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The CJEU and its interaction with international law in the Qualification Directive: a calculated selectivity?

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Introduction

The Court of Justice of the European Union (CJEU) is playing an ever important role in the development of European asylum law. The CJEU?s jurisdiction to rule in preliminary references as well as direct actions has a substantial impact on the definitional and interpretative guidance of EU asylum legislation. Indeed, the Court?s pronouncements are all the more instrumental given that both EU primary and secondary law make explicit reference to international treaties and human rights law. Given that EU asylum policy must be in accordance with the 1951 Geneva Convention [1], the European Convention on Human Rights [2] and any other relevant treaties (see Article 78 (1) of the Treaty on the Functioning of the European Union [3], Article 52 para 3 of the Charter of Fundamental Rights [4], Recitals 2, 3, 4 and 17 Qualification Directive 2011/95/EU [5]), the Court should play a pivotal role in interpreting the law so as to be in compliance with these international instruments.

Notwithstanding the panoply of international sources which the CJEU is bound to apply and the potentially powerful position that the Court could play in evolving refugee law concepts, the Court?s pronouncements appear to selectively refer to instruments, consequently excluding the use of others. This is particularly apparent in preliminary references concerning the Qualification Directive (QD) where the Court appears to unnecessarily compartmentalise international treaties, arguably leading to a gradual dissociation of EU asylum law from international human rights and refugee law. Whilst it is clear that the national courts must abide by their respective international obligations and are to draw specific conclusions from the replies of the CJEU, which are phrased to answer directly the questions referred, by not engaging with a more expansionist construction of EU asylum law, the CJEU, nonetheless, risks circumscribing key refugee terms which, conversely, require a holistic and interpretative coherency.

The aim of this blog is to track the Court?s judgments in three areas of the QD: persecution, subsidiary protection and exclusion, which demonstrate how the Court is drifting away from international soft law, international refugee law and European human rights law respectively, resulting in the stultification of crucial concepts and a lack of consistency within the asylum and refugee legal framework.

Persecution

The CJEU?s judgments in C-71/11 and C-99/11 Bundesrepublik Deutschland v Y and Z [6] and C-

199/12, C-200/12 and C-201/12, Minister voor Immigratie en Asiel v X, Y and Z [7] were the first on the interpretation of acts of persecution in the QD. The former concerned restrictions on the right to freedom of religion and the kind of interferences which would amount to an ?act of persecution? in the QD. The latter related to, amongst other things, the criminalisation of homosexual activities and whether legislation in a country of origin criminalising homosexuality, can amount to an act of persecution (See M.Fraser [8] for further analysis [9].)

In response to the first reference the Court concluded that an act will amount to persecution where the subject, as a consequence of exercising his/her right to religious freedom, runs a real risk of *inter alia* being subject to torture, inhuman or degrading treatment or persecution [67]. The Court has thus equated the severity of sanctions of religious freedom as amounting to persecution where an Article 3 ECHR right is violated and has therefore transposed the yardstick of *non-refoulement* under international human rights law, namely torture, inhumane or degrading treatment or punishment to measure the contours of acts of persecution in the QD.

The approach of the Court in this case has delimited the ambit of persecution in the Qualification Directive quite considerably for two reasons. Firstly, the CJEU has put in place a consequential test, which places emphasis on the concrete consequences resulting from the exercise of religious freedom rather than assessing when interference with the enjoyment of the right becomes an act of persecution itself. In other words, the Court has focused on the degree of sanctions as a marker of persecution, thus obviating from an assessment of the actual infringement of the right (See J.Lehmann [10] for further analysis). Arguably, by not capturing the residual content of the right and the criteria for establishing the harm necessary to amount to persecution in the context of religious orientation itself, the CJEU has failed to take into account guidance from the UNHCR [11] which lists discrimination, amongst others, as religious persecution, where the claimant?s enjoyment of fundamental human rights is seriously restricted. This, according to the UNHCR, includes forced conversion and forced compliance with religious practices.

Secondly, the Court has chosen to carve out an Article 3 ECHR threshold for assessing when a violation of the right to freedom of religion amounts to persecution in the QD, whilst failing to recognise that persecution in International refugee law is not limited solely to Article 3 ECHR violations (UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status [12].) Arguably the phrasing of the question by the German authorities hinged on the definition of Article 9(1)(a), nonetheless, this does not obviate from a thorough assessment of what ?basic human rights? in Article 9(1)(a) of the QD may mean. Furthermore, given the obligation of EU legislation to comply with International treaties in both the TFEU and the Preamble of the QD when applying EU asylum law, Article 9(1)(b) listing the accumulation of various measures, including violations of human rights as constituting an act of persecution could have easily been referred to which would make it clear that Article 9(1) QD is not limited to the rights contained within Article 3 of the ECHR but should be interpreted as encompassing a broader spectrum of human rights as codified by international instruments.

Unfortunately, the CJEU?s selectivity of interpretative references and apparent exclusion of international refugee law and UNHCR guidelines has further permeated into the second reference; X, Y and Z. The CJEU in this case ruled that the existence of legislation criminalising homosexuality *per se* did not reach ?the level of seriousness? to constitute an act of persecution listed in Article 9(1) QD [55]. The Court ruled that only a term of imprisonment which is actually applied as a sanction for committing homosexual acts would amount to an act of persecution within the meaning of Article 9 [56]. Therefore, and in a similar line of reasoning to Y and Z, the CJEU has compartmentalised the criminal provision and the sanction which accompanies it: rather than focusing on the criminal provision itself, which arguably infringes the right to non-discrimination on grounds of sexual orientation (Article 21 of the Charter) and the right to human

dignity (Article 1 of the Charter) the Court has instead stunted the development of these Charter articles and instead focused on the severity of sanctions which must be actually applied following the breach of the criminal legislation, rather than the breach of the individual?s right itself.

Whilst the Court does refer to Article 4(3) of the QD requiring an individualised assessment to be taken into account which Member States must respect, the heavy focus on the deprivation of liberty as persecution distracts from the vast amount of literature [13] and case law [14] which states that legislation criminalising homosexuality does not necessarily have to be enforced for it to amount to persecution. Indeed, the oppressive atmosphere of intolerance which accompanies these types of legislation along with the threat of prosecution can generate a fear of persecution. The Court?s gradual hermetic tendencies from international law developments is all the more noticeable in X,Y and Z given that ECtHR case law has found violations of the right to respect an individual?s personal life in cases where legislation criminalised homosexuality but where prosecutions for those over 21 were very infrequent (Dudgeon v UK, Appl. No. 35765/97, 2000; ECtHR, Norris v Ireland, Appl. No. 10581/83, 1998).

A trajectory line is thus emerging whereby CJEU jurisprudence is sheltering EU asylum law more and more from international influence. Recently this has affected the (lack of) interaction between ECtHR and EU developments in the QD, demonstrated in the recent cases of Case C?542/13 M?Bodj v État belge [15] and Case C?562/13 Centre public d?action sociale d?Ottignies-Louvain-la-Neuve v Abdida [16]

Subsidiary protection and Non-refoulement

In the most recent CJEU judgments relating to the QD, the Court has had regard to whether an individual?s serious illness, which cannot be appropriately treated in his/her country of origin, falls under the definition of subsidiary protection in the QD, specifically Article 15(b).

In M?Bodj, the Court, distancing itself from ECtHR jurisprudence on returns in medical cases (D v United Kingdom [17], application no. 30240/96), held that unless deterioration of a person?s health is caused by an intentional deprivation of health care in the country of origin, such a medical claim would not fall under the definition of serious harm in Article 15 of the QD [31]. According to the Court this is because persecutory or serious harm must take place at the hands of a third party [35]. This is the case even though the ECtHR has found that the identical Article 3 ECHR provision can exceptionally be violated in ?medical cases? [40]. The Court re-iterated this submission in Abdida. However the Court in Abdida decided to re-direct Article 3 *non-refoulement* obligations and the equivalent Charter provision (Article 19 (2)) when applying Article 5 of the Returns Directive [18] so as to prevent removal where there would be a breach of *non-refoulement* if the removal were carried out [48]. The Court further surmised that a remedy must have suspensive effect where there is a serious risk that the applicant would be subjected to inhuman or degrading treatment if returned [47].

The decision in Abdida serves, arguably, to create an ?alternative route to protection [19],? yet by deflecting *non-refoulement* protection in medical cases solely to return decisions rather than under the additional umbrella of the Qualification Directive there is a risk that individuals will fall into a legal limbo where an applicant would have no particular status if *non-refoulement* applied and would receive only ?basic needs? pending an appeal, the form of which would be at the discretion of the Member States[61]. Additionally by not including medical cases within the remit of Article 15 (b) it stunts the development of the QD and takes little account of the purpose of subsidiary protection, which is intended to be a complementary source of protection for individuals who do not meet the definition of the 1951 Convention [Article 18 QD]. Moreover, it prevents from a consistent interpretation of 15(b) which according to the Commission?s explanatory Memorandum [20] on the Proposal for the 2004/83/EC [21] is based largely on international human rights

instruments. Indeed, the text of 15(b) has been directly lifted from the text of Article 3 and in light of Article 78 TFEU, Article 19(2) of the Charter and Article 52(3), which requires that Charter provisions correspond with the meaning of synonymous Convention provisions, the CJEU is arguably obliged to follow the interpretation of *non-refoulement* obligations by the ECtHR.

Therefore, to argue that serious harm requires what appears to be a human actor to inflict the harm distracts from the complementary character of subsidiary protection and further ECtHR jurisprudence which has surmised that to limit Article 3 to treatment which stems from the responsibility of public authorities is to undermine the absolute character of Article 3?s protection (D v United Kingdom para 48). By closing the door on ECtHR *non-refoulement* jurisprudence in the framework of the Qualification Directive the CJEU has cocooned the Directive from international human rights law and may have indirectly created a black hole for those who cannot return to their country of origin on medical grounds.

Exclusion

The United Nations High Commissioner for Refugees (UNHCR) holds a crucial position in the international refugee law system. The UNHCR is the only entity with a legal mandate to supervise the application of the Convention. State Parties signatory to the Convention are obliged to facilitate UNHCR?s supervision and are also required to cooperate with the UNHCR (Article 35, 1951 Convention and Article II of the 1967 Protocol relating to the Status of Refugees)(See M. Garlick [22] for further analysis). Within the EU framework not only does Article 78(1) TFEU apply but Recitals 4 and 22 of the QD also state that the UNHCR may provide valuable guidance to Member States when determining refugee status. Whilst UNHCR soft law instruments have been cited by Advocate General Sharpston in Opinions (UNHCR Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees [13] in Minister voor Immigratie en Asiel v X, Y and Z [23]), submissions and statements by third parties are not referred to as much as they are in the ECtHR, for example, due to restrictive rules on submissions. In fact the UNHCR interventions in various preliminary references have not been referred to at all in the judgments, which begs the question of whether the CJEU is reluctant to embed European asylum law in the wider context of refugee law and interpretative developments by the UNHCR.

Notwithstanding that Advocate General Sharpston has acknowledged the value of UNHCR positions (Opinion A-G Sharpston Bundesrepublik Deutschland v Y and Z [6] and C?31/09 Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal [24]) the CJEU has, conversely, veered away from them in two notable cases, Joined Cases C?57/09 and C?101/09 Bundesrepublik Deutschland v B and D [25] and Case C?364/11 Mostafa Abed El Karem El Kott, v Bevándorlási és Állampolgársági Hivatal [26]. The first, relating to exclusion under Article 12 of the 2004/83/EC [21] QD and the second on the eligibility of Palestinian asylum seekers for refugee status under the QD.

With regards to B and D the CJEU held that membership of an organisation linked with terrorist acts does not in itself bring the individual within the exclusion clauses, set out in Article 12 of the QD. A case by case assessment will have to be undertaken and regard must be paid to a person?s individual responsibility for the commission of acts falling under Article 12 (2)[99]. However, the Court?s subsequent conclusion that exclusion is not conditional on an assessment of proportionality [111] directly opposes the UNHCR statement [27] in relation to the case and instead pegs exclusion on the seriousness of the crimes and the individual?s responsibility. The finding thus does away with an important safeguard espoused by the UNHCR, which is to weigh the consequences of exclusion, i.e. the likelihood of persecution, against the seriousness of the

individual?s acts. A similar trend of departing from the UNHCR?s position is evident in El Kott where the CJEU found that a Palestinian applicant must be recognised as a refugee within the meaning of Article 2 (c) of the QD where protection or assistance of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNWRA) has ceased. The interpretation of ?ceased?, according to the Court, includes a situation where a Palestinian who after actually availing himself or herself of that protection ceases to receive it from UNWRA for a reason beyond his or her control and independent of his or her own violation [82]. According to Garlick, and contrary to the UNHCR?s intervention, this judgment does not exclude the possibility that States ?may introduce a form of special refugee status determination procedure for Palestinians.?

To not take into account international refugee soft law, especially where the QD mirrors the language used in the Refugee Convention, is to, arguably, hamper the development of EU asylum law.

Conclusion

To sheath the QD from international refugee norms and developments within European Human Rights is to ignore the fundamental precepts of refugee protection and to impede any evolution of the Directive?s provisions. Whilst the Court of Justice is limited by the (narrow) questions the referring Court may ask and has, in passing, pointed to key provisions in the QD relating to individualised assessments (albeit without much of an explanation), the CJEU has nonetheless failed to take a holistic approach to all available interpretative sources, arguably breaching Article 78(1) TFEU as well as hindering the development of Articles 18 and 19 of the Charter. Furthermore, by distancing the QD from international influence the law in this area is becoming more and more autonomous with weaker protection available to asylum seekers. Unfortunately, with the CJEU?s re-enforcement of mutual trust within the Common European Asylum System in Opinion 2/13 [28] on the accession of the EU to the ECHR, it seems this self- cocooning may filter into other areas of EU asylum law. It therefore appears that the onus is very much on Member States to observe all of their international obligations when applying asylum law.

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Persecution (acts of)
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Links:

[1] http://www.unhcr.org/3b66c2aa10.html
[2] http://www.echr.coe.int/Documents/Convention_ENG.pdf
[3] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT
[4] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF
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