailed and specific in its requirements. Article 3 of the third Geneva Convention of 1949 together with Article 1 of the Second Protocol attached to that Convention requires one or more non -State groups to be involved and which may involve hostilities between the State forces and the non -state forces or between two or more non State forces. The hostilities also have to reach a minimum level of hostility for example a collective character and where the State armed forces have to be used against insurgents rather than the police and secondly that the non- states forces must be parties to a conflict in the sense that they must have a command structure and be able to sustain military operations. There must be an element of territorial control by the non- State actors so as to enable them to carry out sustained and concerted military operations.

As can been seen here the CJEU considerably simplifies the definition, removing the caveats laid down in international humanitarian law. The CJEU has also clarified the seeming paradox of a "serious and individual threat" as a result of indiscriminate violence as discussed further below.

Part of the problem that the CJEU was dealing with was the disparate practices of some Member States applying International Humanitarian Law and others not doing so. The heading of "particular social group" in the Refugee Convention was not present in the draft Convention but was rather suggested and introduced by the Swedish representative who stated that because some refugees

[107] C-285/12 *Aboubacar Diakite v Commissaire Generale aux Refugies et aux apatrides* 30th January 2014 ECLI :EU :C :2014 :39 para 28

had been persecuted because they belong to particular social groups."[108] The *travaux* of the Convention is unhelpful as this is the only detail that is recorded in them.[109]

Therefore interpretation by courts and scholars has often fallen back on interpreting the provision by referring back to the other four 'reasons of 'grounds of race, religion, nationality and political opinion …identifying elements central to the other categories (such as the immutability or fundamentality of the category) and then to adopt an interpretation of a particular social group consistent with the identified element."[110] For reference the full criteria for refugee status under Article 1A the Convention is as follows, with the temporal restriction lifted in a Protocol to the Convention of 1967:

> "As a result of events occurring before the 1 January 1951 and owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country; or who not having a nationality, and being outside the country of his former habitual residence as a result of such events is unable, or owing to such fear, unwilling to return to it."[111]

In terms of the latter point it is perhaps a good idea to have a brief look at this stage on how the interpretation of "particular social group" has been interpreted both by different scholars and also

[108] M. Fullerton 'A Comparative Look at Refugee Status Based on Persecution Due to Membership of a Particular Social Group' 26 Cornell Int L J (505) 1993 at 509
[109] 'Membership of a Particular Social Group: Analysis & Proposed Conclusions' UNHCR Paper 1 August 2001 p 4 https://www.refworld.org/docid/3bf92b584.html (accessed 30.8.20)
[110] Ibid p 5
[111] Convention Relating to the Status of Refugees 1951 Article 1 (A) (2)

by different Member State courts together with some examples from further afield. This will help to give a sense on how widely this provision is open to interpretation. Hathaway in his *Law of Refugee Status* analyses two approaches that have been used to determine a particular social group. The first stems from the principle of statutory construction or *ejusdem generis.* This principle applied to the 'particular social group' looks at the whole context in which 'social group' appears i.e. in line with race, religion, nationality and political opinion as grounds for persecution. The US Immigration Appeals Board in a case called *Acosta* stated that social group should mean:

> "…persecution directed against an individual who is a member of a group of persons all of whom share a common, immutable characteristic. This shared characteristic might be an innate one such as sex, colour or kinship ties or in some circumstances it might be a shared past experience such as former military leadership or land ownership."[112]

Hathaway comments that this excludes groups defined by a characteristic "which is changeable or from which disassociation is possible so long as neither option requires renunciation of basic human rights or entitlements."[113] The second test that has been developed is that of the social perception test. The Australian High Court described three factors that make up this social perception test:

> "Must be identifiable by a characteristic or attribute common to all members of the group. Secondly the characteristic or attribute common to all members of the group cannot be a

[112] *Acosta (*USBIA 1985) at 233
[113] *The Law of Refugee Status:* J Hathaway & M. Foster ch 5 p427 (Cambridge University Press Second Edition 2014)

Shared fear of persecution. Thirdly possession of that characteristic or attribute must distinguish the group from society at large"[114]

However the interpretation of this can differ and as Hathaway points out the French jurisprudence requires a positive identification common to all members of the group which can be identified by the decision makers and society as a whole.[115]

Where this starts to get complicated regarding the European Union is that whereas the UNHCR in its guidance has stated that the criteria should be satisfied if either of these two tests are satisfied; the Directive applies the test cumulatively.[116] Hathaway notes that this has been implemented by several European countries who demand that both tests be satisfied for membership of a particular social group to be upheld thus leaving scope for divergences with some Member States applying one test, some the other and some both.[117]

The need for the satisfaction of both tests to be applied before a refugee is recognized as a member of a particular social group is a misapplication of the UNHCR guidance and this misapplication was codified in the Qualification Directive in both the original legislation and the recast legislation of 2011. As an example German and Belgian legislation requires the application of both factors whereas the legislation of Ireland and Hungary allow for the two tests as alternatives.[118] France on the other hand favours the social perception test which has caused difficulties for those seeking asylum due to persecution because of their sexuality because unless the behaviour is "perceived by the society as transgressing the legal order" they cannot be eligible for protection. Therefore those

[114] *Applicant S* (Aus HC 2004) at 400 [36]
[115] See n18 at429.
[116] DIRECTIVE 2011/95/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL (Qualification Directive Recast) of 13 December 2011 Article 10 1 (d)
[117] N18 at p430
[118] 'The Ground with the Least Clarity' A Comparative Study of Jurisprudential Developments Relating to a Particular Social Group.' M Foster UNHCR Legal & Protection Research Series August 2012 PPLA/2012/02 p 17

who have not lived as openly gay have been found not eligible for protection.[119] The case law from the CJEU has however made it clear that credibility assessments based on stereotypes of homosexual orientation does not satisfy the requirement that the assessment takes into account the individual and personal circumstances of the applicant. [120]

This differentiation of approach suggests that there is a need for a more uniform asylum law interpretation across the EU. There also needs to be more clarity in the legislation, especially in the final draft of the revised Qualification Regulation. This proposal seems to have had the expected "bumpy ride" that is common with European Union and is at the time of writing listed as "on hold" on the European Parliament's legislative train website. This states difficulties in getting agreement in the Committee of Permanent Representatives and tension between that body and the European Parliament with the site reporting that "the European Parliament stands by the provisional agreement reached in June 2018 and does not wish to re-open negotiations."[121] The draft Qualification Regulation aims at increasing convergence of asylum decisions mainly by obliging Member State decision makers to draw on common analysis and guidance provided by the European Union Agency for Asylum and European Networks for Country of Origin Information. The draft Regulation in its Article 10 also contains also contains a lengthy list of "elements" that are to be taken into account when assessing a claim for persecution. It may be helpful here to quote the section dealing with assessing membership of a particular social group in full as it contains elements that are extremely subjective in how they can be interpreted:

"the concept of a particular social group shall include, in particular, a group where:

members share:

[119] Ibid p37An
[120] C-148/13-C-150/13 *A,B,C v Staatssecretatis van Veiligheid en* Justie ECLI:EU:2014:2406 2nd December 2014 paras 61 & 62
[121] Reform of the Qualification Directive: Legislative Train Schedule European Parliament https://www.europarl.europa.eu/legislative-train/theme-promoting-our-european-way-of-lifehttp://file-jd-reform-of-the-qualification-directive/ (accessed 16.05.2022)

1) An innate characteristic or common background that cannot be changed.
2) A characteristic or belief that is so fundamental to identity an conscience that the person should not be forced to change it.
3) That the group has a distinct identity in the relevant country because it is perceived as being different to the surrounding society.[122]

The section goes on to say that such a circumstance might include a common characteristic of sexual orientation but introduces caveat by saying that this cannot include acts deemed criminal in the country of origin. It also states that aspects of gender and gender identity should be taken into consideration in identifying both membership of such a group and the characteristic of such a group.

The terms of refugee protection under the 1951 Convention the issue over persecution as a result of homosexuality have seen differences of interpretation as well. The CJEU in the case of *X,Y,Z v Minister voor Immigratie en Asiel* [123] has found that people of homosexual sexual orientation form a particular social group under the Convention criteria but also ruled that the criminalization of homosexuality is not necessary enough to warrant qualification as a refugee. The Court ruled that the punishments under the law would have to be sufficiently serious, for example a term of imprisonment, to count as persecution. On the other hand the Court has also rebutted the claim that homosexuals should conceal their sexuality and remain discreet. This should be taken on board by the Member States.

[122] Art 10 (d) Proposal for a Regulation of the European Parliament and of the Council on Standards for the Qualification of Third Country Nationals or Stateless Persons and Beneficiaries of International Protection, for a Uniform Status for Refugees, or for Persons Eligible for Subsidiary Protection And for the Content of Protection Granted Amending Council Directive 2003/109/EC of 25th November 2003 Concerning the Status of Third Country Nationals Who are Long Term Residents (COM) 2016 466 Final 13.7.2016

[123] C-119.12-C-201/12 Minster voor Immigratie en Asiel v X,Y,Z 7th November 2013 ECLI:EU:C:2013:720a

A LOOK AT DIVERGENCES IN LGBTI ASYLUM CLAIMS

Despite the judgment delivered by the CJEU in the X,Y,Z case there has been research following that case that states that there is still a variety of approaches to status determination in regard to LGBTI asylum seekers. These involve having a very parochial and Eurocentric view of homosexual behaviour based on the decision makers' views on how gay people behave in their own society without taking into account the cultural context of the asylum seeker's country of origin. There are situations such as in Denmark where there are "no specific screening or organizational measures" based on asylum claims dealing with persecution for sexual orientation or gender identity." Other countries such as Greece have only two specially trained decision makers to deal with such cases and as such, at the time of the report quoted where planning to run EASO training (as it then was) I regard to gender identity and sexual orientation.[124] Another area of concern raised has been that while some Member States provide separate accommodation for LGBTI asylum seekers; others are placed in general reception facilities where there have been cases of them being attacked[125]

It is hoped that the new European Union Asylum Agency will be able to use its powers to coordinate better education and training and, where necessary, operational help in this area to ensure that asylum seekers are treated with the proper amount of dignity and understanding and with a similar concern for their safety throughout the European Union.

A common European Asylum Appeal Court system could play a part in ensuring a build up of precedent throughout the EU much in the same way but clear and unambiguous legislation would play a great part in making sure that the Member States are following the same approach.

[124] 'Current Migration Situation in the EU: Lesbian, Gay, Bisexual and Intersex Asylum Seekers.' European Uniion Agency for Fundamental Rights March 2017
[125] Ibid p10

Another area that has caused issues due to the clarity of the language is that of Article 15 (c) of thQualification Directive. The wording of the section was the result of political compromise (see UNHCR report)[126] and has posed problems in interpretation.

Such a court could also add to the precedent that has been set by the CJEU such as that played by the Court in clarifying the interpretation of Article 15 (c) of the Qualification Directive in at least attempting t provide a uniform interpretation of the provision to be applied throughout the European Union. However even with this being the case there are still differences in interpretation as is explained further below.

Article 15 (c) has been the subject of a UNHCR study carried out in 2011 which analyses in detail the approaches by six Member States. The study makes the point at the outset that at the time of the report there was only one place where the indiscriminate violence was so severe that it posed individual harm and that was Mogadishu in Somalia. The confusing nature of the wording of this provision, as set down in the original Qualification Directive of 2004, was dealt with by the CJEU in the case of *Elgafagi* which ruled that where the indiscriminate violence "had reached such a high level that substantial grounds are shown that a civilian, returned to the relevant country or, as the case may be to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat."[127]

The issue that needed clarification was in assessing the extent of how far the indiscriminate violence intrudes to such an extent as to put an individual in danger. The UNHCR shows different approaches to interpreting the *Eljafagi* judgment. Belgium requires a "link to a person" and a "mere reference to the country of origin does not suffice." The position of the United Kingdom Court of Appeal was that the *Eljafagi* judgment does not introduce a new case of exceptionality as not every armed conflict

[126] 'Safe at last: law and Practice in Selected Member States with Respect to Asylum Seekers Fleeing Indiscriminate Violence' UNHCR Research Project July 2011 https://www.unhcr.org/4e2d7f029.pdf (accessed 30.8.2020)
[127] *Elgafagi v Statssecuritis van Justititie* C-465/07 ECLI :EU :C :2009 :94 17th February 2009 para 43

would warrant the grant of subsidiary protection status under 15 (c) of the Qualification Directive but "only one where the level of violence is such that, without anything to render them a particular target, civilians face real risks to their life and safety."[128] Different interpretations can also be seen in the sliding scale test in measuring the amount of indiscriminate violence needed to pose a risk to an individual solely by their presence in the territory.

The Swedish Migration board stated to the UNHCR report writers that it applied a standard lower than that of *Elgafagi* "where the degree of indiscriminate violence is not as high as required for subsidiary protection but the applicant can demonstrate a serious risk of abuse due to factors particular to his or her personal circumstances."[129] Although the report states that at the time of its writing it was not clear from Swedish case law whether the sliding scale test had been applied, the comments that it received from the Swedish Migration Board indicated that it was prepared to take a more flexible approach to that of the Dutch Justice Secretariat mentioned above.

These are just small examples of how the nature or refugee and subsidiary protection law has invited differing interpretations. There will always be different opinions by different judges but to help lessen the impact it is argued that there is a common frame of reference for Treaty interpretation which decision makers and judges in the European Union are obliged to follow. This could be guidance given by the UNHCR itself or that formulated by collaboration among experts at the highest level. There is extensive voluntary guidance given by the International Association of Immigration Court Judges but there needs to be a common agreed standard which is more amenable to interpretation.[130]

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[128] *QD and AH v SSHD* [2009] EWCA Civ 620, paragraph 25

[129] "Safe at Last? : Law and Practice in Selected EU Member States with Respect to Asylum Seekers fleeing Indiscriminate Violence" A UNHCR Research Project July 2011 ch 5 p52 https://www.unhcr.org/4e2d7f029.pdf (accessed 20.5.2019)

[130] See for example papers such as 'An Introduction to the Common European Asylum System for Courts and Tribunals: A Judicial Analysis.' Produced by the International Association of Refugee Law Judges European Chapter under Contract to the EASO August 2016 https://www.iarmj.org/iarlj-documents/general/Introduction_to_the_CEAS_FINAL.pdf (accessed 30.8.2020)

Certainly the cumulative interpretation on that of "particular social group" that is contained in the Qualification Directive means that a harder test is required by the European Union legislation than by the UNHCR where either or of the two different approaches can be applied and only one has to be satisfied. Although Member States are free to impose higher standards at the moment, should this be carried over into the Regulation, this cumulative provision will become THE standard. The argument here is that consistency there would be consistency of approach with all the Member States having to apply that standard by nature of the direct applicability of a Regulation. It will be argued later on that an expert specialist asylum court system may give continuity of precedent but there needs to be clarity in the legislative provisions as well.

SAFE COUNTRY OF ORIGIN LISTS

The issue with safe country of origin lists lies in their variation of application throughout the European Union. Some countries have lists, others do not and those countries that do have safe country of origin lists can differ in which countries they contain. One of the answers to this has been the creation of a common safe country of origin. There was provision for the creation of a safe country of orgin list in the first Asylum Procedures Directive.

The attempt to introduce this was subject to legal action in the CJEU who found that the process of introduction was illegal due to failure to follow the correct procedure due to the Council not having the competence to put forward the measure. The 2005 Procedures Directive stated that the Council was to adopt the common list by qualified majority after consultation with the European Parliament. The European Parliament argued that the decision should have been adopted by the co-decision procedure. The Court concluded that the Council in inserting this secondary legal basis into the Directive exceeded its authority given by the Treaty.[131]

[131] C-133/06 *Parliament v Council* 6th May 2008 ECLI:EU:C:2007:257 para 60

The European Parliament legislative train website reports the file of a proposed Regulation establishing a Common Safe Country of Origin list[132] as being closed as per 12th April 2017 with a vague comment that the content could be contained in in the proposed Asylum Procedures Regulation. Such a list is not contained in the current draft proposal for this Regulation although it contains the comment that the European Council had not come to a position on a European Union safe countries of origin list as proposed by the Commission. It also states that the Council also considered but failed to come to a position of incorporating such a list in the Regulation.[133]

Looking at comments on the ECRE website regarding safe country of origin lists one can get a sense in the difficulty in finding agreement among the Member States on this matter. In the example that follows it contrasts France with Belgium and their policy regarding applicants from Albania and Kosovo:

> "Last Monday (23 March 2013) the Belgian government adopted a list of seven safe countries of origin which included Albania and Kosovo. This Monday (exactly three days later) the French Conseil d'Etat annulled the decision of the French administration to add Albania and Kosovo to the French list of safe third countries."[134]

The legislative train website states that that there was "no consensus about which countries should be on the list and there was criticism of the Commission's methodology in drawing up the list, particularly considering that some Member States such as Finland operate the principle of a safe country list but "do not have a fixed list of countries that would be considered safe in every

[132] Proposal for a Regulation of the Parliament and of the Council establishing an EU list of Common Safe Countries of Origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection and amending Directive 2013/32/EU. COM (2015) 452 Final 9,9.2015

[133] Amended Proposal for a Regulation of the European Parliament and of the European Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU COM

(2020)611 FINAL 23.9.20 explanatory memorandum p8
[134] 'Safe Countries of Origin: An Inconvenient Truth' ECRE Weekly Bulletin 30 March 2012 https://www.ecre.org/safe-countries-of-origin-an-inconvenient-truth/ (accessed 30.8.2020)

situation."[135] Other Member States do not use a safe country list at all and some of those that have such measures in law do not necessarily use them. The European Union Agency for Fundamental Rights notes:

> "According to the European Commission the 'safe country of origin concept features in the Legislation of 22 Member States but only 15 of them apply the legislation in practice. Some of them have national lists while others apply it on a case by case basis. The national lists differ substantially…France has 16, Germany has five and Ireland has only one."[136]

There has also been debate in Member States as to whether or not to include a country on a safe country list at all. The Belgian Council of State for example has argued on the inclusion of Albania on their safe country list. In the Netherlands there have been renunciations of decisions regarding Serbia, Morocco, Macedonia, Algeria, Georgia, Tunisia and India as safe countries; the Administrative Division of the Council of State (the last instance Court)) had overturned all those at the time of the European Migration "Inform" paper in March 2018.[137]

The concept of Safe Country of orgin lists features in the Asylum Procedures Directive and it has been driven by the need by Member States to identify claims with the most merit and efficiency in the Member States asylum systems. However the fast tracking of an application from an asylum seeker should they come from a country listed as safe by one Member State, against prospect of

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[135] Ibid p4

[136] 'Opinion of the European Agency for Fundamental Right Concerning an EU Common List of Countries of Origin' Vienna March 2016 p8 https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=576d48a94&skip=0&query=safe%20first%20country%20list (accessed 17.09.20)

[137] European Migration Network "Inform": Safe Countries of Origin https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_inform_safe_country_of_origin_final_en_1.pdf

another country not having that country listed and allowing a longer process is unfair. In the first instance the applicant has to go through the extra hurdle of proving why their case is the exception to the given norm together with having less time for the procedure. This can be a challenging task given language barriers and the need to collate evidence.

The argument against safe country of origin lists is that by a blanket declaration that a country is safe the claim under the Asylum Procedures Directive is accelerated dramatically even though in the recitals to the Directive it states that it "cannot establish an absolute guarantee of safety for nationals of that country."[138] The Asylum Procedure Directive goes on to say that the safe country of origin concept shall be governed by rules governed by national law regarding individual assessment about whether it is reasonable for an individual to be returned to that country, a case by case consideration of the country for a particular applicant AND/OR national designation of countries considered to be generally safe and rules which "as a minimum shall permit the applicant to challenge the application of the safe country concept on the grounds that the safe country is not safe in his or her particular circumstances."[139] As discussed above this could be challenging when an applicant is faced with fast tracked inadmissibility procedure.

If this variance of application of safe country of origin lists is to continue then it begs the question whether there would be a way to even out the playing field at appeal level. The ideal situation would be a situation where each individual asylum application would be adjudicated on its merits. However a situation such as the European Union has at the moment could be evened out with a single central European Asylum Appeal Court whereby each claim is examined on its merits by a European pool of judges working under common court rules and procedures whereby a claim could possibly be allowed and any unfairness could be overturned. This is especially pertinent when considering the difference in judicial approach mentioned in next subsection of this chapter.

[138] Recital 42 Asylum Procedures Directive 2013
[139] Above Art 38 (2) b and c

The way to deal with the complications raised by safe country lists is to either do away with them altogether in a common asylum system or to have a standard list based on detailed research by a European agency. However even were there to be a common safe country list, all applications for protection, whether from a safe country or not, should be given a hearing and have their individual circumstances assessed where they have enough time to prepare their case and collate evidence. Sadly it is the drive for efficiency and the desire to weed out fraudulent asylum claims that has introduced the safe country practice whereby such fundamental rights in Europe are overlooked.

A fully harmonized asylum procedure with single positive asylum status recognized throughout the Union with a common appeal court could even out these variances by gradually establishing precedent as the CJEU has done. Whether or not there is a will for this to happen remains to be seen. A look at the plans for the Asylum Procedures Regulation shows in the drafting an obligation for Member States to reject an application from an applicant coming from a designated safe third country. This envisions a Union wide list drawn up by the

European Asylum Agency in consultation with Member States and experts rather than giving Member States the option as they have at the present time.

This would mean that there would be further harmonization but in some cases it could also mean lower standards of protection in return for more harmonization and consistency. This common list looks unlikely however in the near future given the lack of agreement at Council level and the shelving of the proposal for the present as has been mentioned earlier.

A more rigorous, harmonizedappeal process at Union level should be put in place however in any case so that the evidence of each application that has been subject to an expedited procedure can be examined in detail so that the applicant has ample opportunity to rebut the presumption of safety in detail and with sufficient time and for judges to apply the Convention and Qualification Directive criteria to that particular case if need be.

DIFFERENCES IN JUDICIAL APPROACH

The need for the above is heightened by the fact that different Member States have different approaches to evidence due to their individual legal traditions. The aim of this section is to examine some of these differences in approach and to analyse how this may also contribute to variances in recognition rates. Ida Staffens in her monograph on the handling of evidence in asylum procedures in the European Union states that international legal principles such as those set down by the Refugee Convention and the Qualification Directive can be varied in practice by different approaches to evidence, particularly at the appeal stage She states that:

> "…any regional rule imposed that sets duties or rights for the decision maker will have divergent effects in Member States, not only because of different understandings of the role of the judiciary but also because of different practical and institutional possibilities. In order to reach common standards….either the rules take into consideration divergences in institutional and practical frameworks that exist in Member States or rules imposing common practical outsets are enacted."[140]

In showing differences in asylum appeals processes the United Kingdom (and Ireland) and Germany are a good model for comparison. The United Kingdom has now left the EU but it is still worth looking at comparative purposes and because Ireland adopts a very similar common law system. The literature however is more strongly focused on the English common law system than the Irish. The Common Law approach in Britain and Ireland is an adversarial one at appeal whereas the approach in Germany is inquisitorial. This is not to say that an immigration judge in England will not seek to

[140] *Evidence in European Asylum Procedures* I Staffans (Martinus Nijhoff 2012) ch9 p 241

establish facts by questioning the applicant at a hearing. However a judge in a German immigration appeal will go further and carry out their own research into the matter that needs to be decided. This does have some drawbacks as all but the largest appeal courts do not have their own research services and therefore have to have to draw on information provided by the government which can result in delays to the procedure.

The German administrative rules (Section 86 VwGO) state that though it is the duty of the Court to investigate the matter before it the applicant must still cooperate with the Court and provide all the documentation they have available to substantiate their claim. The German Appeal Courts have no obligation to establish facts that are not presented by the applicant but only those facts that go beyond their individual situation such as the political and social situation in the applicant's country of origin. In such cases the court's duty to investigate is independent of the applicant duty to cooperate. There is a shifted burden of proof where it falls to the State to establish that persecution will not happen in the future if prior persecution has been established.[141]

The situation under the Common Law system is very different. The claimant may or may not have the services of a lawyer at the appeal hearing. They must organize and gather their evidence themselves and present it at their initial asylum claim interview which is when the asylum seeker's testimony is gathered. The decision on whether to grant asylum is then based on what is presented in this original interview. It is only when an appeal the Tribunal that this evidence that is tested. The claimant puts their case again at appeal and this is challenged by a presenting officer in adversarial proceedings. The evidence has already been gathered at the asylum interview stage. The evidence test is that of reasonable likelihood and its development has come about through precedent in the common law tradition. It is well expressed in the United Kingdom Immigration Appeal Tribunal case of *Chiver.* The Tribunal found that although there were inconsistencies and embellishments in the

[141] Ibid p126

applicant's evidence, they did not destroy the general credibility of the applicant's story. As the Tribunal Chair stated:

> "the structure of the determination reflect the adjudicator's approach in listing matters adverse to Mr Chiver and then concluding that these do not affect the adjudicator's belief in the kernel of Mr Chiver's story."[142]

Lord Justice Brook in the case of *Karanakaran* stated that the burden of proof is lower than it would be in a civil litigation claim and that the test is that of reasonable likelihood as developed in the leading case of *Sivakumaran.* He goes on to say that "decision makers are going to hear evidence which they consider probably true, evidence which they could give some credence even though they could not go as far as to say it is probably true and finally evidence to which they can give no credence whatsoever."[143]

The German approach in their Federal Administrative Court looks at the weighing of all the ascertained circumstance and whether "a reasonable minded, prudent human being in the applicant's position could have a fear of persecution." This is quoted by Lord Keith in the *Sivakumaran* case and is a good example of a Judge from one jurisdiction in the European Union examining the approach of another.

The argument for a European Asylum Appeals Court is that there would be a central precedent setting court in asylum matters drawing on the different judicial traditions and skills of all the Member States but pooling their knowledge and resources in one Court. As will be seen this is the vision behind the planned Unified Patent Court. From a combination such as this a common judicial

[142] *Chiver v SSHD* [1994] UKIAT 10758 p8
[143] *Karanakaran v SSHD* [2000] EWCA Civ 11 para 55

approach could grow and an applicant would have the knowledge that their appeal would be dealt with using the same procedure regardless of the country where they made their application.

A common approach to judging the asylum seeker is also extremely important when assessing credibility due to the difficulties of assessing someone who is not familiar with the language and system of the country in which they are claiming asylum. This makes assessment based on attitude and demeanour especially difficult. As the Irish High Court has stated:

> "In many cases where such facts and event are incapable of any independent corroboration the personal credibility of the applicant may be crucial. At the same time however the decision maker must be careful not to misplace reliance on demeanour and risk construing as a deliberate lack of candour a demeanour which may be the result of nervousness, the stress of the occasion and even the embarrassment of being an asylum seeker. An apparent uncertainty may be attributable to difficulties of language and comprehension."[144]

This is crucial at the initial interview stage but even more so when it comes to the appeal stage when the applicant may be examined either by the opposing party or in the case of an inquisitorial system, the judge themselves. An inquisitorial system given these circumstances seems the best way of examining the facts surrounding the applicant's particular circumstances and a central court system drawing on common expertise would arguably be able to draw on information that would make them more culturally aware and able also to draw in the most up to date information on the information that is available on the ground.

[144] *HR v Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform* [2011] IEHC 151 1`5.4.2011.

Staffens mentions that at the German Appeal Court stage the investigating judge will also draw on information from major NGOs who have experience of the country of origin of the applicant. In a situation such as this the application is tested afresh by an experienced member of the Judiciary and it is hoped that this will lead to a fair conclusion. If such dialogue and investigative work could be done at the European Union level in the form of a centralized European Union appeal court of even a central advisory court to give guidance to the Member State court, the hope would be that there would in time be less variance of approach when it comes to assessing evidence.

The point that must be stressed is that the research that is drawn on, especially that in regard to country of origin information, is the same drawn on by all and that it is thorough, up to date and impartial.

Further ethnographic investigations into the asylum appeals procedures in France and Italy have shown that the outcome of the decision is not only dependent on the law and the facts but also the "inner belief" of the judge. Indeed the inner belief as to the veracity of a claim is an integral part of the French legal system appearing in the French Code for Legal Procedure. It is however poorly defined requiring the decision maker to "question themselves in silence and contemplation and to seek in the sincerity of their conscience what impression has been made on their reason by the evidence brought against the accused and the arguments of his defence."[145] This seems to be some kind of gut feeling of the decision maker which seems questionable seeing it could rely on the decision makers world view rather than objective factors.

When there are cultural differences between the judge and the applicant, where the known facts of the case are slim and where the country of origin information is sparse, this "inner belief" system can result in Judges resorting to stereotypes. A French judge is quoted as saying "I was shocked to see what extent we don't practice law here. From the legal point of view the questions raised here

[145] Translation from French Art 353 Code de procedure penale in 'The Inner Belief of French Asylum Judges' C Kobelinsky in *Asylum Procedures in Europe: Ethnographic Perspectives* (Palgrave 2019) ch 3 p55

are very poor." He goes on to stress that there are "few technical aspects involved in decision making" and that there are some "very thorny questions, but we don't raise them, for instance concerning the notion of nationality or residence, but most of our decisions rely on the intime conviction."[146]

This stems from a situation where "the public authority must establish the nature and the quality of the evidence needed" to verify the applicant's claim "because in most cases the documents are inconclusive or contested and the asylum application is rejected." It is in situations like this where the decision maker can fall back on stereotypes especially in sexual orientation cases."[147]

Problems have also been sadly recorded of ignorance among Judges as to the culture of the applicant before them. Given the importance of the hearing where the applicant could be facing return to a country where they have suffered persecution it is imperative that the Judge is thoroughly briefed on the country of origin through research before the hearing. The following example of an asylum appeal in Bologna Italy leaves much to be desired in this respect from the judge:

> "With both her posture and her tone of voice the judge makes it clear that she does not intend to waste any time so while quickly flipping through the files she addresses the lawyer directly in Italian, questioning the nature of two new documents found in the file. Since the interpreter had started to translate, the judge stopped him, explaining that he should only interpret when asked to do so and asked him first to confirm if he was the linguistic interpreter for the "Pakistani" language."[148]

[146] Ibid p 53
[147] Above p61
[148] What Do We Talk About When We Talk About Credibility?: Refugee Appeals in Italy' : B. Sorgoni in *Asylum Determination in Europe: Ethnographic Perspectives* (Palgrave 2019) Gill & Good (eds) ch11 p224

The above shows a judge in haste where the applicant does not get a full and detailed hearing. The judge is also not familiar with the fact that the majority language of Pakistan is Urdu which indicated a lack of knowledge and therefore preparation and research on the background of the applicant. The researcher observing this hearing notes that it lasted barely 20 minutes and that the outcome was obvious from the judge's face when the applicant mentioned supporting his family as well as his life possibly being in danger.

On the mention of the word support there was no further investigation of the violence surrounding the land disputes which formed the basis of the applicant's claim and that the whole decision swung on that word "support" and that the applicant was judged an economic migrant because of this with the medical and police reports that formed the applicant's bundle not perused by the judge.[149]

What these examples aim to show is that the ideal and the reality of asylum appeal hearings are often very far apart and differ in rigour and approach. On the one hand we have a system in Germany where there is an obligation on the appeal judge to research the relevant situation in the country of origin in order to make an informed decision whereas on the other hand there is a situation where there are judges that are making decisions based on gut feeling. This chapter has tried to demonstrate that despite the aim of Tampere to create a Common European Asylum System aiming to further harmonize asylum determination and procedures throughout the European Union, there still remains major differences both in relation to the information used by the Member State authorities and Courts in determining asylum applications. There are also great differences in terms of the style of appeal hearing that an appellant can expect depending on the legal traditions of the Member State.

The next chapter of this study will move on to look at ways in which asylum decision making both at the initial and appeals stage could be harmonized across the Member States to ensure that the same country of origin information is used, that the Judges and decision makers have the same knowledge

[149] ibid

and expertise and that the application will be dealt with according to the same approach and methodology. The most radical harmonization proposal will be the imagining of a centralized European Court System. The further agencification of the Common European Asylum System will also be analysed to see how it could aid harmonization of EU asylum decision making by providing detailed information regarding country of origin information and by the possibility of exercising a supervisory function to ensure the process is carried out fairly and to an equally high standard throughout the Member States.

CHAPTER TWO

THE PATH TO FURTHER INTEGRATION OF THE COMMON EUROPEAN ASYLUM SYSTEM

The last chapter sought to give an overview of how disjointed the Common European Asylum is at the present time and how variances in national legislation and the interpretation of the law and legal traditions can account for differences in recognition rates. This chapter will aim to examine the ways in which the European Union plans to deal with this with the third phase of Immigration and Asylum legislation which is currently working its way through the EU legislative process at the time of writing while also considering other ways in which the European Union might pursue its objectives. Is the move towards Regulations for Qualification and Procedure with the lessening of Member State competence a wise one given the research highlighted in the previous chapter that points to an attitude of "integration without supranationalisation" among the heads of state in the European Council?

Would European Union asylum policy benefit by perhaps focusing on greater policy coordination and cooperation between Member States? Could the Member States be encouraged tosynchronise their policy approach through soft law and mutual consultation measures in relation to asylum policy coordinated by the European Asylum Agency? To that end the Regulation forming a European Asylum Agency will be examined to see how the workings of a more powerful European Asylum Agency which has replaced the European Asylum Support Office, would help with such coordination in line with the proposed Asylum Procedures and Qualification Regulations which by their very nature will compel states to work to the same standards.

Following this the chapter will look at some other policy areas where harmonization of policy has taken place and which require policy coordination as a result. These will include European Union

copyright and patent law harmonization, the General Data Protection Regulation and the audio/visual Media Services Directives. These may sound like a random selection but they are pertinent to this study, especially considering the fact that the law relating to European Patents as there have been long running plans to set up a Unified European Patent Court in Europe which will be a very important comparator in this study when looking at potential future court models for dealing with asylum and immigration matters. Essentially what this chapter aims to do is give an illustration of how policy coordination and implementation can be managed across the Member States moving from informal measures to more formal oversight and supervision before moving on to discussing how centralization in some form of the judicial stage of asylum determination could work in a more harmonized and streamlined system.

THE THIRD PHASE OF THE COMMON EUROPEAN ASYLUM SYSTEM.

The recasting of the Asylum Procedures and Qualification Directive, in spite of offering in more clarity in certain areas, still came nowhere near achieving the aims of Tampere and a Common European Asylum System. The problem lies with legal form by which the policy was delivered. The Dublin provisions concerning which Member State is responsible for determining asylum claims have always been in the form of a Regulation: a directly applicable edict which as soon as it is passed becomes binding law in all the Member States. The Directive by its nature: binding as to the result to be achieved has proven to be a messy way of implementing asylum law. For example after the Asylum Procedures Directive was recast there were a large number of Member States that were served with infringement proceedings for not transposing the provisions laid down in the Directives. The problem is that Directives, despite containing imperative words such as “shall” and “must” rely on Member States to pass their own legislation to put the measures laid down by them into practice and this together with the flexibility that the Directives allow has enabled many differences in procedure and approach in relation to asylum processing.

By aiming to transform the Asylum Procedures and Qualification Directives into directly applicable Regulations the Commission hopes to reduce the margin for divergence which can be caused by the transposition of Directives into the national legislation of the Member States where there is a chance the provisions could be misapplied or interpreted or even not put into place at all with Hungary and Portugal being two Member States that have had reasoned opinions sent to them by the Commission in this regard.[150] These Regulations will become binding in their entirety as and when they pass into law. The negotiations on these proposals have been difficult however and in a bid to inject impetus into the proceedings, these proposals for the Common European Asylum System have been re-worked under what is being called the EU Asylum Pact.[151]

The latest proposals on reforming responsibility allocation see the Dublin Regulation replaced by the Proposal for an Asylum and Migration Management Regulation. This was launched by the European Commission as part of what it terms the new EU Asylum Pact. These documents were released in September 2020. Although this new proposal still has the first country of entry as being the most important criteria in the processing an asylum claim, its proposals both seek to widen the possibilities where another Member State should assume responsibility. One example of this is by its broadening the definition of family members.[152]

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[150] See February (2021) Infringements Package:Key Decisions 18th February 2021 EU Press Corner https://ec.europa.eu/commission/presscorner/detail/en/INF_21_441 (accessed 6.3. 2021), 'Commission Urges Portugal to Fully Implement the EU Asylum Procedures Directive:' Schengen Visa Info article 3 November 2020 https://www.schengenvisainfo.com/news/commission-urges-portugal-to-fully-implement-eu-asylum-procedures-directive/ (6.3.2020)

[151] Communication from the European Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee on the Regions on a New Pact on Migration and Asylum COM (2020) 609 Final 23.09.2020 https://eur-lex.europa.eu/resource.html?uri=cellar:85ff8b4f-ff13-11ea-b44f-01aa75ed71a1.0002.02/DOC_3&format=PDF (accessed 21.01.2022)

[152] The definition of family members being contained in Article 2 (g) Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive EC 2003/109 and the poposed Regulation EU XXX/XXX (Asylum and Migration Fund) COM 2020 (610)Final

The biggest changes to be proposed are in regard to compulsory solidarity measures in the event of a particular Member State being overwhelmed. Under these proposals the Commission would convene a solidarity forum on the basis of an annual Migration Management Report from the Commission which will set out "the short term projections anticipated on all routes for disembarkations…that would be required to contribute to the needs of the Member States of disembarkation relating to locations not at the border procedure or capacity needs of the concerned Member States."[153]

When this report highlights that certain Member States are likely to experience migratory pressure or be subject to disembarkations as a result of search and rescue operations, the Commission will invite within two weeks of the ratification of the report these Member States ,which are not affected, to propose solidarity action. They will then have a month to respond to the report by stating what solidarity measures they are willingto provide.

These measures can consist of relocating asylum seekers in their territory, providing financial backing for the return of illegally staying third country nationals or operational support on the ground and other capacity building measures by way of a solidarity response plan. Should the Commission consider that the indicated contributions from the Member States fall short it will call a solidarity forum of all the Member States and ask those Member States to increase the amount and type of their contributions. Where the Asylum Agency states that the 80% of the solidarity pool that results will be used up by one Member State, the Commission can call another solidarity forum calling upon non affected Member States to up their contributions.[154]

The problem with the above provision will be that of gaining acceptance from all the Member States. The first reaction from the Visegrad countries of Poland, Hungary and the Czech Republic was

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23.9.2020 https://eur-lex.europa.eu/resource.html?uri=cellar:2a12bbba-ff62-11ea-b31a-01aa75ed71a1.0001.02/DOC_1&format=PDF

[153] Ibid preamble p18

[154] See Articles 45-56 of the above for the full, very detailed proposed provisions.

outright opposition with Hungary stating that a complete sealing of the EU external borders was needed and that Hungary along with the Czech Republic was opposed to any form of quotas on numbers of asylum seekers being imposed on the Member States.[155] The previous emergency relocation measures adopted by the Council were wound up with only a fraction of the planned number of refugees being relocated.[156] The provisions put forth in the planned Asylum Management Regulation aim to spread the burden more effectively throughout the Member States. However this study in ch 4 aims to put forward the proposal that the possibility of an independent specialist asylum appeal court which could help eventually form a corpus of precedent which could help to provide a uniform interpretation of these new legislative measures which could help reduce the divergences in interpretation and procedure mentioned in the previous chapter.

As far as the Asylum Procedures Regulation and Qualification Regulations are concerned, they have the aim of increasing harmonization by direct applicability of provisions aim to prevent the problems of national divergences. The most radical approach to achieving a Common European Asylum System would be to put asylum decision making within the competence of the European Union in a fully federalised system but this would require a change to the Treaties.[157] Article 78 TFEU states that the European Union shall develop a common asylum procedure and a uniform asylum status without directly stating how this should come about.

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[155] https://www.euractiv.com/section/justice-home-affairs/news/in-brussels-visegrad-four-reject-the-eus-migration-plan/ (accessed 3.11.2020

[156] G. Shiel 'The Emergency Relocation Scheme: A Burden Sharing Failure' Next EUK Working Paper Series Issue 3 Queen Mary University of London March 2021 https://www.qmul.ac.uk/nexteuk/media/nexteuk/documents/NEXTEUK-Griffin-MAR21-(Fusionn%C3%83%C2%A9)-copie.pdf (accessed 07.02.2022)

[157] E. Tsourdi: 'Of Legislative Waves and Case Law: Effective Judicial Protection, Right to and Effective Remedy and Proceduralisation in EU Asylum Policy.' Review of European Administrative Law Vol 12 No 2 143-166 at p 147.

This study seeks to argue that such a Court would ultimately provide a benefit to European Union Asylum policy by providing specialist adjudication of asylum claims at the European Union Level. Such a Court could work as part of a fully integrated and genuinely common CEAS or it could be a Court of last instance following an appeal from the Member States. In the last instance such a Court could be a purely specialist advisory Court which could advise Member State Asylum Courts on matters of law relating to asylum and subsidiary protection. The advantages of such a Court together with its disadvantages will be considered further in chapter 4 but suffice to saysuch a Court would be different from the seeking of a preliminary ruling from the CJEU in that the exercising of an appeal would be launched by the refugee concerned rather than a preliminary rulingrequest which has to be made by the judge hearing the case.

The European Asylum Pact of 2020 also contained revised plans for the further harmonization of asylum procedures. There are still provisions which leave a lot of room for interpretation and discretion such as the criteria for processing an application under accelerated procedures under Article 40 of the proposed Asylum Procedures Regulation.[158] These include the determination of when the applicant has presented facts which are not considered relevant for an application for international protection, whether he has misled the authorities by presenting or withholding relevant information, whether the application is without substance and whether the application is being made to frustrate an earlier decision which would result in the applicant's removal.

These criteria are vague and could be open to different interpretation by different judicial bodies. A common interpretation by a common court would result in precedent that could even out the potential here for irregularities and ensure that cases on appeal are examined more thoroughly. The

[158] Proposal for a Regulation of the European Parliament and of the Council establishing a Common Asylum Procedure in the Union and Repealing Directive 2013/32/EU Brussels COM (2016) 467 Final 13.7.2016

question may be asked why the CJEU cannot do this. As will be seen the CJEU has since the ratification of the Lisbon Treaty been given jurisdiction in relation to immigration and asylum matter. However it is for the national courts or tribunals to make a preliminary reference to the CJEU for the interpretation of EU law where there is uncertainty. Individual applicants can apply the CJEU for Judicial Review of decisions from any of the institutions or the EUagencies however the ability of any individual to launch judicial review proceedings is restricted by strict conditions on standing.

A European Union Asylum Court presided over by expert asylum judges which can be directly appealed to by an individual would not only build up precedent over time but, as will be discussed in chapter 4, would ensure by way of common procedure and evidence, that all such appeal hearings are carried out in the same manner. Such precedents built up by such a Court could help even out irregularities that stem from a common procedure from Member States in its early stages by giving guidance on the application of the common procedure as well as interpretation of the Refugee Convention and Subsidiary Protection and thus taking pressure from the CJEU although such a European Asylum Appeal Court would have to recognise the authority of the CJEU as the final arbiter of European Union law and make a preliminary reference to the CJEU if necessary. These matters will be discussed further in chapter 3.

The proposed Asylum Procedures Regulation has also seen modification as part of the 2020 Asylum Pact[159] together with the introduction of a new complementary proposal for a Regulation that deals with the screening of asylum applicants at the EU border.[160] The new proposals aim for an improvement in efficiency in the system by firstly filtering out those claimants who come from

[159] The above has again been modified by Amended Proposal for a Regulation of the European Parliament and of the Council establishing a Common Procedure for International Protection in the Union and repealing Directive 2013/32 COM (2020) 611 Final 23.09.2020. Note this is not a complete revision of the first proposal but amends certain Articles.

[160] Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2226, (EU) 2018/1240 and (EU) 2019/817 COM (2020)612 Final 23.9.2020 https://eur-lex.europa.eu/resource.html?uri=cellar:0e922ce2-ff62-11ea-b31a-01aa75ed71a1.0001.02/DOC_1&format=pdf (accessed 8.3.2023)

countries where the recognition rate is of a European Union average of 20% or below. These people will be channeled into an accelerated procedure.

The second important measure is streamlining the asylum procedure and returns process whereby the return order would be made by the same court at the same time as a negative asylum decision or there would have to be a separate expulsion decision the same time as the refusal decision. In regard to the border procedure this may be applied following the new screening process that is planned for on entering the territory.

This screening procedure will apply to those who have madean unauthorised crossing into the EU, or who have been disembarked following a search or rescue mission or who apply for asylum while being checked at the border. It will consist of health and security checks, an identity check and completing a debrief form. Should the applicant fall into the under 20% success category, be found to be travelling under forged papers or is deemed to be a threat to security the border procedure must kick in.[161] Applicants subjected to the border procedure will only get one chance of appeal which the Commission state in their preliminary introduction to the draft Regulation proposal:

> "…the aim of these changes is to strike the right balance between the rights of applicants to an effective remedy and the need to ensure that the asylum systems of the Member States are not abused by applicants, third country nationals and stateless persons who only aim at preventing their removal from the Union."[162]

[161] S.Peers 'First Analysis of the EU's New Asylum Proposals' 25th September 2020 http://eulawanalysis.blogspot.com/2020/09/ (accessed 2.11.20)

[162] Amended Proposal for a Regulation of the European Parliament and of the Council establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/£U COM((2020) 611 Final Brussels 23.9.2020 p8 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0611&from=EN (accessed 1.11.2020)

The overall aim of the revisions that have come with the September 2020 asylum pact in regard to procedure is a drive towards efficiency in sifting out those asylum claimants from low recognition countries together with a concern of the Commission about those whose applications have been turned down playing the system by dragging out the appeals process by fighting on two fronts. This is because with separate appeals against both the asylum decision and that of the return decision can potentially be very far apart in time. There is also a desire to harmonize time limits for lodging such appeals under the new system as at present these can differ greatly between Member States. The Commission Staff Working Paper on the Pact stating that:

> "Return Decisions would be appealed to the same Court with the same deadlines as the asylum ones. A system where return decisions are issued with rejected asylum claims may reduce the burden on administrative and judicial authorities as it unifies two administrative and appeal procedures into a single one. More concretely, joining the two appeal procedures will prevent deficiencies in asylum and return systems from unauthorised movements and creating unwanted effects for the Schengen area (i.e. migrants moving to Member States where they can best evade return.")[163]

These concerns of the Commission are difficult to substantiate in any detail due to a scarcity of comparative data on the time taken for the passage of appeals at first and second instance in Member States. The International Centre for Migration Policy Development carried out a lengthy study in 2020 which examined the asylum appeals processes of Germany, Greece, the Netherlands,

[163] Commission Working Document Accompanying The Document Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and amending Council Directive (EC) 2003/109 and the Proposed Regulation xxx/xxx Asylum and Migration Fund Brussels 23.9.32020 SWD (2020) 207 Final p 73 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0207&from=EN

(accesed 1.11.2020)

Norway,[164] Poland and Switzerland (so a mixture of both EU and Non EU Countries). As is perhaps expected the study encountered "a lack of reliable and comparable asylum data disaggregated by type of procedure, despite the relative statistics available for asylum in Eurostat." The report goes on to recommend the European Union Institutions take this into account which they have done in a revised EU Migration Statistics Regulation which asks Member States to provide to Eurostat on this matter.[165]

In relation to status determination the proposed Qualification Regulation calls for frequent reviews of the situation in countries of origin by host Member State when reviewing of residence permits and also for significant situation changes in the country of origin as well as the potential to refuse protection as soon as the Member State feels that there is internal protection available to the refugee. Article 8 of the proposed Qualification Regulation states that Member States are to ensure that "precise and relevant information is obtained from all relevant sources" which includes the UNHCR but also Union level analysis as well as common analysis referred to in the regulation setting up an EU Asylum Agency which will be considered later on in this chapter. [166]

The central collation of research information and its regular updating would be useful in these proposals to further harmonise the asylum procedures process. Having a centralized agency providing this research will hopefully provide uniform data for the member states to draw on. However due to different legal traditions and approaches in the Member States such information

[164] 'The Asylum Appeals Procedure In Relation to the Aims of European Systems and Policies' Final Report January 2020 p8 International Centre for Migration Policy Development https://www.icmpd.org/file/download/48402/file/The%2520Asylum%2520Appeals%2520Procedure%2520in%2520Relation%2520to%2520the%2520aims%2520of%2520European%2520Asylum%2520Systems%2520and%2520Policies.pdf (accessed 17.02.2022)

[165] Regulation (EU) 2020/851 of the European Parliament and the Council of 18th June 2020 amending Regulation EC No 862/2007 on Community Statistics on Migration and International Protection recital 6

[166] Article 8 (3) Proposal for a Regulation of the European Parliament and of the Council on Standards of Qualification for Third Country Nationals or Stateless Persons as Beneficiaries of International protection, for a Uniform Status for Refugees of For Persons Eligible for Subsidiary Protection and for the Content of Protection Granted and Amending Council Directive 2003/19/EC of 25th November 2003 concerning the Status of Third Country Nationals who are Long Term Residents Brussels 13.7.2016 COM 2016 466 Final https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2016/0466/COM_COM(2016)0466_EN.pdf (accessed 1.11.2020)

still has the ability to be interpreted differently. Another factor that needs to be considered is that that the amended Asylum Procedure Regulation proposal only allows an asylum claim made under the border procedure one chance of an appeal. This aids efficiency but this one chance together with fairly short time limits for making an appeal under the proposed new rules means that those who may have to rebut the presumption of safety, should they come from a country with low average recognition rates, will have a very short time to make their case.

Therefore it stands to reason that the information provided by the European Union Agency for Asylum must be as detailed and up to date as possible. The new legislation states that in these instances the proceedings shall be "as short as possible" whilst still respecting fundamental rights. The fear is that applications rushed through in fast track procedures with limited appeal options which may not be considered in as much detail as they ought as the UNHCR handbook states:

> "In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus while the burden of proof lies with the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed in some cases, it may be for the examiner to use every means at his disposal to produce the necessary evidence in support of the application."[167].

There could be concerns raised that fast track procedures in processing claims within a short time scale and with limited rights of appeal could mean that the standards which the UNHCR deems the most appropriate will not be followed. That part of paragraph 196 quoted above goes on to say that

[167] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees 1979 Re-Edited Geneva 1992 Part 2 Para 196 https://www.unhcr.org/4d93528a9.pdf (accessed 2.11.2020)

in situations where such difficulties of proving the applicant warrants refugee status occur the applicant should be given the benefit of the doubt. An applicant may find it very difficult to prove that they are an exception to the presumption that their country of origin is safe by reason of low average recognition rates. The aim of the European Asylum Support Office and the replacement Agency in providing common analysis and research of country of origin information no matter how laudable the intentions is not an effective end in itself but:

> "…depend on whether the designation of third counties as safe and the inadmissibility finding on an individual level, will be based on a rigorous assessment of information, coming from a multitude of sources including civil society."[168]

The challenge is not only to have uniform information for the Member State asylum systems to draw on but to make sure that those standards are rigorous and of high quality and that they are applied in a uniform way. As stated above civil society, refugees and the UNHCR can have a part to play but the problem that needs to be addressed in this chapter is how can it be ensured that all of these Member State asylum systems can "sing from the same hymn sheet" as far as is possible without the fully federalised asylum system which, judging from experience, would be very hard to Member States to agree to in any case given the difficulties that have manifested themselves in negotiating the Common European Asylum System over the years

In chapter 4 these matters will be returned to where the discussion will turn to the possibility of extending the harmonization beyond what is currently proposed by the European Union by examining whether a harmonisation of the asylum court structure within the EU could not only

[168] See footnote 4 at p156

contribute to the efficiencies that the EU is seeking to achieve but also ensure that claims are examined rigorously, that rights of appeal and the way that such appeals are heard are equal and the possibility to have a centralized appeal/advisory court made up of experts in asylum law that can provide guidance to a lower tier of Courts which are bound by the same rules of procedure.

For now though this chapter will move on to consider ways in which the Member States could ensure that they are adhering to the same standards in regard to asylum policy, how they could find ways to coordinate policy and approach across the Member States as much as possible while preserving the autonomy of the individual Member States as much as possible. For this one has to ideally look towards a future where there is good will and a desire to cooperate. This is as important for the issue of reception conditions as well as procedure and assessing protection needs. This is at the time of writing an extremely sensitive issue with Hungary in particular coming under the scrutiny of the CJEU in particular in relation to the detention of refugees subject to a return decision at the border with Serbia.[169]

POLITICAL COORDINATION

This section in contrast to the above will consider whether a more informal policy coordination could play a part in reducing divergences across the Member States should the measures driving further integration mentioned not gain the required consensus from the Member States. Perhaps those Member States keen to keep control of asylum policy and border control at a national level would respond to a more informal coordination? This raises the statement that both asylum status determination and procedures are currently governed by Directives and consensus has often been difficult to achieve so why would this be any different in the future. An institution that could have an effect more efficient coordination and consensus building is the European Union Agency for Asylum

[169] See case C-924/19 *PPU* & C-925/19 PPU *FMS & Others v Orszagos Idegenrendeszeti Foigazgatosag Del Aifodi Regionalis* ECLI:EU:C:2020 :367 14th May 2020

This Agency has as part of its remit, the provision of researching and providing common country of origin information as well as provision of operational support for Member States. However it also needs to be considered how Member States can co-ordinate their asylum policy to achieve as common an approach as possible. This section will examine the ways in which this can be done on a more informal level.

However for coordination of policy to be effective through the sharing of ideas and common practice, it is heavily reliant on good will and solidarity among the Member States. When dealing with topics that can reach to the heart of Member State sovereignty and where there is room for controversy and dispute a softer approach is has been seen to be beneficial and this can be seen in the "open method of coordination" policy approach. This has been shown in areas such as fiscal policy for example with "a soft coordination of economic policies conceived for monitoring the consistency of national economic policies with the economic objectives of the European Union, and for Member States participating in the Euro Zone, with the Eurozone monetary policy."[170]

Space does not permit a detailed analysis of this approach but suffice to say it adopts a softer method by which the Member States in the European Council working together with the commission to adopt common policy guidelines which they agree to abide by these without going through the traditional community method of setting down legislation. This may have failed in the past with some Member States wary of ceding further competence to the European Union in asylum policy however the new EU asylum agency could possibly act as an effective facilitator of coordination by helping to provide training, detailed country of origin reports and guidance in the form of what is known as the Open Method of Coordination

[170] C De La Porte : 'Is the Open Method of Coordination Appropriate for Organizing Activity at European Level in Sensitive Policy Areas?' European Law Journal Vol 8 (1) 2002 p38-58 at P

THE OPEN METHOD OF COORDINATION

This Open Method of Coordination approach has been said to have four key elements: "the setting of short, medium and long term guidelines for the EU with specific timetables for their achievements, establishing performance indicators and benchmarks tailored to each member state and different sectors which allow comparison of best practice, translating targets from the European to the national and regional levels and finally periodic monitoring, peer review and evaluation with the emphasis placed on the process of mutual learning."[171]

The issue with the open method of coordination is that it again depends on the goodwill of the Member States concerned in agreeing to abide by the policy. Paul Craig has drawn attention towards this method of policy coordination as being held together by peer pressure among the Member States but it is essentially without any teeth in terms of actual enforcement of the policies.[172] It is more a "mutual surveillance of national policies."

For this method to work in an arena as controversial as asylum policy would need to rely on a collegiality among the Member States which when one considers the history of difficult negotiations in passing CEAS may not be there. This can be seen also the plans for emergency relocation of asylum seekers from the hotspots in Greece and Italy ended with only a fraction of the number (less than 30%) of those envisaged with Amnesty International stating that "few Member States had engaged positively with the Scheme…failed to meet their commitments or have accepted asylum seekers at a very slow pace."[173] Three countries: the Czech Republic, Hungary and Poland had

[171] D.Hodson & I. Maher: "The Open Method of Coordination as a New Mode of Governance: The Case of Soft Economic Policy Co-Ordination" 39 (4) 2001 Journal of Common Market Studies 719-46 p 724 See also for full definition 'Lisbon European Council Presidency Conclusions' 23 &24 March 2000 paras 37-40 https://www.europarl.europa.eu/summits/lis1_en.htm (accessed 3.03.21)
[172] *EU Administrative Law*: P. Craig ch 7 p231ff (Oxford University Press 2018 3rd Edition)
[173] 'Why the End of the Emergency Relocation Scheme Should Not Mean the End to Relocation' M.Costa Riba https://www.amnesty.org/en/latest/news/2017/09/why-the-end-of-the-refugee-relocation-scheme-should-not-mean-the-end-to-relocation/ (accessed 27.12.20)

infringement proceedings brought against them for failing to meet their quota. The Court of Justice found that these Member States did indeed infringe EU law by failing to meet their obligations.[174]

There were also reasoned opinions from the Commission following the second reform of the CEAS against the prominent Member States of France, Germany and Italy for not communicating the transposition of some of the legislation in a timely manner.[175] The challenge that is faced therefore with measures such as the open method of coordination is that it is based on the willingness of all the Member States to work together to achieve the same aims. It does not bode well for soft law measures where there is recalcitrance by some Member States in relation to binding provisions such that mentioned above in relation to the Czech Republic, Hungary and Poland. Slovakia too has been found to have disregarded an interim measure issued by the European Court of Human Rights in relation to an individual to Algeria together with also disregarding an interim measure ordered by the Committee of the Rights of a Child in relation to a Dublin Transfer decision to sending an Afghan mother and her four children to the Netherlands.[176]

If there is a tendency for some Member States to defy the CJEU, the European Court of Human Rights and other bodies in regard to the Common Asylum System as it now stands, It is unlikely that such countries would give their support to both further harmonisation of the Common European Asylum System or a centralised EU asylum Court System.

The coordination of best practice in the determination of asylum status could be useful in an area where there are currently such wide differences of outcome and practice. There would have to be the will to exchange these ideas and take on board other's input in for example determining a common approach to assessing evidence and credibility regarding various nationalities. Examples of

[174] C-715/17,C-718/17 & C-719.17 Joined Cases: European Commission v Poland, Hungary & Czech Republic ECLI:EU:C:2020:257

[175] https://ec.europa.eu/commission/presscorner/detail/en/IP_16_270

[176] 'Implementing Judgments in the Field of Asylum & Migration on Odd Days.' Hungarian Helsinki Committee & Friedrich Naumann Foundation 17th October 2022 p 34

policy areas where a more informal Open Method of Coordination has been used are social policy and employment strategy where the approach was to set targets and policy guidelines which the Member States would try to achieve.

An example of this can be seen in the Europe 2020 Policy for Smart, Sustainable and Inclusive Growth which aims to lift 20 Million people out of poverty and increase employment rates for those between 20-64 to 74%.[177] This is more a soft law style of approach. Paul Craig has however stated that it is an error to view the Open Method of Coordination purely as soft law stating that very often the method has its basis in Treaty Articles and EU legislation. A more stringent approach to the Open Method of Coordination can be observed in relation to European Monetary Policy such as in relation to Member States running up excessive deficits where there was the power to sanction such States should they exceed the margin laid down in the rules though Craig notes that in practice these rules had been waived when France Germany, Italy and Portugal had run up a deficit contrary to the rules in 2003 which led to the Economic and Financial Affairs Council to put the excessive deficit procedure for France and Germany.[25]

This damaged the reputation of this mechanism among the Member States and led to complex legal action at the Court of Justice of the European Union.[178] Another example of this is inrelation to the Internal Market, an area where the European Union shares competence with the Member States. The European Commission in a document regarding the timely implementation of Directives in relation to this area of policy refer to an OMC approach stating that:

> "Member States have expressed an interest in learning from one another's practices, and have been consulted, through the Internal Market Advisory Committee, on their good transposition

[177] See https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester/framework/europe-2020-strategy_en. (accessed 3.03.22)

[178] See footnote 22 at p 207

[25] *EU Administrative Law*: P Craig (Oxford University Press 3rd edition 2018) ch7

practices and their different national, constitutional, legal and administrative rules and practices in regard to transposition."[179]

The Open Method of Coordination is essentially a compromise approach where there needs to be a balancing between achieving goals which need a certain level of political and legal certainty with the need to tread delicately in sensitive areas where the Member States are keen to maintain political control for themselves. The idea of the open method of coordination in asylum and immigration policy has been mooted before by the Commission in 2001. The Commission stressed then that it wanted to achieve coordination prior to "the adoption of a common legislative framework which has been set down in Article 63 of the Treaty of Amsterdam."[180] The coordination envisaged here was to ensure the smooth transition to the adoption of the initial set of legislation which was to follow in the next few years following Tampere. The communication proposed that the OMC should be implemented for an initial period of 6 years. This was to cover a period of evaluation of the Directive dealing with the conditions of entry and residence of third country nationals for the purpose of paid employment and self - employment." The Commission also reserved the "right to introduce additional legislative instruments where appropriate for the coordination of the common policy."[181]

The communication put forward the same ambitious agenda that was set out at Tampere on working towards a common European asylum system, a "vigorous integration policy to ensure fair treatment of third country nationals and towards working on the more efficient management of migration flows which envisaged cooperation with countries of origin and transit as well as between the Member States." A further document released by the Commission a few months later went into more detail about how such an open method of coordination would work such as working together to understand migratory flows, identifying measures and good practice among the Member States to

[179] Recommendation from the Commission on the Transposition into National Law of Directives affecting the Internal Market SEC (2004) 918 Final 12.7.2004 para 16
[180] 'Final Communication From the Commission To The Council And The European Parliament: On An Open Method of Coordination For the Community Immigration' COM(2001)387 11th July 2001 p 5
[181] See previous footnote.

strike a balance between tackling illegal migration and providing access to asylum procedures, identifying priorities and objectives for fair and efficient handling of refugees at the reception stage and the coordination of training of both staff who handle asylum and subsidiary protection claims and border staff.

With the third reform of the Common European Asylum legislation in progress, perhaps there is room again for an open method of coordination approach whereby Member States can exchange ideas on best practice regarding the implementation of the legislation before they adopt the new legislation, perhaps alongside the current negotiations. However such coordination relies on collegiality between the Member States and such collegiality could be difficult to achieve. Perhaps more informal cooperation among willing Member States of best practice could at least help reduce differing practices within the Member States account divergence in recognition rates and asylum shopping.

Whether this would have a positive impact on refugees or not is debatable given the tougher approach of the new Asylum Pact in regard to screening and the dealing with applicants from countries with lower recognition rates. What such an approach would do however is ensure greater uniformity of practice across the Member States if they are willing to cooperate in such a manner.

The Open Method of Coordination In migration policy has played a part in the area of integrating migrants into the societies of the Member States particularly in regard to employment where "following a proposal from the Commission the European Council, agrees every year on a set of guidelines setting out common priorities for Member State's employment strategies" with ethnic minorities, migrants and third country nationals as target groups. It has also been used in regard to social inclusion with national action plans and reports being put into place which emphasis the need to reinforce inclusion and anti-discrimination policies towards migrants with the Commission and

the Council providing joint reports where they analyse the individual reports from the Member States.[182]

PROFESSIONAL COORDINATION

Another way of encouraging policy coordination and greater uniformity of implementation would be exchange of best practice among professionals working in Immigration and Asylum determination. This would apply from everyone from the asylum court judges and practitioners through to those personnel who are responsible for the processing of applications at the initial stage.

It is encouraging that there is both an International Association of Refugee and Migration Judges and an Immigration and asylum chapter of the European Association of Administrative Judges. It is also perhaps salient to look across the Atlantic to America and its National Association of Immigration Judges. This association has been vocal along with the American Immigration Lawyer Association in lobbying for an independent and impartial asylum court separate from the Department of Justice and immune from interference from the Attorney General who has extensive powers to overrule decisions. These associations see this as excessive political interference which can interfere in the application of justice.[183] Both these associations in the United States produce a number of good quality and highly informative guidance papers on Immigration and Asylum determination procedures which can be drawn on by practitioners and judges as guidance to good practice.

The International association of Refugee Law Judges has already had an impact within the European Union. Its European Branch has already been commissioned to produce reports by the European Asylum Support Office which provide judicial analysis of important cases from the CJEU regarding

[182] 'Migration Policy Group EU Support for Integration: What about Beneficiaries of International Protection?: A Users Guide to EU Standards, Funds and Cooperation." T.Huddleston UNHCR Migration Policy Group 14th April 2010 p28-30 available at https://www.refworld.org/docid/4bfe96782.html (accessed 6.1.2020)
[183] See D. Noonan and D. Marks 'You be the Judge: Who Should Preside Over Immigration Cases,Where and How? in *The New Deportations Delirium: Interdisciplinary* Responses D. Kanstroom and M. Lykes eds ch 3 (New York University Press 2015)

refugee and subsidiary protection qualification as well as providing guidance manuals on judicial standards an criteria on credibility assessment as well as an international guidance paper on a structured approach to refugee status determination.[184] The European Association of Administrative Judges has an Immigration and Asylum chapter which holds regular meeting in which matters of procedure and the discussion of safe country of origin information where education and common understandings are hopefully fostered.

This sort of professional collaboration with judges working together to come up with common practice could be the precursor to the drawing up of a code of procedure for any future common European Asylum Court. As things stand at the moment these are voluntary with Members signing up. However the formation of a formal professional body with mandatory membership for asylum judges which agreed to abide by common standards could help to reduce the divergences in practice and approach which have been highlighted in the previous chapter.

Another area of professional coordination and cooperation is “on the ground” exchange of practice and culture with those who are at the front lineof initial status determination. The European Asylum Support Office organized a pilot scheme in 2014 dealing with asylum applications, asylum determination and vulnerability assessment wherebyoperatives from various Member States came to work in the host countries of Poland, Belgium and the United Kingdom respectively. Problems of language were overcome by adopting English as a common working language and getting relevant documents translated in to this language.

The now-replaced EASO judged the project to be a success and that there is an advantage of using well trained experts from other Member States, particularly in times of pressure on the system rather than hiring new, short term staff as they are able to get on with the job with the minimum of

[184] ‘An Introduction to the Common European Asylum System For Courts and Tribunals: A Judicial Analysis’ International Association of Refugee Law Judges Under Contract to EASO April 2016 (accessed 6.3.2021)

training.[185] The workers were given an initial orienteering training session and security clearance before taking a share of the case work where they were encouraged to not compare their own system at home with those of the host state but rather make an independent professional judgment based on their own expertise.

Such joint processing could be useful as and when the new measures proposed above come into force. With Regulations substituting Directives in bringing more homogenous rules for qualification and procedure there would be less adaptation needed for operatives working in another jurisdiction. It could be used as the EASO stated to boost manpower in hotspots and in emergency situations but such collaboration and experience sharing is also equally useful in non-emergency situations in building trust and sharing national approaches to practice while also providing the resources to respond quickly:

> "The exchange of experts who have experience of being deployed in another Member State could function as a pool that could deliver fully operational experts within short notice, therefore providing extra resources and flexibility for the mutual benefit of the Member States involved. Deployment of experts in a non -stressful environment (before emergency) increases the chances of success and spares costs and time of orientation before deployment. Regular exercises could be exercised between Member States on a bilateral level that would give the possibility to a wider range of experts to learn the system of the other Member State."[186]

[185] EASO Joint Processing Pilots: Technical Report September 2015 https://op.europa.eu/en/publication-detail/-/publication/84651f96-4e3d-11e6-89bd-01aa75ed71a1
[186] Ibid p14

This exchange of persons under a more harmonized asylum procedure could be developed further under the rules (as and when they are passed) and the sharing of ideas and processes and attitudes could not only be useful for the European Union Agency for Asylum in collating information about different approaches to assessment of claims but could also enable them to develop perhaps a code of procedure and best practice would be bound by. This could be developed after consultation with the various Member States and feedback from any exchange programme could prove useful as operatives would have had a chance to work for a period of time in another Member State and would therefore perhaps be in a position to give unbiased constructive feedback on both the positives and negatives of a Member State's asylum system.

The previous European Asylum Support Office has already published guidance on operational standards and indicators with the objective of:

> "supporting the Member States in the practical implementation of key provisions of the APD to achieve fair and effective asylum procedures and to strengthen the CEAS at operational Level."[187]

This document provides procedural guarantees and guidance for best practice in terms of both the application in terms of access and, interviewing the applicant and processing the application, having access to up to date country of origin information as well as guidance on training and support for decision makers. More importantly it states that a quality control mechanism is put in place to "regularly review decisions" by having the application reviewed by at least two persons and the

[187] EASO Guidance on Asylum Procedure: Operational Standards and Indicators September 2019 p6 available at https://easo.europa.eu/sites/default/files/Guidance_on_asylum_procedure_operational_standards_and_indicators_EN.pdf (accessed 11.01.21)

building up of a case bank of decisions from applicants of various countries that have been reviewed by a competent team or department."[188] These guidelines could perhaps be developed into a more binding procedural code now that the European Asylum Support Office has become the European Union Agency for Asylum. It is this more powerful agency which will now be considered

AGENCIFICATION: EUROPEAN UNION AGENCY FOR ASYLUM

The year 2021 saw the creation of an agency to deal with asylum matters. This is an upgrade from the European Asylum Support Office that was created in 2010. This agency has wider powers than those of the European Asylum Support Office that it replaces which will be explained below in the context of how it could help towards a legal environment that would allow for a uniform asylum appeals procedure carried out by a common court system.

The European Asylum Support Office Regulation recitals did state that one of its aims was to foster cooperation in asylum aims to 'increase convergence and ensure ongoing quality of Member State decision making procedures in that area within a European Legislative framework.' The EASO aimed to do this by gaining and disseminating information on Countries of Origin (Art 4), the training of Member State workers in the area of asylum, supporting the beneficiaries of International Protection from Member States under disproportionate pressure (Art 5) , training for Member State workers in the area of Asylum (Art 6) and the gathering and analysing of information from the UNHCR, Member States and other organisations to identify Member States that are potentially under 'particular pressure' from a refugee influx.

This latter provision gathered information which could lead under the provisions of Section Two of the EASO Regulation to action assisting asylum and reception systems of any such Member State

[188] Ibid p6

under such pressure. This assistance could involve the deployment of support teams on the ground at the request of the Member State (Art 13). Such joint implementation deployment was carried out in Greece at the height of the influx of refugees generated by the Arab Spring and Syrian Civil War.

The European Union Agency for Asylum has wider powers which it is hoped will "reach a situation where the asylum practices in the EU+ Member States are harmonised in line with EU obligations, meaning that an application of an individual in any of the EU+ Member States will always receive the same result' and will 'go through as similar procedure with similar conditions."[189]

Its remit is set down in Regulation (EU) 2021/2303. Key tasks set down in Article 1 of the Regulation include facilitating, coordinating and strengthening practical cooperation and information exchange among the Member States on the asylum and reception systems, supporting Member States in their tasks and obligations under the CEAS, draw up and update reports on the situation in relevant third countries and countries of origin at Union level, set up European Union networks on third country information, supporting Member State in the implementation of the Dublin Regulation. The Agency will also assist Member States on resettlement and relocation of asylum, support Member States in their dealings with third countries and be able to deploy asylum support teams and liaison officers to Member States who are facing undue pressure in their asylum systems. Perhaps the most important factor for the sake of this study is "the development of operational standards, indicators, guidelines and best practices in regard to the implementation of Union law on asylum."[190]

The provisions of the Agency that are most relevant for the purposes of this study are the powers it now has to monitor Member State asylum systems to ensure compliance with the CEAS. This is to be found in Article 14 of the new Regulation. This begins by stating that the Agency in cooperation with the Commission shall "establish a monitoring mechanism for the purpose of monitoring the

[189]European Union Agency for Asylum website https://euaa.europa.eu/about-us/what-we-do (accessed 21st March 2022)
[190] Regulation (EU)2021/2303 of the European Parliament and of the Council of 15th December 2021 on the European Agency for Asylum and Repealing Regulation (EU) 439/2010 Art 1 more particularly Art 1 (o)

operational and technical application of the CEAS in order to prevent or identify potential shortcomings in the Asylum and reception systems of Member States and to assess their capacity and preparedness to manage situations of disproportionate pressure so as to enhance the efficiency of those systems."[191] Article 14 (3) subsection a) goes on to specify that the monitoring will take in "the application of criteria for assessing the need for protection and the type of protection granted." Subsection b) deals with the assessment of availability and capacity of staff in relation to interpretation and translation and the effective and efficient handling and management of cases, including appeals. This comes with a qualification that this is without prejudice to judicial independence and "with full respect for the organisation of the judiciary of each Member State.

Article 15 provides the mechanism by which this monitoring system will work. Essentially the Agency will indicate which Member States will be the subject of monitoring in a particular year with the aim that all Member States will be monitored by the agency over a 5 year period. If a particular Member State gives cause for concern to the Agency in regard to the functioning of its asylum processing and/or reception conditions the Agency can launch a monitoring exercise on its own initiative or in conjunction with the Commission.

Once a monitoring exercise has been carried out the Agency will send its findings to the Member State who then has a month to respond with its own comments and observations. Following the receipt of these observations they are presented to the Agency Management Board who will vote to adopt recommendations by a two thirds majority. Should the Member State not implement the recommendations within the set time limit "resulting in serious consequences for the functioning of the CEAS, the Commission on the basis of its own assessment, addressed to that Member State identifying measures needed to remedy the shortcoming and, where necessary, specific measures to be taken by the Agency to support that Member State."[192]

[191] Ibid Art 14 (1)
[192] Art 15 (4)

These monitoring steps will allow the Agency to see if the various Member States are abiding by the terms of EU legislation and in particular in relation to procedures, reception and status determination. The provisions mentioned above depend however on the good will and cooperation of the individual Member States. There is a possibility that while some Member States might be prepared to cooperate and make sure their asylum systems are in synch; others may be less cooperative in complying with Agency recommendations.

The aim of the Agency seems to be to reduce divergences in the assessment stage. The Agency in its inspections will want to see procedures applied as uniformly as possible and, as the observation process goes on, it should be consistent in its advice and feedback to Member States on any perceived variance in terms of assessment and procedure and will advise as to how they can bring their asylum system in synch with legislation. For the purposes of this study however one needs to consider the varying legal traditions and different approaches to evidence in asylum appeal proceedings.

While the Agency has these powers to intervene where it feels necessary, it will depend on the good will and cooperation from the Member States in putting its recommendations in practice. Independent studies have raised the point that while the establishment of the Agency provides hope for the complete harmonization of the European Union Asylum policy, the difference in legal practice in the Member States may preclude this.

> "The fact that national stakeholders tend to seek for obstacles to harmonisation of the CEAS at national level already illustrated per se the lack of a common European vision. However if national visions are not in line with European ones, also harmonisation of national asylum systems will

stumble and remain contradictory."[193]

Difference at the appeal stage mean that an asylum seeker will be treated differently in Ireland for example with its common law based adversarial system to Germany which has an inquisitorial system which will be discussed further in chapter (3, 4? even if there is more alignment in reducing divergences in the decision making process in the initial stages.

In considering the European Union Agency for Asylum in regard to the aim of this study it can be said that its mandate to provide detailed and uniform research studies on countries of origin and safe countries of origin would be very helpful in helping any uniform asylum appeal court or court draw on a uniform source of information. It will also benefit Member States who are currently drawing on their own independent research.

In terms of the Agency contributing to a further harmonisation of procedures and decision making, only time will tell if the scrutiny of the Agency will have a meaningful effect on bringing the diffuse approaches of the Member States procedural systems more in synch with them. In the next session there will be an appraisal of examples in European Union governance where experts/stakeholders actively meet to coordinate and help shape policy development and adherence. Although the policy areas of communications and visual media are very different from asylum, the purpose is to scrutinise the efficacy of these models in terms of coordinating policy implementation and to see if this model can perhaps be used in regards to asylum policy perhaps under the auspices of the European Union Agency for Asylum.

EUROPEAN REGULATORS GROUP FOR AUDIOVISUAL MEDIA SERVICES AND BEREC

[193] 'Harmonising Asylum Systems in Europe – A Means to an End Per Se?' (2019) M.Wagner et al in CEASVAL Research on the Common European Asylum April 2019 p11 http://ceaseval.eu/publications/25_WP2_HarmonisationWP.pdf

The two bodies above are examples of more formal operational coordination groups. Within these setups policy makers from the Member States meet to discuss coordinating European Union policy audio/media services and electronic communications and to "support or even intensify" harmonization.[194] The European Regulators Group For Audiovisual/Media Services or ERGA has been described as "an expert group which provides technical expertise to the commission" along with exchanging information and best practices among the members of the group.[195]

This group was founded by a Commission Decision[196] and operates alongside a Contact Committee that was specified in Article 29 the 2010 Audio/visual Media and Services Directive which suggests that this committee was not effective enough to ensure the consistent application of the Directive across the Member states.[197] Woods suggests that for some the Contact Committee specified in the 2010 Directive "did not allow for the cooperation of national regulatory authorities as these regulators did not necessarily participate in the Contact Committee" which could "adversely affect consistency in the Pan-EU application of the AVMSD and give rise to concerns about enforcement, especially in the cross border context and the risks of an unequal playing field (as between the approaches of the various Member States.)"

The ERGA webpage on the Commission site states that the mission of the body is to help assist the Commission in its work in ensuring a consistent application of the Audio-visual Media and Services Directive and more importantly to both facilitate cooperation between regulatory bodies in the EU and to allow for an exchange of experience and best practices. The article by Professor Woods describes a rather complicated set up with these two bodies with the Contact Committee, which can

[194] 'Regulators without Frontiers? European Regulators Group for Audiovisual Media Services (ERGA) and the Audiovisual and Media Services Directive 2.0 'Lorna Woods. 27th June 2021 P1

[195] Press Release: ERGA 10th Preliminary Meeting: Brussels 26th November 2018 http://erga-online.eu/wp-content/uploads/2018/11/Press-release-ERGA-plenary-november-2018.pdf (accessed 24.06.20)

[196] Commission Decision on Establishing the European Open Regulators Group for Audiovisual Media Services C (2014) 462 Final 3.2.2014

[197] Directive 2010/13 EU of the European Parliament and of the Council of 10th March 2010 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services (Audiovisual Media Services Directive) Art 29

give opinions and has more of an agenda setting role in directing policy ,while the ERGA group is made up of independent regulators from the member states and is more directly related towards enforcement.

With this model in mind, would policy implementation and, more importantly, interpretation, be more easily configured and brought into line if there was a system put in place whereby regulators from the Immigration Offices throughout the EU would meet to ensure policy co-ordination and best practice. The immigration arena differs from that of Audiovisual Media in the sense that the EU has intention for the agency discussed above to offer expert policy guidance. However that agency could organize such a committee as part of its remit. This would ensure that information is shared both ways.

The Agency, by providing technical support and assistance to the Member States as necessary but also facilitating the sharing of technical best practice amongst the Member States, would help to ensure that by following a commonly agreed approach, disparities in recognition could be reduced. Best practice sharing, such as that given in the remit of ERGA could also provide an extremely useful forum where members of both the asylum authorities and the asylum judiciary could gather together to discuss their approaches and discuss common information made available to them by the agency as well as discussing each other's approaches and also perhaps discuss each member state's recognition rates and discuss the disparities that occur. This could be something that could be organized and coordinated by the EUAA

THE BODY OF EUROPEAN REGULATORS FOR ELECTRONIC COMMUNICATION

The Body of European Regulators for Electronic Communications or BEREC exists to ensure formal coordination of policy within the area of electronic telecommunications.[198] Its mission statements states that it "assists the Commission and national regulatory authorities (NRAs) in implementing the EU regulatory framework for electronic communications, It provides advice on request and on its own

initiative to the European institutions and complements at the European level the regulatory tasks performed at national level by the NRAs. The NRAs and the Commission have to take the utmost account or any opinion, recommendation, guidelines, advice or regulatory practice adopted by BEREC.[199] The gestation of the body was not without problems.

"The Commission initially pushed for an agency though the Member States in the Council of Ministers feared that an Agency would "concentrate powers in the hands of the Commission; would run against the principles of proportionality and subsidiarity; would create additional bureaucracy ; and might slow down the gradual reduction of ex ante sector specific regulation in the telecoms market."[200] The argument from the Commission was of the mind that the National Regulatory Authorities were not doing enough to deal with competition issues in their relevant telecommunications markets along with "favourable treatment for their national incumbents."

Also the Commission described the initial European Regulators Group coordination as loose and only capable of achieving lowest common denominator solutions, complaining that differing national agendas and differing interpretations of the regulatory framework meant telecoms remained a

[198] The legal basis for the Body is to be found in Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11th November 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for the Support of BEREC (BEREC Office) amending Regulation (EU)_2015/2120 and Repealing Regulation (EC) 1211/2009

[199] https://berec.europa.eu/eng/about_berec/what_is_berec/ (accessed 14.10.19)

[200] 'A Case Study of Networked Integration' N. Boeger & J Corkin Bristol Law Research Paper Series no6 2018 p19 http://www.bristol.ac.uk/media-library/sites/law/Boeger%20Corkin%20BLRP%20No.%206%20-%20July%202018_%20MERGED.pdf (accessed 15.10.19)

patchwork of fragmented markets separated by a system of roaming charges and that operators enjoyed no genuinely level playing field, discouraging cross border competition."[201]

The Commission saw that the there was a hotchpotch of different laws and approaches throughout the Member States and wanted to achieve more harmonization; The Member States on the other hand were concerned with handing more centralized power to the European Commission. These sentiments, as has been seen from the at times tumultuous negotiations, can be said to apply to immigration and asylum policy within the European Union.

So although dealing with different policy areas, there is resistance from Member States in both. If anything the extremely sensitive issue of sovereignty and the right of Member States to control their own border policy makes immigration and asylum policy an extremely sensitive political issue.

The European Data Protection Board differs from the ERGA in that under Article 68 (1) of the General Data Protection Regulation it is "established as a body of the European Union" and has a legal personality. The Article goes on to mention in subsection 2 that the makeup of the board which is made up of the head of the supervisory body from each member state and also "of the European Data Protection Supervisor or their senior representatives" or a joint representative where a member state has more than one supervisory authority responsible for the remit of the Regulation. More importantly, and possibly questionably in light of Article 8 of the Charter of Fundamental Rights and Freedoms, the European Commission has a significant role to play in the European Data Protection Board.

The *Schrems* case gives a good illustration of the problems here. Mr Schrems launched an action in the Irish Courts against Facebook Ireland in relation to information provided by the whistleblower

[201] Ibid p 11

Edward Snowdon who made it known that it was making users data available en masse to the National Security Agency.

The Court stated that, in spite of the Commission putting forward a Decision stating adequate protection by organizations applying these safe harbour rules "the national supervisory authorities are responsible for monitoring compliance with the EU rules concerning individuals with regard to the processing of personal data, each of them is therefore vested with the power to check whether a transfer of personal data from its own Member State to a third country complies with the requirements laid down by Directive 95/46 (now replaced by the GDPR)."[202] This raises a situation whereby the Commission could be at odds with the decisions of individual national data protection commissioners.

The Commission had come to an agreement with the United States government based on assurances from both the US Secretary of State that such transfer of data to the US from the European Union would provide individuals with adequate redress should there be any human rights infringements. However in the case both the Irish Data Protection Commissioner and the CJEU ultimately came to the conclusion that this was not the case.

The fact that the Commission has a seat on the European Data Protection Board could be seen as potentially interfering with the independence of the various national authorities given the fact that the European Data Protection Board has a legal personality and has considerable power in shaping the direction of policy.

[202] C-362/14 *Maximilian Schrems v Data Protection Commissioner* ECLI:EU:C:2015:650 6th October 2015 para 47

The fact that the Commission enjoys participation in discussion and debates could be said to affect the thinking other members of the board and hence its independence.[203] For example in the example of the issue raised in the *Schrems* case, the Commission could have been swayed by diplomatic pressure to maintain a good security relationship with the United States. The board is external from the individual Data Protection Authorities. Though the member state authorities are meant to be independent, some are more independent than others.

This is due to the fact that some Member State's DPAs are subject to influence from other bodies whereas others are not as acting as an external body "from the perspective of a DPA, all the other DPAs acting jointly represent an entirely separate interest group which follows its own logic, not necessarily the same as that followed by individual DPAs.[204]

There are of course differences between a Board that is made up of national authorities who have the protection of data protection as their remit and those national authorities who are in charge of enforcing immigration law in the member states but the model of the European Data Protection Board could possibly be adapted. The European Data Protection Board states that its remit is to ensure the consistency of application of the General Data Protection Regulation and that it can do this by either giving general guidance or by issuing binding decisions when necessary as well as providing consistency findings in cross border data protection cases and facilitating cooperation and information sharing between the national DPAs.[205]

With the coming of the Asylum Procedures and the Qualification Regulation the possibility of a board with similar powers to that of the European Data Protection Board with that power to issue binding decisions where necessary along with effective sharing of information could possibly 1) have

[203] Recital 139 Regulation (EU) 2016/679 GDPR https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN (accessed 15.10.19)
[204] M. Szydlo: "The Independence of Data Protection Authorities in EU Law: Between the Safeguarding of Fundamental Rights and Ensuring the Integrity of the Single Market." (2017) European Law Review 42 (3) 269-387 at p382
[205] https://edpb.europa.eu/about-edpb/about-edpb_en (accessed 2.2.19)

the effect of making sure all countries coordinate their asylum procedures and status determinations as far as possible and 2) have the possibility to reign in any potential breaches from any member state that may be recalcitrant in applying the provisions of the provisions of the regulations in full.

This kind of arrangement working alongside the remit of the proposed agency with its technical and operational support could help provide a more level playing field for asylum seekers by helping to iron out as far as possible the inconsistencies which occur through different approaches and the Member State's different legal systems. As is discussed below in relation to a study of inconsistencies in recognition rates carried out in the USA in 2009, it would be virtually impossible to totally eliminate discrepancies due to the individual human factor. However this is where an asylum appeals court could prove its worth. It could be valuable as a mechanism for addressing the inevitable discrepancies that occur at first instance level and it is the exploration of this possibility which will be explored further in the second half of this study.

The situation in the United States has shown that even with a centrally controlled asylum decision making body there are discrepancies in decisions and it is impossible to totally eliminate these. With the possibility however of building up a body of case law and or opinion from a central EU asylum court interpreting EU asylum law, precedents could be set which would reduce such discrepancies and allow refugees the opportunity to appeal their cases at a European level? The difficulties lie in fitting in such a court system within the European legal order in the next chapter. However one can have a look at centralized precedents in asylum working at the national level by examining preliminary rulings on asylum from the CJEU.

The creation of an interstate forum or authority along the lines of any of the above could help to at least go some way towards dealing with the human factor that will occur in assessing asylum

applications both at first instance and on appeal. The aforementioned study by Nogales et al found very wide discrepancies across the US asylum system (from first decision right through to appeal).

They followed the quantitative survey with policy recommendations[206] one of which was the sharing of information. This would concern not only the recognition rate figures but also on the different approaches to making an asylum decision. The variations shown by the study occurred throughout the entire decision making process in the United States from initial decision right through to the appeals process.

The discrepancies did not just run between those States that are known to be more or less liberal. The researchers also found that there were sometimes marked differences in decisions from adjudicators working in the same asylum office. This highlights the human element that enters into immigration and asylum decision making. The evidence is often sparse and this means that the adjudicator has to make a judgment call. Some may have a natural inclination to be sympathetic to those looking to flee persecution while others may adopt a sceptical approach and be more inclined to see an applicant as an economic migrant hoping for a better life.

The Nogales study states that this human element of the decision making process will never be fully overcome as there is a subjective approach to the decision making process: does the judge approach the case with a cynical mind set with regard to credibility for example or with one that is prepared to give the applicant the benefit of the doubt? Robert Thomas of the University of Manchester points to (in his discussion on the US research from a UK and Irish perspective) an Irish Supreme Court case where three asylum seekers challenged having their cases heard by an appeal court judge who had rejected “the vast majority” of the over 1000 asylum appeals that had come before him based on

[206] *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform*: J.Ramji-Nogales et al: (New York University Press 2009)

perceived bias and where other tribunal members challenged this particular judge's claim that his decisions were not at variance with their decisions. Thomas states that the matter was settled out of court but this particular judge eventually handed in his resignation. More tellingly Thomas draws attention to the often hard to reconcile objectives of achieving fair and consistent and accurate judgments with "speed efficiency and cost" together with the pressure of having to turn around a vast number of claims. [207]

However Thomas states that he suspects that the key reason for the divergences in recognition rates shown in the US study relate to the individual decision makers' decisions relating to the claimant's credibility: essentially whether they believe the claimant's story or not. As has been shown in the previous chapter, this is highly subjective and politically sensitive and something which in the UK the Court of Appeal has described as a "difficult and imperfect exercise" with the possibility of different tribunals hearing different witnesses coming to differing views and stating that "a search for theoretical perfection is doomed to failure."

The decision is down to personal approach and mindset: is the judge naturally sympathetic or sceptical?[208] Part of the answer to the situation in the UK that Thomas offers is that of the AIT country guidance system which contributes towards legal certainty due to the fact that both parties to the hearing can draw on this to see where they should focus their arguments and evidence. This as has been shown will be part of the European Union Agency on Asylum remit. By ensuring consistent country of origin reports and encouraging regular meeting between representatives of the different Member States, some attempt at finding consensus of approach can be made.

[207] R. Thomas: 'Refugee Roulette: A UK Perspective' in Ramji-Nogales et al: *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (NYU 2009) p 165
[208] Ibid pp 169-172

This form of consensus forming together with the objective of redrafting key EU Asylum legislation as Regulations would arguably make the job of developing a common EU asylum appeal court easier. A more harmonized EU asylum procedure, the possibility of common EU Asylum status would call for a centralization of the appeals process. Whether that Court would be a separate entity or whether it would involve national courts acting a EU asylum courts is something to be discussed in the next chapter but solid foundations need to be laid earlier on in the process.

A meeting of key stakeholders to discuss best practice surrounding assessment of evidence and credibility discussed in the previous chapter could go a long way towards a meeting of minds regarding approach. There is of course explicit advisory documentation in the UNHCR Handbook on the determination of refugee status, the aforementioned document on credibility as well as key cases from both the European Court of Human Rights and the European Court of Justice on assessing credibility and assessing evidence such as the CJEU decision in *Bundesrepublik Deutschland v Y & Z* (C-71/11) regarding religious conversions. [209]

This case ruled that the competent authorities must assess the situation in the light of the personal circumstances of the applicant in relation to a religious conversion to determine whether it can be reasonably thought that the applicant would continue to practice their new faith if returned to their country of origin. This could in turn potentially subject them to persecution from the authorities of that country and bearing in mind that those authorities cannot reasonably expect the applicant to refrain from those practices.

THE COMMUNITY TRADE MARK

The Community trade mark Regulation lays down wide ranging provisions for the EU trade mark which on successful application provides a unitary trade mark that takes effect in all Member States.

[209] *C-71/11 Bundesrepublik Deutschland v Y & Z* 5th September 2012 ECLI:EU:C:2012:518 See also *F.G v Sweden* App No 43811/11 (ECtHR 23rd March 2016) regarding credibility examination of conversion *sur place*.

Conversely if a particular trade mark application is challenged in the one Member State and the challenge is successful then the trade mark fails in all Member States. The system that The EU has put in place for adjudicating the Community trade mark System (now regulated under Reg 2017/1001, the ETR) is that of designated Member State courts acting as EU trade mark courts. These have exclusive jurisdiction over all matters relating to infringement and validity as laid down in Article 124 of the ETR. If there is a dispute regarding the above the trade mark holder then the hearing will be heard in the country where the defendant has domicile or establishment.

The judgment of that Court once made applies throughout the European Union. Therefore the judgment of one national court is recognized in the whole of the EU. However there are differences between the EU trade mark and the Common European Asylum System, even after the further harmonization goes ahead. For a start the EU trade mark is universal throughout the EU whereas this is not the case with positive recognition of asylum status throughout the EU. Therefore it is argued that for a similar system to work throughout the EU there would have to be a development of a single EU wide asylum status with mutual recognition and this is something that would be bound to prove controversial though essential for a completely harmonized asylum system decision making and appeal process to work.

The desire for a uniform asylum status was discussed as an aim from the very beginning of the process towards a Common European Asylum System. It was set down in the aims of the Tampere meeting, it was reiterated 10 years later at the Stockholm Convention but as yet this uniform asylum status has yet to materialize. The protracted negotiations surrounding asylum procedures at the first legislative phase of the Common European Asylum System show this as does perhaps the fact that both the proposed Qualification Regulation and Asylum Procedures regulation, at the time of writing are still under negotiation.

The European Commission has launched the Asylum Pact in the hope of overcoming the difficulties in these negotiations but no sooner had the package been launched than it was facing criticism from some Member States. With the issue being so politically sensitive the introduction of a uniform European Union asylum status, though something to be wished for, was probably a wish too far at the time of Tampere and remains so today. For mutual recognition of asylum seekers to work in the European Union there needs to be a mutual trust among the members. Again in the aftermath of the migration crisis it is fair to say that there is some way to go in developing this. Those Member States on the frontline which bear the brunt of the effects of the Dublin Regulation still desire to see a fairer distribution of the burden regarding asylum seekers.

It is lack of mutual trust along with the desire for countries control the flow of immigrants into their territory is perhaps why the mutual recognition of protection status has not materialized as yet despite being an objective set down in Article 78(2) (a) of the TFEU, as amended by the Lisbon Treaty. An ECRE discussion paper calls for specific legislation to be drafted to provide for the mutual recognition of positive asylum decisions. It can be noted that such legislation has been around regarding the return of failed asylum seekers since 2001. Perhaps the reason that such measures (in regard to positive decisions) can be found in the discussion paper above which states that:

"The feasibility of establishing a mechanism for the relocation of beneficiaries of international protection found that certain Member State are not in a position to recognize other Member State's asylum decisions. They stated that due to a lack of harmonization, or because Member States were not doing enough to deal with the inflowof applicants seeking protection on their territory, they could not trust those Member States' decisions."[210]

[210] ECRE Discussion Paper: Mutual Recognition of Positive Asylum Decisions and the Transfer of International

The paper goes on to mention that as, at the time of writing the second phase of the Common European Asylum System had been completed, the asylum system would become more harmonized anyway and the third phase, as and when it becomes law, would complete the process. The paper goes on to state that the Dublin III Regulation (the current legislation) "is operated on the basis that Member States apply the same standards and will apply the Qualification Directive and its recast in the correct manner" and that as a consequence of this "politically it would be difficult for States to argue that Member States asylum systems are too difficult to implement and partake in such a (mutual recognition of positive decisions) instrument as to do so would undermine the CEAS."[211]

It can be suggested that with the transposition of the Qualification and Asylum Procedures Directives into regulations together with a strong and well- resourced European Union Asylum agency, there would be greater trust among the Member States with regard to asylum decisions as their systems would be working from the same set of rules with less room for evasion and lack of implementation. Member States who had previously relied on their own country of origin analysis and research would instead be able to rely on the research of the European Union Asylum Agency and it is to be hoped that by having Member States drawing on the same country of origin research there will be less divergence of recognition rates.

If this proves to be the case, and given the human factor involved, this is by no means certain, then maybe the implementation of a single European Union Asylum Status could become a reality. Should this become the case then there is scope for a system that mirrors that relating to European Union trade marks courts.

Looking to the future with the third phase of the Common European Asylum System in operation and a single European asylum status in operation there could be a valid argument for implementing

[211] ibid

such a policy in regard to asylum appeals as well. An asylum seeker would have their case assessed in the country responsible and if this is rejected at first instance it would be passed on to a national appeals court acting as an EU asylum appeals court.

The decision of that court, should it be positive, would be recognized throughout the whole EU in the same way as the decision of the assessing body of the Member State at first instance would confer a EU wide asylum status. If this were to be the case with the Common European Asylum System there would have to be measures in place to ensure all first instance bodies operated to a similar standard in terms of scrutiny and the assessing of evidence (see comparison chapter or part chapter on this?) as the proposed Asylum Procedures Regulation in Article 53 provides for "an effective remedy before a court or tribunal in accordance with the basic guarantees provided for in chapter 2 (of the Regulation). This would involve making the above more specific in stating that an effective remedy should be before a Court with the cases heard by members of the individual Member State judiciary who have received similar training in both the EU asylum legislation and more importantly the research of the European Asylum Office in regard to its country of origin research.

CHAPTER SUMMARY

The creation of the European Union Agency shows at least a willingness by the European Council to move towards consensus in the elusive quest towards forming a Common European Asylum System. This is due to the fact that it has the capacity to not only provide detailed country of origin research but also provide technical advice and, where necessary, intervention in a Member State that Is struggling to process asylum claims. The Agency states in its own introduction on its website that it is to act as a resource with the ability to provide practical,legal, technical advisory and operational assistance." It further states though that its ultimate aim is the harmonisation of asylum practice throughout the European Union "meaning that an application of any individual in any of the EU plus Member States will always receive the same result" and that an application will go through "a similar procedure with similar conditions" enjoying the same rights, receptions conditions and obligations no matter which

Member State the application is made in.

The Agency is at pains to stress that it does not replace the national asylum or reception authorities "which are ultimately responsible for their procedures and systems."[2627] It is in trying to balance the aim of trying to achieve the same result through the same process and procedures while being at pains to trying to achieve the same end result that is where the difficulty lies and has always lain with the Common European Asylum System. The issue is that there is a common goal to be achieved which the European Union would like to put in place: ideally a federalised asylum processing system but they wish to leave the control of how it operates to the Member States in a highly political and contentious area where different Member States may have not only different policies on how to process asylum seekers and be driven by different party political aims but who also have different administrative set ups and legal systems. The issue is can the aim of achieving the same ends in asylum outcome be provided by oversight but where Member States are in charge of policy, processing, implementation and the legal process of appeal.

There is a difference in having lofty ideals and actual practice on the ground. As has been written about elsewhere in this study the European Council meetings at Tampere, Stockholm etc put forward very ambitious aims which are now enshrined in the Lisbon Treaty. A Common European Asylum System with a uniform asylum status and procedure are now a legal imperative in the European Union.

The fact that the European Union still has a long way to go to achieve these goals is because the Member States see the granting of asylum status as something that is bound up with national sovereignty. As has been seen in the previous chapter, the revamped legislation set out in the Asylum Pact does have the aim of procedures, status determination and asylum management legislation being in the forms of Regulations rather than Directives so there is less scope for variance in implementation due to the fact that the provisions of the legislation have direct implementation. Hopefully should these measures be implemented there is scope for the European Union Agency for Asylum to coordinate asylum policy, carry out country of origin research which will enable the Member States to

[26]https://euaa.europa.eu/about-us/what-we-do (accessed 20.11.1977)

draw on a common fount of knowledge. This it is hoped will help reduce recognition in recognition rates for different nationalities in different states.

In terms of political coordination this will very much depend on whether the matters are in the various Member States interests. This study has mentioned the extreme difficulty encountered in organising the re distribution of refugees during the height of the refugee crisis. There has been positive reaction to the idea of mutual recognition of return decisions. The European commission put forward a recommendation for mutual recognition of return decision in March 2023. As migration control is an issue of great concern to Member States. This comes in the wake of a policy paper setting out a common returns strategy in January 2023 and the appointment of an EU Return Coordinator in March of 2022.[28] Twenty one Member States have also issued a solidarity declaration to help with difficulties experienced by Member States which border the mediterranean. This will be facilitated by the European Commission who will work with EU Agencies, provide funding, and coordinating meeting between the participant countries while the European Agency for Asylum will provide operational support.[29]

That there is some political coordination in this area is to be encouraged but whether the Member States will be able to manage this in the area of asylum procedures remains to be seen. We have seen that this has been the most difficult area to negotiate in the past due to the reluctance for Member States to give up control of their own procedures and adjudication. The European Parliament's legislative train page at the time of writing states that the European Parliament and the rotating presidencies of the European Council have signed a roadmap committing to the aim of completing the negotiations by April 2024. It also confirms that the Member States have reached agreement on the Asylum Procedures Regulation in June 2023.

It is the political sensitivity of asylum and immigration policy that makes political cooperation on a looser, more informal level such as the Open Method of Coodination difficult to envisage working well.

[28] Commission Recommendation on mutual recognition of return decision and expediting returns when implementing Directive 2008/115EC of the European Parliament and of the council C (2023) 1763 Final 16.3.23

[29] https://home-affairs.ec.europa.eu/policies/migration-and-asylum/migration-management/relocation-eu-soliarity-practice_en (accessed 2.11.2023)

If we look at the issues of the previous chapter and the problems of implementation highlighted there when measures have been put in place by legal means then one can envisage If certain policy is moved into the realms of soft law.

Therefore Open Methods of Coordination is something that the European Union may be able to consider in future times as and when the implementation of asylum and immigration policy in its final form is finished. The European Union has a big task in going through the current round of draft legislation from the asylum pact which runs to hundreds of pages. All these documents have to be meticulously gone through and compared line for line and provision for provision in the triage stages of negotiation between the institutions. As things stand at the time of writing the European Union and the Member States have enough to contend with in negotiating and seeing the legislation of the "Asylum Pact" through. Judging by the difficulties had in negotiating such legislation in the past, this may take some time.

This may sound pessimistic but there are grounds for hope in relation to the closer harmonization of asylum and immigration legislation in the European Union. As has been discussed Regulations bring closer harmonization by default as they are directly applicable as soon as they become law and Member States have to apply their provisions without the "wiggle room" that Directives can allow in letting Member States implement the legislation by their own legislative instruments. Of course there is still room for interpretation with Regulations and care will be needed to make sure the final drafting of these Regulation is as clear and unambiguous as possible. However it will mean direct implementation of asylum legislation in the areas of status determination and procedures for the first time rather than legislating by proxy

The coming into being of the European Union Agency for Asylum is another positive step towards further cooperation and synchronization in asylum legislative implementation. It has increased powers of oversight and hopefully as it develops it can be a facilitator of more informal cooperation between the Member States. For example as and when the "Asylum Pact" suite of legislation is passed then having an oversight board, perhaps overseen and facilitated by the Asylum Agency with representation from each member state could well be beneficial in having stakeholders take stock of how they are

implementing policy in the same way as the in the same way as electronic communications and audio and visual services. As stated the open method of coordination approach would be too loose and informal given the task of trying to bring recognition rates closer together but this does not mean to say that the possibility of cooperation cannot be facilitated in the future. As it stands the Agency has as part of its remit the facilitation of training and education of asylum and immigration personnel from first instance decision makers through to appeal court judiciary. How rigorous and effective this training is in ensuring more uniformity of implementation of decisions across the European Union remains to be seen. However it being the source of what should be definitive country of origin through its reports should hopefully contribute towards this as Member States will be drawing on the same source of research materials.

As the American Study by Nogales and al showed the variation even within one appeals court or in one office of first instance decision makers can vary wildly. That study argues for closer agencification and oversight. This is something that the European Union already has in place. if it wants to make its remit effective needs to bring the results of its research to law makers and members of the judiciary around one table. This would allow the opportunity to compare notes and approach. This is especially the case when it comes to judges and decision makers. Professional training could be combined with the drawing up of a uniform code of practice and guidance for decision members in all the Member States to follow, this combined with the same regularly updated research regarding decision making would be a positive step towards helping to make decisions more aligned. The European Union Agency for Asylum could also review a body of asylum decisions from across the Member States and intervene if there is a cause for concern at wide levels of discrepancy. The alternative would be the setting of minimum and maximum percentage quotas for positive and negative decisions which was dismissed by academics in the United States in relation to the “Refugee Roulette” study. This is because it would be extremely to set quotas for individual refugee producing countries. The US scholars in the Refugee Roulette study set a 50% allowance rate which the study authors regarded as generous whilst acknowledging that a lower figure such as 10% to 20% would allow too little tolerance for individual

variation threshold between decision makers[30]

On reading the above one might wonder why so much attention has been given to analysing different ways of ensuring the close harmonization of asylum and immigration law within the European Union. The reason for this is that, as will be seen particularly in chapter four, any form of European Union asylum court would work better within a harmonised system where the law is interpreted in the same way, the objectives behind the law understood in the same way and where there is a coordination of implementation which exists together with a common source of the country of origin information which is so crucial in forming decisions in asylum cases. It is obvious that when Member States have their own research giving differing opinions as to whether a country of origin is safe then there is going to be discrepancies by default.

As has been seen the formation of a common EU safe country of origin list never came into being. It is also too soon to see whether decision makers whether at the bureaucratic first instance level or high echelon judiciary at the appeal stage make use of this pooled research from the Asylum Agency in the same manner. With the option of a fully integrated court this pooling of resources could be coordinated by an aligned approach to dealing with evidence particularly at the appeal stage.

The second half of this study will move on to considering the conditions for the setting up of an independent asylum court. In doing so it is vital that such a specialised court has a source of up to date information and research that it can draw on and who can provide training if possible to future European Asylum Judges. Whether that would be politically expedient is a question that cannot be answered in this study but it is interesting to note that in regard to the Immigration Appeal Judges in the United States, members who were experts in asylum and immigration law either as practitioners, academics or members of government or NGOS were far more likely to grant asylum claims than those who did not have a background in the area.

There is no doubt that the European Agency for Asylum has the remit to be a consolidating force in relation to the oversight of asylum adjudication in the European Union. The problems it faces are political and an environment when Member State governments and populations are developing a more

[30] *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform*: J. Ramji-Nogales et al ch 6 p97

hard line and security minded approach in dealing with immigration in the face of at least perceived rising numbers. Given the fact that this area is also a policy that is deeply tied up with Member States' national sovereignty, the task of more centralised oversight from the Agency may be easier said than done.

CHAPTER THREE

CONSTITUTIONAL ASPECTS OF AN ASYLUM COURT: FITTING INTO THE EU LEGAL ORDER

Introduction

The last chapter endeavoured to present ways in which the European Union is seeking to bring closer harmonization to the Common European Asylum system through the planned introduction of directly applicable Regulations for status determination (qualification) and asylum procedure. There was also consideration of recently adopted European Union Agency for Asylum. The hope is that, with coordination from a central agency with the responsibility for researching and dissemination of country of origin information, the coordination and possible exchange of personnel together with an oversight board, will help to reduce (rather than avoid) divergences in asylum procedure and status determination among the Member States.

The aim of this chapter is to look at the constitutional aspects of how any new centralized asylum court system would fit into the EU legal order. It does not take long looking through a lengthy list of case law to realize the difficulties involved in setting up any specialized court system within the European Union sphere. The European Court of Justice is the ultimate authority on the interpretation of EU Law under the Treaties. This position has been taken very seriously by the Court which has ruled against any possible treading on its turf. As will be seen this ranges from investment tribunals through to the European Court of Human Rights. Ultimately there must be an option to refer questions to the European Court of Justice for a preliminary ruling under Article 267 TFEU and that is something that is only available to a court of a Member State.

This situation has meant that attempts to set up specialized courts outside this European Union legal order have been difficult. In this chapter there will be a an overview of the case law regarding various specialist courts and of the European Court of Justice defending its position so as to give an overview of what options would ultimately be worthy of consideration for a European Union asylum court, its scope and potential problems. As will be seen the two most viable options for consideration and for comparative analysis are the Benelux Court of Justice and the Unified Patent

Court. The first is a long standing institution and the latter has had a long and complicated development. The aim for the Unified Patent Court has been one of efficiency and the view has been expressed that the involvement of the European Court of Justice in the Unified Patent Court system would lessen this efficiency. In the words of the barrister Henry Carr QC in giving evidence to the House of Commons European Scrutiny Committee before the United Kingdom exited the European Union:

> "Let's say you are involved in a trademark case and the question of interpretation arises, unless the UK Court is absolutely certain what the answer is – not just here but in all Member States- it has to refer it. So your case then stops and it takes about two years to get an answer from the ECJ, and of course during that time there are additional costs because the parties have to provide written observations, governments intervene, you go to a hearing of the ECJ and eventually you get your answer."[212]

Other leading figures such has the former judge Sir Robin Jacob and Professor Rudolf Krasser of the Max Planck Institute for Intellectual property both argued against a regulation entrenching the Unified Patent into EU Law, fearing that putting the Unified Patent Court under the jurisdiction of EU law (Articles 6-8 of the Unified Patent Court Regulation) [213]and hence the scrutiny of the Unified Patent would lead to unacceptable delays which be contrary to the efficiency aims that the creation of the Unified Patent Court was seeking to address.[214]

The European Court of Justice gave a binding judgment on the plan for the Unified Patent Court in 2011. The original UPC agreement was to set up a court system to adjudicate over the European

[212] "The Unified Patent Court: Help or Hindrance?" The House of Commons European Scrutiny Committee Sixty fifth report of session one Volume one 2010-2012 25th April 2012 p 16 para 69.
[213] 'Effects of an Inclusion of Regulations Concerning The Content and Limits of the Patent Holders Rights to Prohibit in an EU Regulation for the Creation of Unitary European Patent Protection' October 2011 http://blog.ksnh.eu/en/wp-content/uploads/2012/03/Prof-Krasser-opinion-on-EU-Patent.pdf (accessed 5.1.2021) p1
[214] ibid

Patent which would include non -EU member states with the CJEU comparing the Unified Patent Court with the Benelux Court of Justice.[215] However as this chapter will show, even the revised Unified Patent Court Proposal, this time with the option to join only available to Member States is a very different set up from the Benelux Court of Justice in its set up. [216]

The setting up of the court proposal has been under an international treaty with the aforementioned Regulation regarding the court being passed to integrate the court into EU law. What has therefore materialized then is hybrid system with a plan for a fully independent Court ruling on unitary patents granted by a body outside the European Community Institutions: the European Patent Organization. The Benelux Court of Justice is also based upon an international treaty between the three Benelux nations and which aims to ensure that the rules of the Benelux Economic Union are harmoniously applied. The merits and workings of both will be set forth below.

Such a court set up by international agreement is interesting from the point of an asylum point of view. The topic of asylum is one of the most divisive and controversial areas in EU policy and there could be little doubt that some of the member states with more hard line attitudes to asylum and migration policy would be reluctant to take part in a harmonizing and centralizing of judicial process regarding the Common European Asylum System. Therefore any scheme for a centralized European Asylum Court would have to be one based on differentiated or variable geometry integration.

[215] *Opinion 01/09* Creation of a Unified Patent Litigation System-European and Community Patents Court-Compatibility of Draft Agreement with the Treaties: ECLI:EU:C:2011:123 8th March 2011 para 82

[216] At the time of last revision of this chapter on 7.1.2023 the Unified Patent Court website lists shows 17 Member States which have ratifiedthe Unified Patent Court Agreement, seven Member States who have signed the Unified Patent Court Agreement but not ratified it and three Member States who have not signed the Agreement (Croatia, Poland and Spain). https://www.unified-patent-court.org/en/organisation/upc-member-states (7.01.2023)

What this Chapter will look at first of all as a select overview of the European Court of Justice's case law on specialized Courts and tribunals. As will be seen from this case law there have been situations where 1) there have been plans for the creation of Courts and 2) references to outside tribunals as well as the conundrum of the influence of the European Court of Human Rights and its relationship with the European Court of Justice which has, for the moment, halted the European Union acceding to the European Convention of Human Rights.

As will be seen where there is any hint of a non-member state court straying into the territory of interpreting European Union law, the European Court of Justice defends its position rigorously. An analysis of this situation is helpful as it will set the background to two main points of comparison for any Centralized Patent Court: the Unified Patent Court System and the Benelux Court of Justice.

Following on from this will be a discussion of the potential political and constitutional problems and objections a centralized European asylum court could pose. A challenge regarding the constitutionality of the Unified Patent Court Agreement was rejected by the German Constitutional Court in July 2021.[217]

The reasons behind this application will be examined in any case as documented criticism expressing concerns for such a unified court system which could very well be mirrored for the ideas presented in this study for a unified asylum appeal court system. There will be a discussion of the issues of efficiency along with the need for high quality judgments which aim to ensure refugee rights are protected while aiming to address the varying recognition rates throughout the EU: can the drive for efficiency be squared with high standards of protection? The issues of varying recognition rates and asylum shopping have already been dealt with earlier in this study but how would a potential asylum

[217] BWerfG, Order of the Second Senate of 23rd June 2021- BvR 2216/20 paras 1-81

Court seek to address these? Using both the proposed patent court system and the Benelux system as a point of comparison this study will examine ideas of centralization that could possibly work.

THE EUROPEAN COURT OF JUSTICE AND THE DEFENDING OF THE EUROPEAN LEGAL ORDER

From the earliest days of the European Union since the seminal judgments of and *Costa* and the Court's declaration of a "new legal order" where the Member States have "limited their sovereign rights" in limited fields, and created "a body of law which binds both their nationals and themselves,"[218] there has been a tension between the primacy of EU law and the national law of the Member States. As European Union Law grew giving wider competences, so the Court has striven to defend both the supremacy of European Law and its position as the final authority on European Union law under the Treaties. Indeed in 1992 in its Opinion regarding a Court for the European Economic Area. [219]The Court's verdict led to a stripping back of the original plans for that Court, the "limiting of sovereign rights" had moved on from "limited fields" to "ever wider fields."

The initial plan for a Court for the European Economic Area was to fall foul of the European Court of Justice for several reasons, due to provisions which the Court saw as a threat to its ultimate authority. Firstly the agreement stated that although the Court would be bound to interpret the agreement by the case law of the European Court of Justice up until its creation, it would not have an obligation to do so after that date.

The Court also took issue with a juxtaposition of identically worded legal rules based on the agreement with identically worded Community roles. The Court felt that this would mean that the

[218] C-6/64 *Flaminio Costa vs E.N.E.L* ECLI:EU:C:1964:66
[219] Opinion 1/91 10th April 1992 ECLI:EU:C:1992:189 para 21

EEA Court could pass rulings concerning the division of competences in the EC as it then was. The Court had a mandate to settle disputes between the Contracting Parties in regard to matters coming under the agreement which could mean either the Community, the Community and the Member States or the Member States alone because the agreement was a mixed agreement between the Community and the Member States.[220] The European Court of Justice found that this would infringe on its sole jurisdiction to interpret European Union Law under the Treaties.[221]

The CJEU also found that the plan to employ Judges from the European Court of Justice to sit as Judges of the EEA Court would compromise their independence by the wearing of two hats as it were. Another serious concern was the fact that EFTA States were "free to authorize or not authorize their Courts or Tribunals to refer questions to the Court of Justice and there was no provision to make such a reference obligatory in the case of courts of last instance in those states." Even more importantly any preliminary ruling given by the Court would not have been binding. It would merely be taken into consideration. This considered unacceptable by the CJEU who commented that:

> "…the fact that answers are not binding on the EFTA Courts may give rise to uncertainty about their legal value for Courts of Member States of the Community. Furthermore the possibility cannot be ruled out that courts in the Member States will be led to consider that the non-binding effect on interpretations by the Court of Justice under Protocol 34 also extends to

[220]B. Brandtner 'The Drama of the EEA: Comments on Opinions 01/91 & 01/92' 3 EJIL (1992) 300-328 at p 309
[221] Opinion 01/91 para 35

Judgments given by the Court of Justice under Art 177 of the EC Treaty."[222]

The situation that the CJEU was judging on was therefore a Court presiding over a body of law that in many cases was identical to European Community law but had the potential to be interpreted differently. This was because the EEA agreement was to be interpreted according to the Vienna Convention relating to the interpretation of Treaties whereas the European Community law was of a sovereign and constitutional kind as originally decided by the CJEU in seminal cases such as *Costa* and *Van Gend*. The object of this mirroring of EC law was set down with good intentions with the idea of creating legal and harmony and certainty for those third countries that were part of the agreement: aligning it with the European Community.

However the CJEU found that this could lead to problems especially regarding conflict of interest for the CJEU judges who were to sit on the EEA Court should they have to hear a case that would involve Community law together with the EEA agreement. This was especially the case since the EEA Court would only be bound by CJEU case law that existed prior to the agreement coming into force. Therefore there was the real possibility that the EEA Court would be out of alignment with the CJEU: again with the risk of confusion and a lack of legal certainty.[223]

The CJEU were to rule on a revised agreement for the EFTA Court the following year. In this Opinion the Court noted that under the revised agreement the EFTA Court (as it was to become) would have no "personal and functional links with the Court of Justice." However the EFTA Contracting Parties could call upon the CJEU to give "an interpretation on the relevant rules" where necessary. EFTA

[222] Ibid para 62-3
[223]above para 26

Member States may "authorise their Courts to ask the Court of Justice to give a decision" and not just "express itself on the interpretation of a provision of the Agreement."[224]

More importantly the provision in the former agreement that the CJEU take "account of the decisions of other Courts" was removed.[225] The agreement was also changed so that decisions both past and future would be kept under constant review by the EFTA Joint Committee who would regard such decisions as binding. The CJEU stating that if the Court is called to give a ruling under Art 113 (3) of the Agreement, the contracting parties and the joint committee alike will be bound by the Court's interpretation of the rules at issue."[226]

THE WORK OF THE REVISED EFTA COURT.

The EFTA Court as it now is made up of Judges from Iceland, Norway and Lichtenstein. Although the Court is small and deals with cases pertaining only to the legal issues of the European Economic Area Agreement,[227] it has had an interesting dialogue with the CJEU since it has been active. Compared to the CJEU there is no obligation for last instance Courts from EFTA countries to refer to the EFTA Court, nor are the EFTA Court Judgments on preliminary rulings from national courts binding in theory being essentially advisory. However in reality these judgments are in effect directly effective as Members of the EFTA Agreement have been found to have liability for any laws which they breach which are contrary to the agreement. This is particularly the case in dualist legal systems such as Norway. A particularly interesting case which illustrates this involved a woman who was injured in a car accident while a passenger in a vehicle driven by someone under the influence of alcohol. She sued her insurance company who refused to pay out citing a Norwegian law that prohibited

[224] *Opinion 01/92* Draft Agreement Between The Community On The One Hand And the Countries Of The European Free Trade Association On The Other Relating To The Creation The European Economic Area: 10th April 1992 ECLI:EU:C:1992:189 paras 13-15
n[225] Ibid para 16
[226] Above para 35
[227] https://eftacourt.int/the-court/surveillance-and-court-agreement/ (accessed 7.01.2023)

payments to injured passengers of drunk drivers under a Norwegian Statute. This case found its way to the EFTA Court and that Court found that this Norwegian law was in breach of insurance obligations under the EFTA agreement. The injured woman then proceeded to sue the Norwegian government who was found liable for being in breach of the agreement so the EFTA Court has proved that it has legal weight and that its Opinions are advisory in name only.[228]

For the purposes of this study though it is interesting to cast an eye on the legal dialogue the EFTA Court has with the CJEU. One of the most well known internal market cases dealing with advertising bans posing a barrier to the entry of a market and a breach of Article 34 TFEU is that of *D'Agostini*. This case involved a ban in Sweden involving advertising on television aimed at children. A case with similar facts was heard first of all by the EFTA Court which held that such a national advertising ban could not prohibit such advertisements that form part of a televised broadcast from another Member State. The CJEU was to decide in the same way as the EFTA Court in this case.[229] Therefore although the EFTA Court is an international court it is fair to say that it is an institution that has both strong ties with the CJEU in terms of dialogue.

THE LAYING UP FUND TRIBUNAL CASE

Back in 1977 the Court had ruled on the creation of a fund between the Community and Switzerland which would offer compensation to ship owners that voluntarily laid up their vessels on the Rhine when the river was running over capacity. This fund was to have its own small tribunal or court which would have Judges from the European Court of Justice sitting on it. In their "Laying Up Fund" opinion the Court expressed similar sentiments regarding the potential for conflict with "double hatted" judges and also took issue with the fact that the tribunal was to accept preliminary rulings

[228] C. Baudenbacher: 'The EFTA Court: An Actor in European Judicial Dialogue' 2004 Volume 28(2) Fordham International Law Journal 353 at 364
[229] Joined Cases E-8/94 and E 9/94 *Forbrukerombudet v 1) Mattel Scandinavia A/S 2) Lego Norge A/S* see also ibid at p367

that could rule not just on the operation of the "organs of the fund" but also the interpretation of the agreement and the statute concerned.

The Court felt that this was at odds with a previous judgment it gave (C-181/73 *Haegemann v Belgian State* [1974] ECR 449) which stated that an agreement entered into by the Community with a third state was to be considered an act by one of the institutions of the Community under what was then Article 177 of the Treaty and therefore the ECJ had jurisdiction to give a preliminary ruling on the interpretation of such an agreement. The Court also noted some confusion over whether the rulings of the proposed Tribunal would replace that of the European Court of Justice regarding the interpretation of the agreement or whether the national courts would have a choice of whether to refer to the ECJ or the Tribunal for an opinion.[23]

SUMMARY

These Opinions show the European Court of Justice as extremely wary of any other judicial body impinging on its sole right to interpret European Union law under the Treaties in relation to the EU institutions and the Member States. The problem is as we will see this has the potential to potentially hinder any court or tribunal system where there is the possibility of European Union Law being interpreted and where there is no provision for a reference to the ECJ.

In the case of the European Economic Area Court, the opinion of the ECJ saw the creation of a much smaller court set up which solely concerns the European Free Trade Agreement members (who are outside the European Union) so instead of having one Court for all there is now a two pillar structure with the ECJ covering the European Member States and the EFTA Court covering those EFTA states who are not part of the European Union. The EFTA Court has that freedom not to be bound by ECJ case law given after the agreement (though as seen above it very often takes it into account) and so

[230] Opinion 01/76 26th April 1977 ECLI:EU:C 1977:63 para 19.

has some judicial independence and flexibility. However its jurisdiction is much smaller and it does not tread on the toes of the ECJ.

MATTERS OF COMPETENCE.

The scene was set for the difficulty of having international courts give a definitive judgment on European matters was set long before the EFTA Opinion. The difficulties come from the combination of the classic definitions of EU supremacy as laid down in the classic cases like *Costa* together with a widening of the competence of the EU over time. As has been seen the "limited fields" of the *Costa* case had become "ever widening fields" by the time of Opinion 01/91.[231] In the case of matters with an external or international law dimension, the case of *ERTA* or the European Road Transport Association showed the European Court ruling that where the EEC Treaty (as it then was) lays down common rules, despite the form in which they may take, the Member States no longer have the right to act singularly or collectively in that area and that the "system of internal community measures may not be separated from that of external relations."[232]

The latter judgment was one which caused considerable controversy as the judgment was an example of the Court's teleological style of decision making. As the Council argued in the case there was no express provision for this thinking in the Treaties but the Court, by implementing an approach which it considered would create a situation where the Treaty provisions could work more efficiently expanded the European Community's competence in this area.

Those who support this approach will put forward the efficiency argument; those who are against argue that it is unacceptable judicial activism from the ECJ which allows for competence creep. No matter which way the decision is viewed however this expansion of the EU competence in the external arena has in turn extended the European Court of Justice's powers to give ultimate

[231] Ibid para 21
[232] C-22/70 *Commission v Council (ERTA)* 31st March 1971 ECLI:EU:C:1971: 32 para 19

interpretation on the provisions that fall under the competences of the EU. This in turn makes things more difficult for any international or specialist court to give (final instance) interpretive rulings on European Union law. In the case of migration law the European Union has a shared competence in that the member states retain their own national competence to the extent that the European Union has not exercised its competence. In terms of any form of European Union Asylum Court however, setting up as system outside the European Union legal framework would be a very hard task.

The application asylum law globally is a complex matter. The principle of non-refoulement (the return of any refugee seeking protection) is seen as "jus cogens" in International law, in other words a principle of law that is paramount and which cannot be set aside.[233] Having said that the Refugee Convention has no official international judicial body on which to hear cases regarding its implementation. Although Article 38 of the Refugee Convention states that the International Court of Justice can be seized of any dispute between parties in relation to the convention, but in practice no states have yet done so.[234]

There have been calls in the refugee law literature for greater supervision of the Refugee Convention with calls for an expert committee of judicial and non - judicial experts who would be able to issue advisory opinions at the behest of the High Commissioner for Refugees.[235] For now however the Convention stands alongside the 1948 Convention on the punishment and prevention of the crime of genocide as lacking a mechanism of independent judicial oversight.

The UN Committees have considered asylum matters in the context of pronouncing Opinions in relation to International Conventions such as the International Convention on Civil and Political

[233] See for example. J.Alallain 'The Jus Cogens Nature of Non refoulement' Int J Refugee Law (2001) 13 (4) 533
[234] Hathaway, North and Pobjoy: "Supervising the Refugee Convention" (2013) 26 J Refugee Stud 323 at p 324.
[235] 'Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and Beyond": W Kalin in *Refugee Protection in International Law: UNHCR Global Consultations on International Protection* E.Feller et al eds (Cambridge University Press 2003) ch 10 p 614 ff

Rights and the United Nations Convention on the Rights of the Child. These opinions can involve refugee issues. A recent case involving a Palestininan woman and her child fighting return to Bulgaria (where they alleged ill treatment by the authorities) is *M.K.A.H*.[236]

In this decision the Human Rights Committee found that the Swiss authorities had failed to take into account the child being an asylum seeker, a victim of armed conflict and the act that he had been subjected to ill treatment by the Bulgarian authorities and therefore failed to take his best interests into account and did not satisfy themselves that he would not be subject to inhumane and degrading treatment so breaching Article 3 (1) of the United Nations Convention on the Rights of the Child.[237]

The problem is that such opinions from the likes of the Human Rights Committee and Committee on the Rights of the Child are not legally binding. Cases come before the committees by parties under the provisions laid down by the Optional Protocols such as the three relating to the UN Convention on the Rights of the Child and the International Covenant on Civil and Political Rights (ICCPR). These, as with the example given above are based on often extensive reports and evidence. Despite this these committee reports are rather regarded as "secondary soft law instruments… that interpret and add detail to the rights and obligations contained in the respective human rights treaties." There has been commentary however which has stated that "unless state parties contest the content of a general comment, it constitutes subsequent practice under 31 (3) (b) of the Vienna Convention and so must be taken into account when interpreting the Covenant."[238]

An example of the lack of legal force to the Human Rights Committee's opinions can be seen in the issue of the ban on pupils wearing religious symbols in public schools. A Sikh student who was prevented from studying in class for wearing a turban took his case to the UN Human Rights

[236] *M.K.A.H v Switzerland* CRC/C88/D/95/2019
[237] Ibid para 10.9
[238] H. Keller & L.Grover 'General Comments of the Human Rights Committee and their Legitimacy' in *UN Human Rights Treaty Bodies: Law and Legitimacy* H.Keller & G Ulfstein eds ch 4 p 131 (Cambridge University Press 2012)

Committee who ruled in his favour stating that the turban was part of his religious identity and that the French law was in breach of Article 18 of the ICCPR. [239] The French government however has shown no signs of compromise on the issue of the wearing of religious symbols in state schools. Indeed it seems to be going in the opposite direction and seeking to extend the law to accompanying adults of children on school trips.[240]

The lack of binding enforcement of opinions from the Human Rights Committee has led to calls for a World Court of Human Rights. This is a subject that has been explored at length in a paper for the European University Institute by Professor Martin Scheinin and the template that he envisions will be discussed in the next chapter in relation to how that Court would fit into the international judicial order.

Refugee law in Europe is of course also bound by the European Convention of Human Rights in particular regarding Article 3 which prevents the return of anyone faced with torture or inhumane European Court of Justice and the European Court of Human Rights in Strasbourg in regard to Refugee Law. Perhaps the most important piece of jurisprudence in the European refugee law sphere of recent years is *MSS v Belgium and Greece* which ruled that, due to the complete collapse of the asylum system in Greece, which had left asylum seekers in limbo, destitute and without support, the transfer of asylum seekers back to Greece under the Dublin system should be halted on the grounds of Article 3 (inhumane and degrading treatment) and Article 13 (the right to an effective remedy).[241]

The European Court of Justice had a chance to give its take on this issue in the case of *NS v SSHD.* In this case the ECJ put a great emphasis on the principle of mutual trust between Member States and their position was that only in the case of what they termed systematic deficiencies in a Member

[239] *Singh v France* CCPR/C/106/D/1852/2008
[240] https://www.france24.com/en/20191030-french-move-to-extend-ban-on-wearing-religious-symbols-sparks-fears-of-radical-secularism (accessed 22.12.2022)
[241] *M.S.S V Belgium & Greece* Ap No 30696/09 (ECHR) 21.2.2011

State's asylum system could transfers under Dublin be halted. They found this to be the case in the case of Greece but this judgment begs the question over potential breaches of human rights when there may not be a complete failure of the asylum system of a member state but severe strain which leads to problems: a good example of this being Italy.

The Court has modified this test somewhat despite maintaining the "systematic flaws" terminology in the case of *C.K and Others v Republika Slovenija* by stating that even in the absence of such systematic flaws in the system of the receiving Member State, a transfer can be blocked or postponed if there is a risk of inhumane and degrading treatment where a transfer would "result in a real and proven risk of a significant deterioration in the health of the person concerned." [242]

The CJEU stated it is up to the National Court concerned to weigh up the risks on whether despite adequate precautions being taken in the transfer to enable "significant and appropriate protection of the person's state of health" and decide whether the transfer should go ahead or not and use the discretionary clause of Article 17 (1) in (the Dublin III) Regulation 604/2013 and decide on the applicant's asylum claim themselves.[243]

The CJEU handed down its Opinion 02/13 on December 2014 dealing with accession to the ECHR. This Opinion will be considered further below. However it needs to be stated that there is the potential for conflict between the CJEU and the ECtHR. On the one hand the Member States that are in the EU are legally bound to acknowledge the Supremacy of European Union law as set down in the seminal cases mentioned in the case law above. On the other hand all the Member States are signed up to the ECHR and must meet their obligations under that Treaty also.

The Lisbon Treaty also contained provisions that 1) the European Union shall accede to the ECHR (the "shall" making it a legal obligation) and secondly that the European Union Charter of

[242] C-578/16 *C.K & Others v Republika Slovenija* 16th February 2017 ECLI:EU:C:2017:127 para 55
[243] Ibid para 96

Fundamental Rights and Freedoms shall become binding, carrying the same legal weight as the Treaties themselves.

The European Court of Human Rights does have the ability to find that EU legislation and policy can be counter to the Convention indirectly by holding a Member State implementing European Union law in breach of Convention rights. The Key case from the ECHR in this regard is *Bosphorus.* In this case, which involved the grounding of aircraft in Ireland as part of a package of EU sanctions against what was then Yugoslavia, and which revolved around the applicant's right property as against Ireland as a signatory of the Convention but which was acting on a binding Regulation from the European Union, the ECtHR overcame the situation by stating that:

> "State action in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides."[244]

Therefore the ECtHR got around a difficult issue by presuming that the protection offered by the European Union through the European Union is equivalent to that offered under the ECHR. However this has not prevented the ECtHR to state in judgments that the issues of mutual trust and adherence to human rights could be cast into doubt should the circumstances require I.e. the presumption is rebuttable.

> "…the CJEU recently stated recently in Opinion 02/13 that 'when implementing EU law, the Member States may under EU law, be required to presume that fundamental rights have

[244] *Bosphorus v Ireland* ECtHR application no 45036/98 30th June 2005 para 155

been observed by that other Member States, so that…save in exceptional cases, they may not check that that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.' Limiting to exceptional cases the power of a State in which recognition is sought to review the observance of fundamental rights by the state of origin of the judgment could, in practice, run counter to the requirement imposed by the Convention according to which the Court in the State addressed must be at least empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of Origin, in order to ensure that the protection of those rights is not manifestly deficient."[24]

The problem that is faced here is that there are two distinct two human rights standards that are binding on the Member States of the European Union. There is no hierarchical relationship between the two Courts and so certainly from the standpoint of the European Court of Human Rights perspective there has been a desire to avoid conflict as much as possible "because a conflict, once it has materialised, cannot be that easily resolved." [246]

The then President of the ECtHR Dean Spielmann stated in a 2015 that he viewed that the ECtHR would continue its mandate and that:

"…the important thing is to ensure that there is no vacuum in human rights protection within the Convention's territory, whether the violation can be imputed to a State or a Supranational institution. Our Court will thus continue to assess whether State acts, whatever their origin,

[245] *Avotins v Latvia* application ECtHR no 17502/07 23 May 2016 para 89
[246] M. Kuijer: 'The Challenging Relationship Between the European Convention on Human Rights and the EU Legal Order: Consequences of Delayed Accession.' The International Journal of Human Rights 2020 Vol 4 No7 998-1010 at 1003

are compliant with the Convention. The essential thing is not to have a hierarchical conception of systems that conflict with each other."[247]

The judgments in the *NS* and *Abdullahi* cases are important as they show that the principle of mutual trust between the member states is something that the European Court of Justice takes very seriously. Its premise seems to be that as fundamental rights are an integral part of the European legal order, the Member States are presumed to respect them and take them seriously and it takes a very serious and sustained breakdown such as that mentioned in the *NS* case for the abandoning of that mutual trust and for a member state to have doubts or question the human rights provisions in another member state of the EU. The importance of this was made clear in the EU court's controversial decision regarding the accession of the EU to the European Convention on Human Rights. This decision has since been expanded since in the C.K case mentioned above.

The Court mentioned its unease with the fact that, unlike the mutual trust principle under EU law, the ECHR would require both the EU and the Member States individually as contracting parties to check whether other Member States were observing fundamental rights undermining the principle of mutual trust.[248] However the main stand out points that one gets from Opinion 2/13 is the European Court of Justice fearing a threat to its position as the sole authority on European Union law. The Court feared that, despite the EU not planning to sign up to what is known as Protocol 16 which allows for the highest courts and tribunals of signatories to the ECtHR to request an advisory opinion matters of on the interpretation and the application of the Convention, the courts of the

[247] Solemn Hearing for the Opening of the Judicial Year of the European Court of Human Rights: Opening Speech President Dean Spielmann Strasbourg 30th January 2015 p5 https://www.echr.coe.int/Documents/Speech_20150130_Solemn_Hearing_2015_ENG.PDF (accessed 20.12.2022

[248] C-2/13 Opinion 2/13: EU Accession to the ECHR ECLI:EU:C:2014:2454 18th December 2014 para 194

Member States who have signed up to the protocol would be tempted to ask the ECtHR for the advisory ruling rather than ask for a preliminary ruling from the ECJ.

Another crucial judgment from the CJEU is the *Melloni* case regarding the European Arrest Warrant. This highlights the difference in standards of application between the ECHR and the EU Charter of Fundamental Rights and Freedoms. Whereas the ECHR gives a baseline of standards which the signatories to the Convention can improve on should they so wish, the CJEU in the *Melloni* case ruled that a Member State's more favourable standard of rights in their national constitution could not hinder the operation of a transfer of someone under the European Arrest Warrant so rather than setting a baseline which can be approved on, the EU Charter of Fundamental Rights and Freedoms and EU legislation in conformity with it is the standard which cannot be improved upon without affecting the primacy of EU law.

"The interpretation envisaged by the national court at the outset is that Article 53 of the Charter general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and where necessary to give it priority over the application of provisions of EU law…Such an interpretation of Art 53 of the Charter cannot be accepted. That interpretation of Art 53 of the Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution."[249]

[249] C-399/11 *Stefano Meloni v Ministerio Fiscal* 26th February 2013 ECLI:EU:C:2013:107 paras 56-58

The *Melloni* case is one of considerable constitutional significance within the European Union. Although the *Costa* case saw the CJEU establish the doctrine of supremacy, there has been a long running debate as to what has ultimate authority or competence should there be a clash of principles between the rights enshrined in Member State constitutions and European Union law should there be a clash. There has been long running dialogue between the German Constitutional Court and the CJEU regarding this matter.

The German Constitutional Court decided with regard to the legality and compatibility of the Maastricht Treaty that it was the Member States themselves and that the legal system enshrined in the Treaties was legal in Germany only because German Law said that it was. Any increase in competence of the European Union would have to be brought in by amendments to the Treaties which Germany would have to ratify. The German Constitutional Court said that it would take the decision itself whether any laws of the European Union went beyond the competence conferred on it by the Member States and that providing sufficient guarantees were given to that effect by the European Union, the Maastricht Treaty did not infringe on the democratic constitutional rights of German voters.[250]

The German Constitutional Court also considered the Lisbon Treaty and its provisions. Again the German Court held that the Lisbon Treaty could go through but it stated in its judgement that there should be the retention of "sufficient space for the Member States for the political formulation of the economic, cultural and social circumstances of life, which the European unification n the basis of a union of sovereign Member States, must not be taken away from the Member States."[251] The German Constitutional Court stated in the judgment that:

[250] *Constitutional Problems of the European Union*: T. Hartley ch 8 p 155 (Hart Publishing 1999)
[251] A. Steinbach: 'The Lisbon Judgment of the German Federal Constitutional Court-New Guidance on the Limits of European Integration?' German Law Journal Vol 11 No 4 1st April 2010 367-390 at 374

"Essential areas of democratic formative action compromise *inter alia* citizenship, the civil and military monopoly of the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights above all in *major encroachments on fundamental rights such as depravation of liberty in the administration of criminal law or the placement in an institution.* "[252](Italics mine

With the Charter of fundamental Rights and Freedoms becoming binding European Union law after the ratification of the Lisbon Treaty, the CJEU now has a direct mandate to oversee human rights issues within the European Union and so does have the remit to look into those areas that are singled out by the German Constitutional Court above. The facts of the *Melloni* case dealt with an Italian criminal who had fled to Spain and had been convicted in his absence by an Italian court. The Italian authorities on tracing Mr Melloni to Spain subsequently sought his extradition under the provisions of the European Arrest Warrant. After his arrest he applied for constitutional protection from the Spanish Courts citing Article 24 (2) of the Spanish Constitution regarding a right to a fair trial because he could not challenge his conviction in absentia. The Spanish Court wanted to make the extradition of Melloni conditional upon the possibility of a review of his conviction by the receiving Member State as was required by Spanish Constitution.

This judgment has led to some commentators expressing concern that it may lead to the constitutional courts of some Member States deciding that "fundamental rights are no longer effectively protected under EU law thus reviving a conflict that long seemed to be resolved."[253]

[252] BverfG Judgment of the Second Senate of 30th June 2009 2 be 2/08 paras 1-421 at 249

FURTHER ISSUES OF COMPATABILITY

The problem that is apparent from a succession of the EU to the ECHR is that the EU would be fully signed up to the ECHR its own Charter of Fundamental Rights and Freedoms being binding alongside the European Union Charter of fundamental Rights. The Charter of Fundamental Rights and Freedoms is legally binding European Union law with the same weight as the Treaties as declared by the Lisbon Treaty. These two parallel Human Rights instruments are interpreted by two different courts. The Charter being interpreted by the CJEU and the Convention by the European Court of Human Rights.

The CJEU was unhappy that the provisions of the draft agreement of accession had inadequate provisions for the EU to consider whether the CJEU already dealt with a matter of law in a matter coming before the European Court of Human Rights and that the CJEU would only be able to rule on the validity of EU secondary law under the prior involvement procedure and not on its interpretation.[254] Therefore although Article 53 states that nothing in the Charter of Fundamental Rights of the European Union would limit or restrict the rights laid down by the European Convention on Human Rights, there remains the possibility of differences in interpretation which can be perceived very differently and whether intentional or otherwise can to either more restrictive or more generous provisions by the CJEU than that of the ECtHR which is illustrated by the *Melloni* case above.

[253] A.Pliakos & G.Anagnostaras 'Fundamental Rights and the New Battle for EU Supremacy:Lessons from Melloni' Yearbook of European Law Vol 34 No1 (2015) pp97-126 at 97
[254] See footnote 24 Para 242 ff

The ECJ also voiced its concern in Opinion 2/13 over the fact that the European Court of Human Rights would be able to review matters relating to common foreign and security policy. The ECJ has only a very limited jurisdiction over acts adopted in this area. However on accession to the ECHR the human rights Court would have such jurisdiction to rule on the applicability of acts and omissions of EU policy made under CFSP regarding its is compatibility with the ECHR, whereas the ECJ mostly does not have such jurisdiction. For the ECJ this constitutes an external court ruling on EU matters which it found unacceptable even though it itself has limited powers in this area.[255]

The ECJ was also at pains to point out its monopoly in regard to dispute resolution laid down in Article 344 TFEU in regard to the interpretation and application of the Treaties. This is an especially important area for the purposes of this study in that it has proved a hindrance to external courts outside the EU legal order settling disputes or giving advice or opinions as to the settling of disputes where the interpretation of EU law is concerned. In regard to the European Court of Human Rights the ECJ was concerned that Article 33 of the ECHR, which deals with referral to the ECtHR by one of the contracting parties regarding the breach of the Convention or its Protocols by another, would intrude on its monopoly under Article 344 of the TFEU. It argued that on accession to the ECHR, the principles laid down in the ECHR would become EU law and therefore any disputes would fall under the jurisdiction of the ECJ.

The ECJ had ruled back in 2006 on a matter where it regarded dispute measures laid down under an international convention intruded on its exclusive remit to settle disputes that related to EU law. This was the MoX Plant case where Ireland referred the UK to the dispute tribunal that was set up under the United Nations Convention on the Law of the Sea and the Convention for the Protection

[255] ibid 254 ff

of the Marine Environment of the North East Atlantic as well as the International Tribunal for the Law of the Sea.

Ireland was concerned about a plant built to process nuclear waste from the Sellafield plant. The UK and the European Commission countered by saying that the Ireland should not be able to refer the dispute to this tribunal because the agreements concerned were mixed agreements which the EU and the Member States were parties to. As the provisions which the dispute revolved around were laid down in European Union law, it was the view of the Commission – accepted by the CJEU – that dispute should be referred to the European Court of Justice under what is now Article 344 TFEU.[256]

The CJEU mentions in Opinion 02/13 a situation where there is a dispute between Member States as to the interpretation of provisions under the ECHR. The problem would arise where a dispute would involve provisions of EU law which have the same content and application as provisions of the ECHR. This would be an infringement of Article 344 TFEU as the CJEU is of course to have exclusive jurisdiction in inter partes cases which involve EU law.

As Nikolaos Lavranos has argued, there has been an increase in specialist courts and tribunals that have sprung up from international agreements which go alongside the expansion of the European Union's competence in areas that used to be solely governed by international law. Human rights have already been mentioned but there is also trade, security and, as in the case of the *Mox Plant* dispute, the environment. This in turn has led to the expansion of the remit of the European Court of Justice and as the *MoX plant* case demonstrates, along with this has developed the concern of the European Court of Justice for the possible "fragmentation of European law" with Member States

[256] Case C-459/03 *Commission v Ireland* 30th May 2006 ECLI:EU:C:2006:345 at para 121.

opting to avoid taking the case to the ECJ and having an alternative body hear the dispute and potentially interpret EU law.[257]

The problem that has occurred for the Member States and other institutions and bodies is that this has curtailed the choice of fora for dispute resolution in, to quote the ECJ's own words, ever expanding areas although Lavranos raises the interesting point of the case of Ijeren Rijn dispute where the Member States and the Commission agreed together to submit the dispute to an independent tribunal thus side stepping the exclusive jurisdiction of the ECJ.[258] However in situations where the European Court of Justice could potentially have jurisdiction Lavranos suggests that the International Court or Tribunal concerned should stay the proceedings and advise the Member States or body concerned to enquire whether the European Union courts have jurisdiction by way of a preliminary ruling.[259] Lavranos states that the arbitration tribunals in both cases were both *de facto* applying and interpreting EU law when issuing their awards without considering the potential jurisdiction of the CJEU and in the IJzeren Rijn case there was a specific aim to do this. This dispute involved the recommissioning of a railway line that ran from Belgium through the Netherlands and into Germany.

The railway line and the rules of operation between the countries was governed by an agreement of 1899 and this was the agreement that the hearing of the tribunal was convened under. However there were also elements of European Union environmental law to be considered. The tribunal however decided that these elements of EU law was not "directly relevant" to the dispute at hand even though both the parties had raised EU law in their pleadings. However European Union

[257] N.Lavranos: "The MoX Plant Dispute: Court of Justice of the European Communities" 2 (2006) European Constitutional Law Review 456-469 at p466
[258] Ibid p 467
[259] Op cit p 468

environmental law was clearly needed to resolve the dispute at hand. Therefore because the Tribunal could not make a preliminary ruling to the CJEU by itself (because it did not meet the criteria for a Court of the Member States under the *Dorsch Consult* criteria) it should have declined jurisdiction of the case as if the European Commission had decided to bring the two Member States before the CJEU for breaching what was then Article 292 EC (which the Commission did not in the event do) there would have been a conflict of rulings.[260] In the end "the Tribunal handled the dispute as if Community Law or the EC did not exist at all, thus creating the fiction of deciding the case as if it were in the year 1899."[261]

A similar question of jurisdiction that has arisen at the time of writing is in relation to disputes regarding Bilateral Investment Treaties. The ECJ has ruled, to the consternation of many, in the case of *Achmea* that an award relating to an investment dispute between a Dutch company and the government of Slovenia which fell under the BIT should be revoked as the ECJ rather than the tribunal should be seized of the dispute as it involves EU law, even though commentators have suggested that EU law in such a dispute plays only a minor and secondary role and that the main dispute revolves around that of the contract between the company and the state concerned. The decision has been called a "death sentence" (Daniel Thym)[262]for autonomous investment protection tribunals. The dispute revolved around the Slovakian government changing its rules in relation to its health insurance regulations which meant that the company concerned was left out of pocket.

The problem that the CJEU had was that the arbitration tribunal could, by its evaluation, be called upon to interpret EU law. Contrary to the opinion of the Advocate General in the case, the CJEU

[260] N. Lavranos. 'The Mox Plant and IJzeren Rijn Disputes: Which Court is the Supreme Arbiter?" Leiden Journal of International Law 19 (2006) -223-246 at 240
[261] Ibid p 241
[262] D.Thym: "The CJEU Ruling in Achmea: The Death Sentence for Autonomous Investment Protection Tribunals http://eulawanalysis.blogspot.com/2018/03/the-cjeu-ruling-in-achmea-death.html (accessed 28.8.19)

found that the Court was not a "Court of the Member States" in that it was not part of the judicial system of the Netherlands and Slovakia due to the "exceptional nature of the Tribunal's jurisdiction" which the judgment states was precisely the reason why the Article 8 in the BIT establishing the Tribunal was inserted.

The CJEU also noted that arbitration tribunals such as that that provided for by the Bilateral Investment Treaty involved member states agreeing to remove potential dispute resolution from the jurisdiction of their own courts disputes which may concern the interpretation of EU law and hence from "the system of judicial remedies which the second paragraph of Article 19(1) TEU requires them to establish in fields covered by EU law."[263] The effect of this according to the ECJ was such as to call into question "not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU."[264] This is because any dispute could be resolved by the courts of the Member States that are party to the agreement. The dispute found its way to the CJEU only because the Tribunal was to meet in Frankfurt and be subject to German law. However the CJEU took issue at bypassing the Member State legal systems by the setting up of an independent Tribunal:

> "In the present case however, apart from the fact that the disputes falling within the jurisdiction of the arbitral tribunal referred to in Art 8 of the BIT may relate to the interpretation both of that agreement and EU law, the possibility of submitting those disputes to a body which is not part of the judicial system of the EU, provided for by an agreement which was concluded not by

[263] C-284/16 *Slowakische Republik v Achmea BV* 6th March 2018 ECLI:EU:C;2018:158 para 55
[264] Ibid para 58

the EU but by the Member States. Art 8 of the BIT is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided by Article 267 TFEU and therefore is not compatible with the principle of sincere cooperation mentioned in Article 34 above."[265]

The tie in between the national law of the Member States and EU law is something that the CJEU emphasizes here as the Tribunal had to take into account… the law in force of the contracting party concerned" and "the nature and characteristics of EU Law …must be regarded both as forming part of the law in force of every Member State and as deriving from an international agreement between Member States." [266] According to the ECJ the Arbitral Tribunal in the *Achmea* case was that it was not part of the judicial system of the EU and therefore did not have a remit to interpret EU law. This was particularly concerning to the Court considering that a decision of the Tribunal according to the BIT agreement was final. The fact that a reference had come to the CJEU regarding the BIT only came about because the BIT stated that it would come under the jurisdiction of German law and the Tribunal would come under the jurisdiction of German law and so it was a German Court that finally referred the matter to the CJEU.

The debate surrounding bilateral investment tribunals has since been added to by the the decision of the CJEU in the *Komstroy* case. The facts of the case are complicated but to summarise the investment involved the selling on of electricity supply for Moldova. The key thing to note with this case is that, unlike *Achmea,* neither of the parties had a connection to the EU. The issue was between Moldova and a Ukrainian company. The case came to the attention of the Court of Justice

[265] ibid
[266] Above at para 41

because the arbitration tribunal attached to the agreement was based in Paris. The tribunal ruled in favour of the investors Komstroy in their decision but Moldova challenged the decision in the Paris appeal courts arguing that the supply of electricity could not be classed as an investment, the decision to set aside the award in favour of Komstroy was set aside by the French Supreme Court. The case was ultimately transferred to a second court of appeal in France which made a preliminary ruling to the CJEU asking whether a claim for the supply of electricity could be classed as an investment under the Energy Charter Treaty which is a mixed agreement concluded by both the European Union and the Member States in 1994).

This judgement has drawn criticism in the academic literature because although the preliminary reference from France contained no question concerning the legality of the Paris based arbitration tribunal, the CJEU took it upon itself to state Obiter Dictum, that such a tribunal, even if it was arbitrating matters which did not involve an EU Member State, would fall under the ambit of European Union law with the Grand Chamber of the CJEU stating that:

> "The exercise of the European Union's competence in international matters cannot extend to permitting in an international agreement, a provision between an investor of one Member State and another Member State concerning EU law may be removed from the judicial system of the European Union such that the full effectiveness of that law cannot be guaranteed."[267]

Alan Dashwood raised questions about why this was considered by the CJEU at this time. He draws the distinction between the situation in *Achmea* where there was a decision between the two Member States "to remove a category of disputes from the judicial system of the EU." This was not a

[267] *Republique Moldovie v komstroy LLC* ECLI:EU:C:2021:655 2nd September 2021 para 62

factor that needed to be considered in the *Komtroy* case.[268] Dashwood states that the "sole focus of the concern" of the CJEU was an Energy Charter Treaty tribunal outside the EU judicial system to interpret and apply EU law with the Court explaining that this Treaty, as a mixed agreement is itself an act of EU law."[269]

Others have drawn attention to the fact that the CJEU used the seat of the jurisdiction of the Tribunal to weigh into a question that it was not asked about and was stretching its terms of reference to the limit, though acknowledging that the CJEU felt that it needed to interpret these provisions in the ECT because there was a need to "prevent the possibility of future divergence sin interpretation, since it is possible that an arbitral tribunal may interpret the ECT in a way that diverges from the CJEU." It was for this reason that the CJEU ruled that it had jurisdiction in this matter."[270] This has however raised concerned that the CJEU might adopt this reasoning and intervene in disputes, arbitrated withing the EU involving non EU parties such at the United Nations Convention on the Law of the Sea with the view to prevent divergences in interpretation.[271]

While such cases are very far removed from asylum law, they are covered here to show just how strongly the CJEU will work to preserve the autonomy of the EU legal order. Any common EU asylum court would have to be under its oversight and meet the criteria for "a court of the Member States." It is to a discussion of this that we now turn.

[268] A.Dashwood: 'Komstroy and Opinion 1/20-Curious and Curiouser' Common Market Law Review 59 S1 2022 51-60 at 54
[269] Ibid at 55 and *Komstroy* judgment para 49.
[270] J.Odermatt: 'Is EU law International?: Case -741/19 *Republic of Moldova v Komstroy LLC* and the Autonomy of the Legal Order.' European Papers 2021 Vol 6 No 3 pp 1255-1268 at 1261
[271] Ibid p1266

What Constitutes a Court of the Member States

The ECJ has established the following criteria through its case law for defining a Court of the Member States under Article 267 TFEU and which subsequently has jurisdiction to make a preliminary ruling to the Court. The Court will consider whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent."[272]

The *Achmea* judgment is interesting as the ECJ gave an opinion that went against the advice of its Advocate General Melcchior Wachelet, a former Judge of the Court, who put up a strong defence for the case that the Investment Tribunal in the *Achmea* case is or rather was a court of the Member States. He gave examples of occasions in the past where the ECJ had declared on a case by case basis, to accept preliminary rulings from arbitral tribunals. Wachelet held that the Tribunal, unlike those which have their basis in a contract between the parties, is in fact established by law as it has its basis not only in the international treaty which formed the BIT but by the statutes of the two states concerned which ratified it and allowed it to become part of the legal orders of those two States. Wachelet drew comparison with the *Ascendi Beiras* case[273], directing the Court to the fact that the arbitration tribunal in that case had its basis in a law which prescribed arbitration for the remedying of tax disputes.

[272] See for example C-196/09 *Paul Miles & Others v European Schools* ECLI:EU:C 2011:388 14th June 2011 para 31, C-394/11 *Valeri Hariev Belov v CHEZ Elektro Balgaria AD* et Al ECLI:EU:C:2013:48 31st January 2013 para 38 C-203/14 *Consorci Sanitari del Maresme v Corporacio de Salut del Maresme i la Selva* 6th October 2015 ECLI:EU:C:2015:664 para 17, C-377/13 *Acendi Beiras e Alta, Auto Estradas das Beiras Litoral e Alta SA v Autoridade Tributaria e Aduaniera* ECLI:EU:C:2014:1754 12th June 2014 para 23

[273] C-377/13 *Ascendi Beiras Litoral e Alta,Auto Estadas das Beiras Litoral e Alta SA v Autoridade Tributaria e Aduaneira* 12th June 2014 ECLI:EU:C:2014:1754

The arbitral tribunal in *Achmea* was deemed to be permanent not because of the composition of the arbitral tribunal but rather due to the institutionalization of arbitration as a dispute resolution method. He drew attention to the case of *Merck Canada*[274] in which the Court found that the arbitral tribunal in that case "was established on a legislative basis…it had permanent compulsory jurisdiction and in addition national legislation defined and shaped the applicable procedural rules." The evidence of the institutionalization of arbitration was, according to Wachelet, also in evidence in the BIT stating that the power to appoint arbitrators rests on the Stockholm Chamber of Commerce which is permanent and also to the fact that UNCITRAL rules applied to the arbitral proceedings. The fact that the decisions of the tribunal are final and binding on the parties with the parties consenting to submit the dispute to the tribunal if it had not been settled amicably within six months satisfied the compulsory element of the requirements of the ECJ in determining a Court of the Member States.

Wachelet submitted that the BIT agreement stated that the Tribunal shall establish its own rules by applying the arbitration rules of UNCITRAL which has in its Article 15 that the parties are treated with equality and that at any stage of the proceedings each party is given full opportunity to presentits case. Finally in regard to independence an impartiality Wachelet noted that the ECJ had not questioned these attributes in any of the arbitration tribunals in any of the cases before it and that the UNICTRAL Arbitration Rules "guarantee the independence and impartiality of the arbitrators by imposing a clear obligation to disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence."

[274] C-555/13 *Merck Canada Inc v Accord Healthcare Ltd, Alter SA, Synthon BV,Ranbaxy Portugal, Comercio Desenvolvimento de Produtos Farmaceuticos, Unipessoal Lida* 13th February 2014 ECLI:EI:C:2014:92

The points are rationally argued and given the tendency of the ECJ to adopt a practical teleological interpretation that gives "effet utile" to the provisions concerned it is easy to be convinced by Wachelet's approach. However as has been mentioned the Court takes a notoriously conservative approach concerning the potential of an outside judicial body ruling on EU law.

THE BENELUX COURT: THE FAVOURED SOLUTION OF THE ECJ AND THE UNITARY PATENT COURT.

The European Court of Justice has held up the Benelux Court of Justice as a model for an international court which fits into the legal order. For a body to be considered a court of the member states of the EU there must be a strong link between the body and the national courts of the Member States which are signed up to the body. In the *Paul Miles* case the ECJ found that a complaints board relating to European Schools which made an application for a preliminary ruling to it did not have the jurisdiction to do so. It stated that the Benelux Court ensured that:

" the legal rules common to the three Benelux states are applied uniformly and moreover The procedure before it is a step in the proceedings before the national courts leading to definitive interpretations of common Benelux rules. The Complaints Board does not have any such links to the judicial systems of the member states."[275]

In the *Christian Dior* trade mark case the Court stated that there is "no good reason" why a Court common to the Member States could not submit a reference to it for a preliminary ruling and that allowing a Court such as the Benelux Court of Justice to make a preliminary reference to it posed no

[275] C-196/09 *Paul Miles & Others v European Schools* 14th June 2011 ECLI:EU:C:2011: 388 para 42

problem. At the time the Court was a legal institution which under (what was then) Article 177 was a Court to which there was no judicial remedy under the national laws of three member states that fell under its jurisdiction under Article 177 such a Court had to refer.[276] The Benelux Court was said by the ECJ to give "definitive rulings on the interpretation of uniform Benelux law" and the ECJ found that in the circumstances (a trade mark dispute) of the *Christian Dior* case, the Benelux Court may be obliged to make a referral to it for interpretation of the particular Directive that was being invoked in the case.[277]

The ECJ was to hold the Benelux Court of Justice as a model in its Opinion on the formation of a Unitary Patent Court. There have been plans in Europe for unifying and streamlining patents going back several decades and the opinion concerned revolved around the formation of a Court system that would rule on a proposed unified patent. The idea being that instead of applying for multiple patents, one could apply for a bundle of patents valid in the Member States that had signed up to the agreement, the idea being both greater efficiency in the patent process together with reduced cost. The proposed European and Community Court was to rule on disputes regarding this proposed Unitary Patent with the existing European patent which is essentially a bundle of patents which have been authorized in each member state. At the time of this Opinion, the European Patent Convention, the founding document of the European Patent Organization had 38 signatories so included third countries as well as EU member states.

It was this international element that the ECJ had problems with when it gave its opinion on the matter. The fact that the Court was to be a stand - alone international entity with exclusive jurisdiction on the Unified and European Patents meant that an international court would be interpreting European Union law:

[276] C-337/95 *Christian Dior SA & Parfums Christian Dior BV v Evora BV* 4th November 1997 ECLI:EU:C:1997:517 Para 22
[277] Ibid paras 24-27

> "By contrast the international court envisaged by this draft agreement is to be called upon to interpret and apply not only the provisions of that agreement but also the future regulation of the Community patent and other instruments of European Union Law, in particular Regulations and Directives in conjunction with which that regulation, would when necessary be have to be read, namely provisions relating to other bodies of rules of intellectual property and rules of the FEU Treaty concerning the international law and competition law. Likewise PC may be called upon to settle a dispute pending before it in the light of fundamental rights and general principles of European Law or even to examine the validity of acts of the European Union."[278]

This together with the fact that under the draft agreement the Unified Patent Court would take the place of national courts with regard to its exclusive jurisdiction regarding the matters under its competence meant that to all intents and purposes it bypasses national courts and prevents them making a preliminary ruling regarding matters relating to European and Unitary patents to the European Court of Justice. The Court goes on to note that Article 267 TFEU "establishes between the Court of Justice and the National Courts direct cooperation as a part of which the latter are closely involved in the correct interpretation and uniform application of European Union law" and that "the tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the Treaties."[279] The Benelux Court is mentioned as the antithesis of planned Unified Patent Court as it is a "court common to a number of Member States, situated, consequently, within the legal system of the European Union". More importantly if the Patent Court was to be found to be in breach of European Union law it could not

[278] Opinion 01/09: Draft Agreement Unified Patent Court ECLI:EU:C:2011:123 v78
[279] Ibid paras 81-84

be held accountable via nfringement proceedings or result in any financial liability for the Member Sates.[280]

THE BENELUX COURT AND ITS USE AS MODEL FOR A COURT OF THE MEMBER STATES.

The European Court of Justice as has been seen likes to hold out the Benelux Court of Justice as a model for a court of the Member States. Despite those behind the Unified Patent Court re-drafting the Unified Patent Court agreement so that parties to the agreement will only include Member States and despite stating that it will base the new court on the Benelux model the reality is that the two courts are very different. The Benelux Court has a very specific function and works in a very specific way in conjunction with the national courts of the three Benelux countries.

The Court by a Treaty between the three Benelux countries in 1965 and entered into force on the 1st January 1974 to be the ultimate judicial authority on the Benelux Economic Union and the common legislation developed by the three member states under that union and to "guarantee the harmonious interpretation and application" of common rules developed under the Benelux Economic Union.[281] Up until 2012 the Court has operated by a system of referral for preliminary rulings by 1) from the national courts of the three Benelux Countries, 2) a referral from the governments of the Benelux Countries for interpretation (although this has only happened once) and finally what was called the College of Arbitrators which was a body set up to deal with disputes between two state parties regarding the Benelux Economic Union though this body has been expunged in a new Benelux Union of 2008.

[280] Op cit para 86

[281] "Benelux Court of Justice" Max Planck Institute for Procedural Law Luxembourg MPILUX Working Paper 2 2017 p6 https://www.mpi.lu/fileadmin/mpi/medien/research/MPEiPro/WPS2_2017_Belkahla_Benelux_Court_of_Justice.pdf (accessed 12.08.2018)

In reality nearly all the referrals to the Benelux Court of Justice come from the Benelux National Courts. The way the system works is that the Courts make a referral to the Benelux Court of Justice for a preliminary ruling. The Benelux Court will then give a preliminary ruling on the issue that has been referred to it. This will then be handed down to the national court which referred the issue which will then incorporate the preliminary ruling of the Benelux Court into its own judgment. This referral, depending on the circumstances can either be voluntary or mandatory depending on whether the decision of the referring court is a final one or whether it can be challenged.

Since 2016 (and the ratification of a 2012 Protocol to the Benelux Court Treaty) the judges of the Benelux Court of Justice are made up of members of the Supreme Court judiciary of the three Benelux states (the Justices) and Judges of the lower courts directly below the Supreme Courts (The Dutch Gerechtshoven, the Belgian and Luxembourgish Cours d'Appel) and interestingly these judges continue with their regular routine judicial work on their respective national Supreme Court benches alongside their duties at the Benelux Court. This is said to ensure that the Benelux Court is an "emanation of the State's Highest Courts and ensure co-operation at the highest level" although this has also led to concerns over how truly independent the Benelux Court of Justice Judiciary is.[282]

Since the ratification of the 2012 Protocol the Benelux Court is also able to hear direct actions and rule on the merits of cases in relation to trade mark disputes (though the Protocol provides the possibility for the extension of this jurisdiction to other Benelux Economic Union areas in the future) and will be "subject to appeal to another chamber of the Benelux Court but only on points of law."[283]

[282] Ibid p 4
[283] Op cit p 10

Shortly after the European Court of Justice gave its opinion on the Unified Patent Court, the Council of the European Union put out a paper called "Reflections on the Benelux Court of Justice" in relation to the creation of a Unified Patent Court. This was of course just before the creation of the 2012 Protocol mentioned above, so the Council were examining a judicial body whose purpose was to give preliminary rulings on Benelux Economic Union Law. It is interesting to note that the Council highlights the fact that the majority of cases that came before the Benelux Court are those concerning trade mark law, though at that time this was via referrals for interpretation from the lower courts of the three Benelux states.

The Council do take note of the negotiations that were ongoing regarding the 2012 Protocol though and state that, as and when this protocol was to be ratified, the similarities between the Benelux Court of Justice and the proposed Unified Patent Court were "striking." As will be seen though, it has been argued that there are major differences between the two, but the document shows that the Council as well as the various other stakeholders involved in the Unified Patent Court proposal were anxious to overcome the objections to the Unified Patent Court given by the ECJ in opinion 01/09.

The Council document states that the aim for the new Unified Patent Court was that it was to be solely a court common to the Member States, that it like the Benelux Court, would be seen as the highest level courts for the matters in which it has competence. Both will give "definitive interpretations of the law" in which they have competence, that national courts "will not be able to act as a remedy if the said courts were to misinterpret EU law except in cases of liability for damage as a result of infringement of EU law," both have the ability to make preliminary rulings to the ECJ and thus both are "subject to mechanisms capable of ensuring the full effectiveness of EU Law."[284]

[284] "Creating a Unified Patent Litigation System-Reflections on the Benelux Court of Justice" Council of the European Union 13984/11 9 September 2011 p7

There are however marked differences between the Benelux Court of Justice and the Unified Patent Court, even allowing for the protocol which gives the former the direct powers in relation to trade mark law. For a start it is very obviously a court of the Member States. It is the highest court of a confederation of three member states. In terms of the Unified Patent Court, the Court is an independent body which is entirely outside the "ecosystem" of the member state court/ CJEU. It is outside the loop. To try to remedy the issues raised by the CJEU in Opinion 01/09 the Unified Patent Court Agreement stipulates that the parties to it are limited to those of the Member States and there is a provision for the court to make a preliminary ruling to the CJEU. There could be mileage in using this general set up as a model for any future asylum court. Below will be an analysis of the approach of having a fully contained system of a European Union Asylum Court which could be based on the approach taken by the Unified Patent Court which will then be contrasted by that of the traditional Benelux model.

Although the German Constitutional Court challenge has now passed, the Unified Patent Court has been the subject of a negative decision from the Hungarian Constitutional Court. It ruled that the Unified Patent Court provided for by the UPC Treaty would cause unacceptable interference with Hungary's own private law jurisdiction in the field of patents stating that an international agreement which "entirely draws" to an international institution the adjudication of such private law disputes and which also entirely draws the constitutional judicial review of these disputes under the Hungarian Constitution away from the jurisdiction of the Hungarian Judiciary would be unconstitutional.[285]

It is important to note that the United Patent Court aims to be a court of the Member States in its revised form by cutting out the proposed international element which was objected to by the

[285] Decision 9/2018 (VII 9)AB on the interpretation of Article E) paragraphs (2) and (4), Article Q) paragraph 3 and Article 25 of the Fundamental Law: Hungarian Constitutional Court para 53

European Court of Justice. The Patent Court may be held out to be a Court of the Member States by the stakeholders behind the proposal but there is no denying that the Unified Patent Court will be directing powers away from the Member States in the areas under its jurisdiction. The adaptation of the United Patent Court model for such an area as migration law (an area which is much more politically explosive and an area where, as has been seen in the introductory chapter to this study, the Member States are keen to keep as much domestic control as possible) would surely be a cause for controversy if such an asylum court was to completely supplant the Member States' court systems in matters of asylum, although this complete harmonization option will be looked at in this study, there can be no doubt as to the problems such an approach would cause. It is a matter of "at what price a Common European Asylum System?"

The Unified Patent Court as a model poses far more of a problem in this matter than the Benelux Court of Justice. The latter deals with uniform rules between only three Member States. problem of constitutional challenge is one that any future Asylum Court may face if it were to take on the breadth of competence that the Unified Patent Court has taken on.

CHAPTER SUMMARY.

This chapter has attempted to show the constitutional difficulties of setting up any specialized court or tribunal within the European Union The Court of Justice jealously guards its position as the final arbitur of European Union Law. It is also strict in defining the definition of a Court of the Member States. What this means is that any court or tribunal within the European Legal System to which a matter of European Union Law forms even a relatively minor part of the proceedings must have the ability to make a preliminary ruling on a technical point of European Law if need be. If this position of the Court of Justice is challenged the Court will have no compunction in challenging the set up of such a court or tribunal.

This has advantages in that any matter of challenged European Law will ultimately be decided by a final

instance court which then form a binding precedent. This is a positive step for legal certainty. The negatives come when considering efficiency. The comment given by a British barrister in this chapter is a pertinent one. Complex litigation is time consuming and expensive for the parties and the CJEU has a very large ongoing docket of cases referred to it. This is bad situation in a dispute situation as the domestic proceedings have to be halted if a technical point of European Union Law needs interpreting and the matter gets referred to the CJEU in a preliminary ruling. This could entail a period of several years depending on the case load of the CJEU at any time.

This is not only an expensive inconvenience in commercial situations but it could also prove a problem in relation to asylum and immigration proceedings. Once of the key aims of the Asylum Pact is the drive for faster processing and faster expulsions of irregular migrants that have no case for asylum or subsidiary protection. Any form of specialist EU asylum court or tribunal would have to make a preliminary ruling to the Court of Justice in the event of the need for interpretation on a point of law. This would run against the Member States drive for efficiency as any potential expulsion would be delayed until the CJEU had given its opinion on the matters concerned. If this was to happen in multiple cases then a backlog of cases would mean extended stays for irregular migrants that Member States would like to deport as soon as possible. This of course would not endear such a court or tribunal to the Member States. With the expansion of the European Union this issue of backlog has become more of a problem and it was one of the reasons that the now defunct civil service tribunal was set up.[31]

Any form of integrated European Union Asylum Court would need to be able to slot into the European Union legal order seamlessly and without the delays and litigation which have often hindered other attempts which have been set down here. The next chapter will attempt to assess the options and formats that a European Union asylum court could take using some of the existing specialised courts in the European Union at the present time.

[31] T Cheong-yeung et al: 'Time Efficiency as a Measure of Court Performance: Evidence from the Court of Justice of the European Unon.' European Journal of Law & Economics (2022) 53 209-234 at p215

CHAPTER FOUR

SQUARING THE CIRCLE FROM JUDICIAL COOPERATION TO A DESIGNATED COURT

The European Union has made its intent for closer judicial cooperation and closer collaboration in implementing EU law in the action plan implementing the Stockholm Programme. [286]This details projects ranging from the European Public Prosecutor's Office establishing collaboration in bringing prosecutions of those who threaten the EU's financial interests to the adoption of the UNIDROIT contractual principles, to increased training of lawyers throughout the EU. These principles are intended to ensure more mutual trust and confidence among the Member States in the harmonious application of European Union Law.

This might sound easy in practice but with different legal traditions and approaches there needs to be a critical examination both on what the European Union already has put in place in an attempt to ensure harmonization of decision making together with what could possibly work in the future. This chapter will critically analyse what exists and will provide suggestions for the future based on models that exist bearing in mind the conditions for a Court becoming part of the legal order discussed extensively in the last chapter.

The chapter will begin by looking at judicial cooperation with the European Judicial network together with judicial training in the European Union. This study has already examined the

[286] Communication to the Commission to the European Parliament, The Council, The European Economic and Social Committee and the The Committee on the Regions: 'Delivering an area of freedom, security and justice for Europe's citizens: An Action Plan Implementing the Stockholm Programme.' COM 2010 (171) final

difficulties that arise in assessing credibility given different legal cultures and judicial approaches. Plans have begun to provide detailed and Country of Origin information. This has begun with a report on Afghanistan and more reports will come in the future from the European Union Agency for Asylum. Decision makers both at initial case worker level and in asylum courts of higher instance need to be aware of these reports and to be trained on their content so that asylum seekers from such countries can be assured that the same information is being relied on throughout the European Union. Along with this analysis will be a suggestion for coming to common assessment of the evidence at European Union level. The UNHCR Refugee Handbook provides guidance on this matter but (as seen in the chapter on divergences) in reality Member States can apply different standards.

Following on from a look at training and networking, the chapter will move on to look at examples of attempts to have a common approach to decision making in the European Union. The chapter will look at what exists currently in the field of patents and trade marks within the European Union together with setting up a unified patent court within the EU. Although intellectual property and migration suits may seem far apart they are both areas where policy is coordinated by a central office. In the former case there is already schemes in place to ensure uniformity of decision making throughout the EU in terms of dealing with disputes with designated national courts being European Trademark Courts.

The Benelux Court of Justice is also empowered to give rulings on trade mark and copyright disputes, which then become binding throughout the Benelux countries. The Benelux Court is also worth looking at in detail as the CJEU held it out as a model of a cross border “court of the Member States” in its judgment regarding the initial plans for the Unified Patent Court

These models will be considered to see if they can be adapted in the future to issues of

asylum. It will be stressed that for this to work there would have to be a mutual recognition of positive asylum decisions in the EU. Under the current EU asylum system only negative decisions are recognized. Any further harmonization of decision making or centralization of court structure would have to be passed in an EU where solidarity and burden sharing can be an issue and where the direction of asylum policy can arguably be seen to be more concerned with securing borders and burden shifting than with protection. The second question that needs to be posed is how can the EU balance its need to securing its borders with its commitment to strictly implement the European Charter of Fundamental Rights as stated in its action plan to the Stockholm Programme

METHODS OF COORDINATION

The Stockholm Programme states that mutual trust between authorities and services in different Member States as well as decision makers is the "basis for efficient cooperation" and "ensuring trust and finding new ways to increase reliance on and mutual understanding between the different systems in the Member States" will be one of the challenges for the EU in the future.[287] The EU also has laid down plans for continuing professional development for legal professionals in the EU. The latest targets at the time of writing aim for access to continuous EU training to reach 65% of Judges and Prosecutors, 15% of court and prosecution office staff who need EU competence, 15 of lawyers and 30% of notaries by 2024.[288]

[287] The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens Brussels 9th September 2009 p 5 https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/the_stockholm_programme_-_an_open_and_secure_europe_en_1.pdf (accessed 7.12.2019)

[288] Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee for the Regions: Ensuring Justice in the EU – A European Judicial

The Commission has put forward a communication putting forward ideas for the improvement of judicial training within the EU. These ideas range from encouraging short term exchanges, especially for newly appointed Judges and prosecutors to developing language skills and mastering legal terminology in foreign languages to making sure that legal practitioners have education of EU law fully integrated into their initial training. The Commission states that by reason of "respect for judicial Independence and the self - organization of the professional associations of lawyers, notaries and bailiffs" no central monopoly structure at European Union Level is to be created but rather have the Commission work as an active partner in supporting judicial training activities by all stakeholders.[289]

It is interesting to note however that the Commission does not identify migration law as a priority area for training though training on fundamental rights is mentioned. In order to address the balance that the European Union is striving to achieve between securing its borders against illegal immigration on the on hand and ensuring fair and thorough procedures for genuine seekers on the other, it is essential that training throughout the Union is given on qualification for refugee and subsidiary protection status together with procedures. However to make sure that this is effective it is a common approach will need to be adopted.

Training Strategy for 2021-2024 COM (2020) 713 Final 2.12.2020 p8 https://ec.europa.eu/info/sites/info/files/2_en_act_part1_v4_0.pdf#page=1&zoom=auto,-18,843 (accessed 14.3.2021)

[289] COM (2011) 551 final Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions: Building Trust in EU – Wide Justice: A New Dimension to European Judicial Training p6-8

The European Union Agency for Asylum does have a role to play here in that it does provide a core training curriculum for Member State decision makers. However as far as traditional training in future is concerned, the importance of continuing training higher level judges and decision makers needs to go hand in hand with work by the Agency to ensure as much policy coordination as possible.

This would not only be in terms of the third country reports previously mentioned but also a need to at least try to form a common approach to assessment of credibility. This would not only need to take into account the case law of the CJEU which has provided important precedent on credibility, such as using stereotyped notions to assess homosexuality[290], but also agreeing a common standard of proof in establishing credibility (of which more below) and ensuring that this is employed across the EU.

In the proceeding chapters this study has combined a critical look at the Common European Asylum System as it now stands and has endeavored to explore ways in which further centralization of decision making can be introduced to ensure more uniformity and help to reduce the divergences in decision making throughout the system. As has been shown the variations in decision making in the field of asylum is extremely hard to deal with even in a an administration where the rules are completely harmonized as the decision making often can be down to individual assessment of credibility based on sometimes scant evidence.

Such disparities are impossible to eradicate completely, however the premise is that they can be reduced through greater pooling of information and guidance from the European

[290] Look up ABC case?

Union Agency for Asylum. As will be seen with agencification comes potential problems with accountability and responsibility too.[291] When an agency is heavily involved in the asylum processing in a Member State there can be questions raised about who can be held accountable, the Member State or the agencies.

Trying to argue for further centralization of decision making and appeals in asylum through agencification and more centralized court structures involves a difficult balancing act. On the one hand there is of course the need for convergence in the process of application and appeals to ensure that applicants for protection can as far as possible be ensured that they are enjoying the same quality of adjudication and appeal no matter where they are making their application. This however has to be balanced with the principle of subsidiarity whereby EU should only take on a task that cannot be dealt with at a local level.

This could be said to be fair enough in hotspots where a Member is under pressure from a mass influx of refugees but the question needs to be asked whether other Member States would consent to any form for centralization of the decision making process in regard to the asylum process. Solidarity in the field of asylum has long been a problem in the European Union (back this up with some documentation and references). Therefore this study unavoidably contains an element of blue sky thinking. The aim of this section is to look at models of judicial decision making within the EU and consider whether these models could be applied to the field of asylum law

[291]See 'The Gaps in Judicial Accountability of EASO in the Processing of Asylum Requests in Hotspots' G.Lisi & M. Eliantonio http://www.europeanpapers.eu/en/europeanforum/gaps-in-judicial-accountability-of-easo-in-processing-of-asylum-requests (accessed 6.11.19) also https://www.icj.org/an-effective-accountability-mechanism-for-frontex-european-border-and-coast-guard-agency/

This section will begin by looking how judicial cooperation has been currently cultivated in the EU and how effective such measures have been in seeking to unite different judicial traditions within the European Union to ensure a more uniform application of EU law. This will take a critical approach and will consider firstly whether the measures that carried out so far are effective given the very different approaches adopted with regard to procedure and evidence in Member States.

The section will then consider further centralization of the judicial process within European Union and will consider how this would work alongside the further agencification in the area. For comparative purposes the model of designated national courts acting as European trade mark courts will be examined. Following on from this the model of a completely self-contained European Union Asylum Court system, using the model of the planned patent court as the main source of comparison, will be analyzed. As has been seen in the previous chapter ( ) the plans for this court have travelled along a fairly rocky road with the initial plans falling foul of the CJEU. Although patent systems and the Common European Asylum System seem very different, the system is useful for comparison for showing a harmonized policy backed up by a fully centralized judicial model.

The chapter will finally move on to consider whether there could be a Court made up of judges who are expert in asylum law who would be able to give clarification matters of implementation of a future more fully harmonized Common European Asylum System. The model used as a point of comparison for this in the chapter is the Benelux Court of Justice.

TRAINING AND NETWORKING

It can be argued that there is a paradox in the European Union stating on the one hand that it would like to create European Culture on the one hand whilst recognizing the differences

in the legal traditions and cultures of the Member States on the other hand. How do you square a single legal culture with national judicial autonomy? This is especially important given the political nature of asylum policy and a State's desire to control its own borders.

This will need to be considered when looking at the possibility of some form of centralized asylum court structure. On the one hand there is training and informal networking which has a laudable aim in ensuring good practice and dialogue between lawyers and judges throughout the EU but which ultimately leaves different judicial and legal cultures to continue to enjoy their national autonomy. At the other end of the scale there are varying degrees of centralization of decision making which will ensure potentially greater harmonization of decision making and approach at the expense of national autonomy.

This difference in approach cannot be understated. It has already been covered in this study when looking at approaches to the type of hearing and application of evidence. It does go further than this however for example one can talk about judicial training but the role and approach of judges are very different between the mainly common law system of the Republic of Ireland and the majority civil law systems in Europe. The judiciary in the United Kingdom and Ireland are recruited senior lawyers: barristers and solicitors who have long experience in practice before being called to the bench. Conversely on the continent the career of a judge is a career in itself where applicants are appointed at quite a young age with a Czech Minister of Justice and later Supreme Court judge commenting that "on seeing the kids at Prague Castle taking the judicial oath" he became more convinced that judges

needed to have at least 10-20 years life experience before being appointed judges.[292] Of course the same could be said for Judges from the UK in a different way for as Van Caenegem notes Judges tend to come from more privileged backgrounds and more often than not are educated at private schools and elite universities which remains the case today despite drives to make the Bar and other professions more diverse.[293]

The differences between the two systems fill whole books of comparative law and are beyond the scope of this study but they are real and manifest themselves starkly in approaches to evidence as has been seen and even more so in areas like Contract Law and a European Civil Code which has faced criticism for being very difficult to achieve. These points are raised to highlight the potential tension between aiming for a common legal culture while maintaining national legal and judicial autonomy.

CENTRALIZING APPEALS IN A CLOSER HARMONIZED CEAS

The increase in refugees making their way to Europe's borders in recent years has seen Europe take a tough stance in attempting to secure its borders. Part of this process has been to increase the operational capability of agencies operating in the Member States at the Union's outer borders where such refugees seek entry. The main two are Frontex and the European Agency for Asylum.

[292] *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation* Z. Kuhn ch 4 p171 (Brill Nijhoff 2011)
[293] *Judges, Legislators and Professors: Chapters in European Legal History* R Van Caenegem ch 1 p42 (Cambridge University Press 1987) See also *https://www.theguardian.com/society/2019/jun/25/britains-top-jobs-still-in-hands-of-private-school-elite-study-finds (accessed 10.12.19)*

The latter in particular has been involved in the processing of asylum seekers in Greece during the height of the refugee crisis. The European Agency for Asylum is intended to be a "centre of expertise" and also hasgreater powers of Itervention in Member State asylum processing should their help be deemed warranted by "providing operational and technical assistance, in particular when their asylum and reception systems are subject to disproportionate pressure."[294]

There is a danger here though in where decision making power actually lies when the EUAA is operating on the ground in a Member State like Greece and where the accountability and responsibility lies for errors in decision making and practice lies. Is it with the Greek Immigration agencies or with the European Agency for Asylum.

This chapter aims to take the argument one stage further and consider the possibility of making judicial decision making and accountability within the CEAS more uniform to complement the proposal for the new agency and third phase revisions of the main legislation. After all although a refugee is defined by the 1951 Convention and guidelines are given in the UNHCR Handbook, who qualifies as a refugee is ultimately down to Member State sovereignty.

In the same way, subsidiary Protection and the Qualification Directive ae interpreted differently by the Member States as has been covered in the previous chapter. It is hoped that the European Agency for Asylum will help to devise common standards and interpretations which could be implemented across the European Union. Therefore once

[294] Regulation of the European Parliament and of the Council on the European Agency for Asylum Agency and Repealing Regulation (EU) 2021/2303 15th December 2021 recital no 6.

such commonality of approach has been agreed upon could there not also be some form of centralization of the court structure to help ensure a consistent application of standards?

The problem here is one of national sovereignty. Whilst Member States who are under dire pressure may invite the agency to come in and take charge of determining asylum applications, for most Member States such an issue of who is to be allowed into their territory as a refugee is a matter for national sovereignty. The issue is of a deeply political nature whereas the comparators that I will be putting forward as models deal with intellectual property law and patents which could be said to be far less politically controversial an area. Nevertheless, both the European Trade Mark Courts and the Unified Patent Court provide examples whereby harmonized measures in the EU are or will be overseen by Courts which, though they have different regional bases, will interpret the law in the same way (or in the case of the latter those EU countries who have rarified the UPC Treaty).

The European Trade mark Court System.

Like the proposal for the reform of the Common European Asylum System the system for the European Union Trade mark has its legislation laid down by a Regulation and is also overseen by an agency in the form of the European Intellectual Property Office. This EU agency oversees the application process of the European Trade mark. However when a trademark has been passed and is then contested, the Regulation stipulates that a national court is registered as a European Trade mark Court and adjudicate the dispute according to

the provisions of the harmonized EU law providing for the European Trade mark which has effect throughout the entirety of the European Union.

The provisions of the Regulation provide that the action should be brought in the Member State where the defendant is domiciled or where the defendant is established if he is not domiciled in any of the Member States. If neither of these apply then the Court would be where the plaintiff is either domiciled or established.[295]

Article 123 (1) of the European Trade mark Regulation stipulates that Member States shall "designate in their territories as limited a number as possible of National Courts as European Trade mark Courts. By way of example the European Trade mark Courts in England and Wales (when the UK was a Member State) would be the Chancery Division of the High Court, the Intellectual Property Enterprise Courts and certain designated County ourts at both first and second instance.

All hearings would be heard by a Judge with long experience in in intellectual Property law such as the head of the Intellectual Property Enterprise Court Richard Hacon who has long experience at the bar in the intellectual property arena.[296] These courts have the ability to issue injunctions which cover the whole of the European Union if necessary though these injunctions can also be limited to part of the European Union if this is all that is needed to give the injunction effect.

[295] Article 125 Regulation EU 2017/ 1001 on the European Union Trademark.
[296] https://www.judiciary.uk/publications/his-honour-judge-hacon/

The latter was dealt with by the CJEU in the case of *DHL Express France SAS v Chronopost SA* where the French Cour De Cassation was acting a second instance European Trade mark Court. The defendant brought a cross appeal questioning whether the Court's decision should extend to the entire area of the EU. The case was referred by the Cour de Cassation to the CJEU which ruled that if the acts or threatened acts or infringement are limited to one Member State or part of the territory, then the Court can limit the territorial scope of the injunction it issues.[297] The CJEU has also given valuable guidance on issues of offers of counterfeit goods delivered electronically holding that an alleged offender can be brought to book in the country where the goods are marketed at regardless or not of whether the electric communications emanated from outside the EU or not. (see AMS Neve Case C-172/18)

POSSIBLE APPLICATION OF THE EUROPEAN TRADE MARK COURT STYLE MODEL IN THE AREA OF ASYLUM.

The above description aims to give a comparative example of how national courts of individual Member States work to enforce EU wide harmonized legislation. The most obvious difference between the Trade mark law and EU asylum law is that it enforces a positive in the sense that a registered EU trade mark is protected and enforced and the Courts assure that protection. In regard to asylum Law only negative decisions are recognized by the Courts.

[297] C-235/09 DHL Express France SAS v Chronopost SA ECLI:EU:C:2011:238 12th April 2011 para 48

In this way the asylum Courts of the Member States are acting in the same way as the Trade mark Courts but are enforcing a negative. So an asylum seeker that gets refused in Hungary for example cannot “forum shop” and try their luck elsewhere.

For the European Trademark Court Model to work in asylum the positive recognition of asylum claims offering an EU wide asylum status, as originally proposed at the Tampere European Council, would need to be considered. However there are still problems in this area. Having a higher national court act as an EU asylum court enforcing an EU wide asylum status would probably not have a positive effect on reducing recognition rate variance unless all of the Courts operated under an identical procedure, had the same approach to evidence such as inquisitorial rather than adversarial, and had access to the same country of origin reports. Therefore the role of the EU Agency for Asylum would be crucial here.

As explored earlier we have seen that with issues of credibility when evidence is thin on the ground, courts and individual judges even can vary in their assessment. To minimize this there would need to be detailed rules and guidance on the standard of proof needed as regards assessment of credibility. This should be based on the precedents from the CJEU and the European Court of Human Rights as well as guidance from the UNHCR. (show some EU and UK caselaw and precedent). The UNHCR Handbook is clear that a good degree of flexibility is needed stating that:

> “In most cases a person fleeing from persecution will have arrived with the barest necessities and often even without personal documents. Thus while the burden of proof in principle lies with the applicant, the duty to ascertain and evaluate all the

relevant facts is shared between the applicant and the examiner. Indeed in some cases it may be for the examiner to use all the means at his disposal find evidence in support of the application."[298]

Therefore not only does the initial assessment of asylum claims need to be diligent and thorough but any appeal to a EU asylum court needs to be as well especially when considering that fast track and border procedures and those in areas of mass influx under great strain either do not have the will, the ability, the time or the desire to carry out detailed independent research to try to corroborate the story of an asylum seeker.

The UNHCR has also produced a comprehensive report on assessing credibility within the EU which provides detailed advice on assessing the credibility of asylum claimants which the organization hopes will "contribute to inform the necessary discussions at EU level or the further harmonization of credibility practices."[299]

This full harmonization of credibility assessment practice methodology would need to be in place for a truly common European Asylum Court System. As the UNHCR report states there is a tension between decision makers putting emphasis in the possession or otherwise of documentary evidence with the reality that refugees, who have often had to flee their country of origin at short notice and in dire circumstances. Very often the refugee will not

[298] Handbook on Procedures and Criteria for Determining Refugee Status and guidelines on International Protection under the 1951 Convention and 1967 Protocol Relating to the Status of refugees Reissued Feb 2019 p 43 https://www.unhcr.org/uk/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html (accessed 19.12.19)

[299] 'Beyond Proof: Credibility Assessments in EU Asylum Systems' UNHCR May 2013' necesshttps://www.unhcr.org/uk/protection/operations/51a8a08a9/full-report-beyond- proof-credibility-assessment-eu-asylum-systems.html (accessed 13.4.2023)

have such documentary evidence and therefore having detailed country of origin information, and more importantly the same information to draw upon, is crucial.

Each Member State would need to have complete trust that the methodology of the assessment would be equally rigorous EU wide and furthermore the asylum seeker themselves should be able to have full confidence that the same procedures and methodologies would be applied to assessing his claim regardless of the country. The European Council has acknowledged this in the Stockholm Programme which states that:

> "It is crucial that that individuals, regardless of the Member State in which the application is lodged are offered an equivalent levels of treatment as regards to reception conditions, and the same level as regards to procedural arrangements and status determination. The objective should be that similar cases should be treated alike and result in the same outcome."[300]

With an appeal of a case the same principles should apply. The UNHCR notes that decision makers may suffer from case hardening, credibility fatigue and emotional detachment over time as has been seen in chapter 1. The UNHCR found that personal views on credibility often manifested itself in statements by the decision maker at initial interview which

[300] Council of the European Union The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens OJ (2010/C 115/01) 2010 section 6.2 p32

created an environment of incredulity which may prevent the applicant from providing further information. [301]

Harmonized rules on procedure and assessing together with joint training is essential at appeal stage too. An applicant in a genuinely common European Asylum System has to know that not only are the decision makers applying the same methodology but that on appealing a negative decision the appellate Court will take the same approach to examining the case.

The effective remedy laid down in the Asylum Procedures Directive can only be genuinely effective throughout the EU if the appeal courts are applying the same methodology and procedure. This is where the difficulty of national courts as European Union Asylum Courts lies. In the next sections of this chapter the discussion moves on to discussing the possibilities of various models of more Centralized Court Systems.

THE BENELUX COURT OF JUSTICE AS A MODEL

As we have seen in the chapter 3 the Benelux Court of Justice has been held by the ECJ as a model for any court that has a remit over more than one Member State. This is because it fits in with the rules set down by the CJEU in regard to homogeneity. The Court is made up high ranking judges from the Benelux Countries and, unlike the Unified Patent Court in its first itineration, does not place a block or a bypass for a national court to refer to the CJEU.

[301] 'Beyond Belief: Credibility Assessment in EU Asylum Systems UNHCR May 2013 p113 https://www.unhcr.org/51a8a08a9.pdf (accessed 22.12.19)

Indeed as has been discussed the Benelux Court of Justice can to refer to the CJEU on a matter of EU law should it need a preliminary ruling.

The Benelux Court of Justice was formed as a result of the Benelux Commission for the Unification of Law which had the task "to propose prinicples or even statutory texts by which in certain areas uniformity or even uniformity of law may be attained." TheNetherlands – Belgium- Luxembourg Customs Convention was signed by the government of the three countries in exile in 1944. After the war the three countries moved to harmonize their duties, customs legislation and to work together on trade and this cooperation eventually led to the signing of The Benelux Economic Union Treaty on 3rd February 1958. This not only declared the intention to ensure free movement of goods, capital, services and people between the three countries but also" to pursue a coordinated policy in economic, financial and social matters."[302] This Treaty entered into force in 1960. The Benelux Court was established by a Treaty of the 31st March 1965 and which finally entered into force on the 1st January 1974.

The Court has been substantially revised since a protocol of 2012 and since 2016 been made up of three chambers.

The first is made up of nine high Court judges from the Benelux states along with 9 Substitute judges and this chamber deals with preliminary rulings referred to it by high courts of the three states. These judges hold their position at the Benelux Court of Justice alongside their respective national positions.

302 https://www.cvce.eu/en/education/unit-content/-/unit/026961fe-0d57-4314-a40a-a4ac066a1801/c28bd41d-7e26-48bf-b9a6-1cce7cc5eb70 (accessed 29.12.19)

There is a second chamber is made up of six judges from the Courts of appeal of the three Member States and its function is to ultimately hear actions at first instance as and when this competence is given to it by future protocols, though none have been signed as yet. These will be decided on a case by case basis in the future and as provision has been made in the 2012 protocol for this, there will be no need for further modification of the Court's founding statute.

The third chamber is made up of judges from the first two chambers and deals with mattersof both personnel within the Benelux union and matters from the Benelux Office of Intellectual Property.[303]

So can this system be adapted to work in regard to adjudicating asylum matters in the European Union and if so how could it be adapted? Well the main difference between this Court and the Unified Patent Court is that it is an intergovernmental Court not a supranational one. One has to face the face that should any form of asylum court ever be considered in the European Union, it would be bound to face opposition and there is the real possibility, given the issues of solidarity that already exist, that some Member States may choose to opt out of the signing up to such a system.

In this respect the model of the Benelux Court of Justice as an intergovernmental court will be considered. The object here would be that for those countries who chose to sign up to such a system, there is the possibility that, like the Benelux model, they would benefit from

[303] Bulletin Benelux Numero 2 2012 p21-22 https://www3.nd.edu/~ggoertz/rei/rei560/rei560.100tt1.pdf (accessed 2.1.2020)

a Court made up of experienced judges employed from the Member States who sign up who could firstly examine asylum and subsidiary protection claims through the European legislation together with pooling their combined experience from applying asylum law in their own Member States.

In terms of the Benelux model it needs to be considered which type could be adapted and the pros and cons of each. The classic version of the Benelux Court is that of an advisory Court in the same way as that of the European Court of Justice, handing down interpretations of common Benelux rules. The advantage here is that the lower Court is getting a definitive interpretation of the relevant law with a combined ruling of the court where individual assents and descents are not noted. This could work well with the development of further work of the European Union Agency for Asylum to help ensure a uniformity of interpretation on the criteria for both refugee and subsidiary protection status. The disadvantages here are also clear however. The Benelux Court of Justice in its original itineration had a low case load. It was dealing with the harmonized law of only three Member States and it was not called upon to give many preliminary rulings: less than 300 before the current reforms of the system came into play regarding trade marks and direct action regarding other issues of common rules.

With a possible asylum advisory Court, even should not every Member State decide to participate in any advanced cooperation (write a little bit about advanced co -operation before this Court analysis stuff) the load on such a court is sure to be much higher. This together with the obligation as a “court common to the Member States” to refer any matter of interpretation on to the CJEU for interpretation would cause both delays in the proceedings and the potential for extra expense while matters are paused in an initial

national appeal for example while potentially not one but two higher Courts have to give their preliminary rulings. This in turn could cause hardship for the asylum seeker themselves who are often in straightened circumstances without the right to work or claim any social protection while their claims are being considered.

The Benelux Court with its proposed new competence for direct action poses another set of questions such as should this be mirrored in an asylum appeal court of the Member States (a court of last instance) or would harmonization be served better by a homogenous Court that forms part of the system from the beginning from a harmonized initial decision making body which could be formed as part of the European Asylum Agency and go right through to an integrated appeal Court. In other words a fully harmonized asylum system where not only the rules are harmonized but there is a fully harmonized decision making process too. Agencies themselves both in the European Union and also the Benelux intellectual property office have (or have had) their own internal appeal boards in the past but in terms of the Benelux Intellectual Property Office the CJEU has ruled that it is too closely aligned to the office to be defined as an Court. Such matters of accountability have also been raised in terms of other Agency appeal bodies, so integrated would mean being part of a procedural chain but also the Court being at arm's length from the agency itself.

As has been seen in the analysis of the European legal system in this study so far the Benelux Court system was held up as a model by the CJEU in Opinion 01/09 because it maintains that crucial link between the Member State Courts and the CJEU as laid down in Treaty Article 267 TFEU. Therefore although the traditional Benelux model may pose some

problems as far as efficiency is concerned it can be argued that it is the model that would present the least difficulties in slotting into the European Union legal order without problems.

The next section of this chapter will go on to look at the Unified Patent Court in its current model as a potential model. This study has covered the legal technicalities involved in this setting up this Court in some depth in chapter 3 (previous chapter).

This Court from a practical point of view appears to be a good example of a fully integrated court system . However despite the Commission, in the words of one commentator "jumping" on the Benelux model as a panacea after Opinion 01/09 there are clear differences between Benelux and the Unified Patent Court.

Perhaps the most obvious one is that rather than forming a homogenous part of the Member State courts as the Benelux Court System does, the Unified Patent Court System, though membership is now limited to Member States, is still a stand-alone Court system formed by an international agreement or a flanking Court. There is no referring up from national courts nor will the judges wearing two hats as per the Benelux Model though as we have seen above the modifications to the Benelux Court Treaty have laid the foundations for that Court to give first instance decisions based on powers to be given to it by future treaties

THE UNIFIED PATENT COURT SYSTEM

The development path of the Unified Patent Court has been a rocky one and the problems of trying to fit the Court into the European Union legal order have been covered at length in chapter… The discussion about the need for harmonized patent protection began seriously after the WW2 when the Council of Europe Committee for Economic questions identifying

"patents alongside trade tariffs, agriculture, transport and postal services as areas of economic activity where integration could increase economic prosperity." A first proposal idea for a European Patent Office was put forward by the Council of Europe on 8th September 1949 which would have operated under its umbrella.[304]

This debate has continued of course right up to the present day. European Patents have already been developed and are administered by the European Patent Office but the saga of the Unified Patent Court involves a fiction where a national patent isapplied for and this patent only becomes a patent with Unitary Effect after grant. The comparison of setting up a unitary patent status of one form or another with a single asylum status may not sound like a good model for comparison but on looking at the matter in depth, the two systems would have the same aim of ensuring the uniform interpretation of an area of law across the European Union.

With the Unified Patent System there is the desire to increase efficiency by reducing the need for an innovator not only to register a patent in multiple states of the European Union but also the potential for having to litigate on multiple fronts to defend their patent rights should there be any infringement in the future. Very simply an application is made to the European Patent Office for a European Patent.

[304] A Unitary Patent for a (Dis) United Europe: The Long Shadow of History: A. Plomer International Review of Industrial Property and Copyright Law 508-533 at 511 August 2015

The problem with these at the moment is that they have to be validated and kept up in each individual country of the EU where they take effect which makes for an expensive and complicated process. This is because validation requirements vary between the different Member States, as well as the cost of translating the applications into the language of the Member States together with professional fees that need to be paid to lawyers to go through the process. With the application for a patent with unitary effect all the above work is to be carried out in a single procedure by the European Patent Office. There will be a central register which will contain the important information regarding the EPUE status and information such as revocation, licence, limitation, transfer and lapse.[305]

Alongside the creation of the patent with unitary effect there was a desire to centralize and streamline the court process for enforcing and challenging patents. There was also an amendment to the Brussels Regulation relating to the enforcement of judgements across the Member States was also modified to so that its provisions would also apply to rulings handed down by both the Benelux Court and the Unified Patent Court.[306]

Along with the expense as with the classic European Patent granted by the EPO, any litigation would have to be carried out in each of the individual Member States where the patent had been validated: again something that would potentially incur large expense.

[305] https://www.epo.org/law-practice/unitary/unitary-patent/features.html (accessed 13.01.19)
[306] Regulation(EU)542/2014 of the European Parliament and of the Council of 15th May 2014 amending Regulation (EU) No 1215/2012 as regards the rules to be applied with respect to the Unified Patent Court and the Benelux Court of Justice.

The aim of the European Patent with Unitary Effect is if the latter is applied for after grant the patent is granted unitary effect throughout the Member States who have signed up to the system.

The European Patent Court is the means by which patent disputes can be litigated post grant. As has been shown the development of the Court has been troubled with its first itineration deemed contrary to Europea Union law by the CJEU. Even in the Court's current form, there have been efforts to bypass European Union Law as much as possible by including the substantive law regarding patent infringement and defenses not in the Unified Patent Regulation but in the Agreement for a Unified Patent Court. The reason for this being a mistrust in the Patent Community about the expertise of the CJEU in patent matters as well as concern for the potentially long delays caused by making a preliminary ruling to the European Court of Justice. (see for footnote textbook on UPC and procedure too) This being said the appeal branch of the UPC must as a Court of the Member States refer "questions referring to the interpretation of European Treaties to the CJEU, including biotechnological inventions, supplementary protection certificates, the exhaustion of patent rights and matters of enforcement."[307]

Despite the latching on to the idea a Unified Patent Court being adapted to mirror the Benelux Court after the negative 01/09 judgment of the CJEU, there are marked differences between the Benelux Court, even in its revised 2012 model and a Unified Patent Court. The most obvious one is that the UPC model is a completely self-contained court system. The Courtwill be a one stop shop for litigation Patents with Unitary Effect and for a limited time, European patents too.

[307] F Baldan & E Van Zimmeran: "The Future of the Unified Patent Court in Safeguarding Coherence in the European Patent System." 52 Common Market Law Review 2015 1529-1578 at p 1567

The structure of the Court involves a Central division based in Paris with offshoots of the central division with particular specialist expertise being based in London (pharmaceuticals and chemistry based patents and Munich for engineering based matters.

Local divisions are formed by notification of a state party to the Unified Patent Court Agreement in accordance with the Statute in Annex one of the said agreement local divisions or in the case of two or more signed up states the creation of regional divisions is possible. In so far as the latter is concerned at the time of writing only two regional divisions have been planned: one for Romania and Bulgaria and the other for Sweden, Estonia, Latvia and Lithuania.[308]

One of the most pertinent aspects of the UPC system that could well transfer over to a more centralized asylum system is the elements: firstly a technically specialized judge and secondly a judge on the panel who is not from the State/Region where the hearing is being heard. These non jurisdictional judges are actually in the majority in a local region with less than 50 patent cases a year with two non national legally qualified judges on the panel to one from the Member State. This is reversed in local divisions with more than 50 patent cases a year so as to have two national judges and one from another contracting state. In so far as the technical judges are concerned one of the parties involved in litigation before the Court of First Instance can request the addition of an extra non legal but technically

[308] https://www.unified-patent-court.org/sites/default/files/upc-agreement.pdf p121 Annex 1 (accessed 22.11.2023)

qualified judge from a central pool of judges. The parties will be able to request that the case be heard by a single judge should they so desire.[309]

The involvement of technically qualified judges and judiciary members from other member states could add value to an asylum court model by not only bringing a different perspective to evidence and approach from their legal systems but could also be seen as a foil to any potentially political instincts that a judge may hold. As has been seen in the chapter on assessing evidence, when dealing with issues such as credibility in asylum matters where there is sometimes very little evidence, the personal world view of the judge can be important and may very well contribute to divergences in decision making depending on the "luck of the draw" and which judge one is allocated. Having a panel that must reach agreement on the matter could help negate this with one judge from another Member State less likely to be influenced by the narrative surrounding migration in the state concerned and a technical judge as per the patent model can be replaced by possibly a judge from the UNHCR or other migration and immigration charities and civil society and possibly academia who have first hand knowledge of the situation on the ground regarding refugee trends and can add their expertise to the legal assessment of the evidence.

As there has been shown in the patent court arena there has been a concern that judges should have sufficient experience of cases they have been dealing with and this concern has encompassed the expertise of the CJEU also. With the abolition of the pillar structure and the bringing in of Justice and Home Affairs under the ambit of the EU with the treaty of Lisbon all Courts of the Member States and not just the Courts of final instance can make

[309] Ibid see Article 8 Rules of Procedure.

preliminary ruling to the CJEU on a point of EU asylum Law. This has inevitably seen a large increase in the number of preliminary rulings made to the CJEU.

The formation of a specialized EU asylum court with both legal and specialist judges with a cross Member State formation could possibly lessen the burden on the CJEU by having a thorough integrated system of decision making based on cooperation among the member state judiciary not just in terms of training in the legal sphere but in among civil society organizations as well. The European Asylum Agency could be a significant force in providing a common pool of knowledge and research as has already been discussed.

The danger and concern would lie with any asylum court being seen to be too closely aligned with the asylum agency. Such matters have already been raised in regard to the European Patent Office in regard to the appeal boards dealing with unsuccessful patent claims, with concernthat the appeal boards are too closely linked to the agency which impacts on fairness. The has been a case with the Board of Appeal where an appointment of a member of the chair of a particular board of appeal was occupied by someone who had a prominent job in the European Patent Office administration at managerial level. He was subsequently removed due to the fact that there could be a suspicion of lack of impartiality even though this may not have been the case.[310]

This problem could also manifest itself in any future asylum court if there is perceived to be too close a link between the European Union Agency and any appointment of judges. The problem with the Unified Patent Court is that the Unified Patent Convention state that both the chairman and the members of the Board of Appeal are appointed by the administrative

[310] See vol 1 International journal of intellectual property and competition law 2015 English translation of the case from Max Planck Institute. See also 'The European Patent and its Courts: An Uncertain Prospect and an Unfinished Agenda International Review of Intellectual Property and Competition Law 2015 Volume 46 p 1-9

council of the European Patent Office after consultation with the President of the European Patent Office.[311]

The situation here is that these boards of appeal hear appeals following the rejection of a grant of a patent to a party and there could be the suspicion that if the members of the appeal board are appointed by and have links to the management of the administrative branch that assessed and subsequently refused the grant of the patent, there could be perceived bias even though this may not exist in practice.

This follows from the case law of the ECtHR where the the Court ruled in *Micallef v Malta* that a judge hearing an appeal who was the uncle of the lawyer for the other side could be perceived objectively to be biased even if this was not the case and allowing for the fact that Malta is a small island with whole families engaged in the legal profession. In regard to this objective test the Court said that:

> "It must be determined whether, quite apart from the Judges' conduct, there are ascertainable facts, which may raise doubts as to his impartiality…what is important is decisive is whether this fear can be objectively justified."[312]

The Judges of the Unified Patent Court will be appointed on the recommendation of an advisory committee made up of "patent judges and practitioners of the highest

[311] See Article 11 European Patent Convention http://documents.epo.org/projects/babylon/eponet.nsf/0/A3DF61084E7706E7C12584A400521D6F/$File/EPC_16th_edition_2016_en.pdf (accessed 27.01.20)

[312] *Micallef v Malta* App no 17056/06 (ECHR 15th October 2009) para 96.

competence" who will submit a list to administrative committee of the Unified Patent Court which will be made up of one member from each of the signatory states.

One aspect of the Patent litigation system that is not suitable for use in the asylum matters is the split decision making between the appeals board which deal with appeals relating to refusal of grant together with the Unified Patent Court system which will deal with litigation surrounding patent post grant, the most obvious being infringement of another's copyright. What one can take away from the European Patent Court though along with the creation of the Patent with Unitary Effect is the methodology and the thinking behind them.

Like the situation that exists with the Common European Asylum System at the moment, the patent system, even for the Europaan bundle of patents was fragmented with the applicant having to register as stated in each Member State where they wished it to take effect. The creation of the Patent with Unitary Effect and the Unified Patent Court, for all the problems that has befallen it, is a practical and pragmatic approach to both harmonize the relevant law and ensure as uniform an enforcement of it as possible.

IDEAS FROM THE UNITED STATES

As has been shown the Immigration Court system has come in for strong criticism from the American Bar Association and the immigration judges themselves due to the fact that it is a part of the Department of Justice and decision are capable of and have been interfered with by the Attorney General in some cases. Therefore the call has been to create an independent court free from the interference of the Justice Department. The academic

Stephen Legomsky has written at length giving suggestions as to reform. Legomsky proposes moving to a system in the United States where there are administrative judges sitting in an independent tribunal. Decisions from the Immigration Court can appeal to the Board of Immigration Appeals and subject to some restrictions the asylum seeker has the right to apply for a Judicial Review of the BIA decision at the Court of Appeal in the circuit where the initial removal hearing was held.

Legomsky seeks to address criticisms that come from what he says are those regarding fairness and consistency of decisions from the left and those relating to excessive cost from those on the right. Therefore Legomsky suggests replacing the initial asylum courts with an independent tribunal staffed with administrative judges and replacing the possible two step process with a single round of appeal at an Article Three Immigration Court.

The reforms that Legomsky recommends regarding the appeal stage are particularly interesting and they could contribute towards the modeling of a centralized European Asylum Appeal Court structure. Legomsky proposes staffing this appeal court with judges who have had "several years of experience on federal courts of general jurisdiction.These judges would then be "totally immersed in immigration law for two years" where they would learn from each other and "specialized support staff with institutional memory and from specialized books and other resources."[313]

[313] 'Restructuring Immigration Adjudication' S.H Legomsky 59 Duke Law Journal 1635-1721 (2010) at 1693

CONCLUSIONS

This aim of this study has been to examine the Common European Asylum System, both as it stands at the present time, and its planned development, and consider whether the possibility of a centralised asylum court system would fit in with these plans. When considering the issue of asylum legislation in conjunction with European Union harmonisation one needs to consider both the politics involved just as much as the legal issues. The politics in particular pose a challenge because it is the political considerations that are arguably responsible for the yawning gap between the official legal stance contained in the Treaties and the European Union legislation on the statute books. The Lisbon Treaty came into effect on the 1st December 2009. Fourteen years down the line, despite strenuous efforts. The Common European Asylum System that it envisages is not in force.

The situation has not been helped by strong migratory pressure at the European Union borders fuelled by the Arab Spring and civil war fuelling an asylum crisis in 2015. The challenge of dealing with the situation caused by those events and continuing irregular migratory pressure has made a challenging policy area harder to develop both legally and politically. There has been academic commentary that has suggested that such are the variations in reception conditions of asylum seekers and irregular migrants that the Common European Asylum Policy exists as a name and a concept only. It would be stretching things to suggest that the European Union is a fully federal entity. Nevertheless more and more policy areas have come under its supernational ambit and, as we have seen, justice and home affairs, of which asylum policy is part, forms one of them. However immigration policy is a policy area that Member States prefer to deal with at the national level due to their desire to have their own control over third country nationals crossing into and remaining on their territory. The continuing pressure from irregular migration has only strengthened this approach. There has been a situation where some Member States, in particular Germany and Sweden, have accommodated far more refugees than others, there has been real difficulty in solidarity and burden sharing in relation to refugees and this has contributed to difficult conditions for negotiating further harmonisation in

asylum policy. Arguably the system itself contributed to this unfairness with the Dublin Regulation, which as has been seen, places responsibility for processing asylum applications to the first country of entry subject to defined exceptions. It was this that led to the intolerable pressure on external border countries such as Greece and Italy. When other Member States saw the scale of the people that needed to be accommodated many Member State governments baulked, as shown by the failure of the redistribution of the relocation mechanism despite the Dublin system totally collapsing under the pressure.[32]

Another factor to consider is that migratory pressure has also hardened political opinion among Member State governments which has increased the desire to deal with asylum processing at a national level rather than a supranational level this pulling back from the destination being worked towards set down in Article 78 TFEU. As has been discussed in this study the Visegrad group of Eastern European Member States have been particularly strong in pushing back against centralised policy and implementation of EU law "expressing dissatisfaction with the disregard for national identities, rapid cenralisation in the EU and what they deemed to be unreasonable immigration quotas."

The European Commission for its part has responded by stressing the importance of pressing ahead with the ratification of the most recent legislative proposals which it maintains will deal with the concerns raised by Member States with Vice President of the Commission Franz Timmermans stating a need to "move away from ad hoc and responsive reactions to completing the reforms for a sustainable, future proof migration and asylum system." The European Commission has placed a strong emphasis on the protection of the European Union external borders in a tacit agreement of the failure to adequately protect its external borders during the height of the refugee crisis along with "deeper collaboration with partner countries.[3334]

Writing this in 2023 there can be said to have been some definite progress with the setting up and the

[32] 'The EU's Refugee Crisis: Framing Policy Failure as an Opportunity for Success' A Ripoll-Servant Politique Europenne 2019/3 (No65) 178-210 at p191

[33] 'The Refugee Crisis and the Reinvigoration of the Nation State: Does the European Union Have a Common Asylum Policy?' in *The European Union and the Return to the Nation State* (Palgrave McMillan 2020) ch4 p105

[34] 'Managing Migration: The European Commission Calls Time on Asylum Stalling: European Commission Press Release 4th December 2018 (accessed 21st November 2023)

operation of the European Union Agency for Asylum along with agreement into implementing the revised Asylum Procedures Proposal as put forward in the 2021 European Union Asylum Pact in June 2023 along with the proposal for crisis management and force majeure in the field of crisis and migration.

The creation of the European Union Agency is a positive development. The development of an agency from the previous European Union Asylum Support office has the potential to provide a positive benefit even the time of writing where Member States still have considerable control over the asylum and subsidiary protection application process. This depends though on the Member States working positively with the Agency in its capacity of administrative and technical support to their national immigration authorities. Not only could this contribute to a common approach to assessing protection claims in terms of process but it could also, by providing detailed, up to date and impartial reports on the situations of refugee producing countries, allow Member States to draw on a common bank of expertise and response. Although divergences in recognition rates is something that is impossible to eradicate completely it is argued that by drawing on the same source of information on Member States, more consistency of recognition rates could be achieved.

The question of how the above relates to the formation any European Union Asylum Court system is that, ideally the more unified the system is in the early stages of decision making, the more seamlessly such a court could exist. If for example there was a drive to push for a common European Union asylum appeals court with the current different approaches to evidence, recognition rates, country of origin information and methodology, such a court could very well be overwhelmed in its work, certainly at the beginning until such a court established a body of precedent as those seeking protection and having their claims refused in countries with a tougher line seek to have their applications overturned and whose lawyers, if they were shrewd, would bring to the attention the decisions of Member State tribunals and courts who took a more lenient approach. Essentially what must be surmised here is that at any form of cenralised EU Asylum Court would operate best under a more harmonised system and ideally a fully harmonised system.

Under a fully harmonised system with a common procedure and a common European Union Asylum status such a court would be far easier to blend into the system. One cannot foresee what such a future harmonised system would entail but it is a given that the European Union Asylum Agency would play an integral part of the system, ensuring that the common procedure was applied in a uniform way throughout the Union. A Common European Union asylum court. As discussed in the previous chapter there could be a system with in-country or regional asylum appeal courts to hear both first instance and second instance appeals. Such court panels could include at least one judge from another member state as well as both practicing and academic lawyers with an expertise in asylum along with experts from NGOs that deal with asylum cases.

In regard to a last instance European Union Asylum Court this could be integrated into the European Union without a fully integrated EU asylum system. However there are difficulties with this in terms both legally and practically. We have seen how a Court of the European Union must make a referral to the CJEU on a matter of interpretation of EU Law if there is any doubt. This would lead to practical difficulties in terms of efficiency as a last instance court in a Member State could refer to a EU asylum court which would then have an obligation to the CJEU in regard to any interpretation. This would lead to both delay and extra expense.

A possibility to get around this would be to constitute a final instance EU asylum court as part of the CJEU and attached to the General Court. There is of course provision for this in the Treaties in Article 257 TFEU although the only specialized court that has been set up within that structure to date has been the relatively short lived Civil Service Tribunal which existed between 2005 and 2016. Article 257 states that such a court is to be set up by a Regulation and must establish rules of procedure in agreement with the CJEU and that these rules would have to be approved by the Council of the European Union.

This again raises the issue political agreement and a desire for a fully integrated EU asylum system with accompanying court amongst the Member States. On scanning the current political mood within the European Union it does not look like there is the desire to move to a fully integrated system although

the impetus is moving towards more harmonized law in procedure through the move to directly applicable regulations. A EU Asylum Court system would best work within a homogenous, fully unified system with a single EU positive asylum status throughout the European Union.

There is an argument for a n EU asylum appeal and or advisory court outside such a system. This could have the advantage of bringing in more expertise and more impartiality into final instance decision making but it has disadvantages relating to the potential for delays should there be a need for a referral to the CJEU. Ultimately a last instance advisory court dealing with immigration and asylum already exists in the CJEU despite the concern that CJEU judges do not have enough experience in the area of asylum. As has been seen the CJEU has been instrumental in shaping asylum law in several cases through its judgments as has been seen throughout this study.

In terms of Member States being willing to forego their own asylum courts and tribunals for a common EU appeal court/tribunal would depend on politics. This study has endeavoured to show that such as system could be an advantage within the European Union but persuading Member States to opt for more centralisation would be another matter when some Member States are actually desiring to move away from centralisation and want to deal with asylum claims at a national level. They could also argue that in line with the European Union doctrine of subsidiarity, such matters are better dealt with at a national level as opposed to an EU level.

The other option and one which could fit seamlessly into the European Union legal order is that of a final instance advisory court. This study has looked at the Benelux Court of Justice as a model for this but to avoid efficiency issues such a court would be best set up as a specialised court of the Court of Justice of the European Union. As has been seen this has been done with the creation of the civil service tribunal so there is no reason why with the necessary work the Court of Justice of the European Union could not have a dedicated asylum chapter. Again how such an idea would go down with the CJEU cannot be predicted. This is especially the case now that since Lisbon, the CJEU has as seen the power to give preliminary rulings in relation to asylum cases and has done so in many, many cases. The

Court as it now is and the Member States would have to be convinced that such a specialised court would merit a place within the legal order and would be able to offer the required balance between expertise and efficiency.

As things stand at the moment however it can be argued that it is doubtful whether a centralised EU asylum court system would have much traction as a policy objective if any. For the present it is hoped that the EUAA Asylum Court and Tribunal Network will have a positive effect with coordinating approach through its annual meetings and training provision.

It is hoped however that this study will provide food for thought for the future and especially as and when the political situation allows for the full implementation of the Common European Asylum System and a single European Union Asylum Status with mutual recognition.