The ECtHR and CJEU as Refugee Law Courts: An Assessment
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Overview:

I. Two Supranational Courts, yet Three Regimes
II. Constructive Pluralism
III. Today’s Focus
   I. Protection: Refugee + Subsidiary Protection
   II. Access to Protection
   III. Asylum Procedures

Sources:

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Sources:

• FRA / ECtHR Handbook on European Law relating to asylum, borders and immigration (2013)
ECtHR + CJEU - Refugee Courts
- De Baere ‘The Court of Justice of the EU as a European and International Asylum Court’ (2013)

CJEU as human rights court
- Carrera, De Somer, Petkova ‘The Court of Justice of the European Union as a Fundamental Rights Tribunal…’ CEPS (2012)
- De Búrca ‘After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator’ (2013)

Three Regimes
- EU Law
- ECHR (and other IHRL? Not for today but!)
- Refugee Convention (RC)
  * Added value of ICCPR (HRC) on detention and jurisdiction; CAT on risk assessment

Pluralist Pitfalls
- Complexity?
- Incoherence, inequality?
- Fragmentation?
- Complacency? Apparent human rights surfeit?
- Excessive deference?
- Stagnation?
- Convergence when there are good reasons for differences? Eg. Losing specificities of refugee and EU law? EU principles (eg mutual recognition) undermining human rights?

“Constructive human rights pluralism”
- Pluralism = regimes develop interfaces (but not equated to ‘constitutionalisation’)
- Dialogue and interaction
- Convergence, only when appropriate
- Possibility for mutual correction
- Forum shopping is good! (for vulnerable asylum seekers and refugees, but of course governments are the main repeat players!)

In a nutshell:
- Constructive human rights pluralism describes the desirable mode of interaction between human rights regimes, whereby each cultivates a degree of openness to the others, while maintaining its own integrity.
EU – ECHR Interfaces

- ECHR informs general principles of EU law
- ECHR and EUCFR – Article 52(3) EUCFR ‘correspondence’
- EU accession to ECHR required by Lisbon Treaty

Article 6 TEU (post Lisbon)

1. The Union recognises the rights, freedoms and principles set out in the [EUCFR] of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the [ECHR]. Such accession shall not affect the Union’s competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to Member States, shall constitute general principles of the Union’s law.

ECtHR Jurisdiction over EU MS

(pending accession)

Application No 43844/98 TI v UK 7 March 2000

Application No 45036/98 Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi (Bosphorus Airways) v Ireland [GC], 30 June 2005.


EU – RC Interfaces

Long shadow of the Spanish (Aznar) Protocol

Article 351 TFEU (ex 307 EC)

Article 78 TFEU (ex 63 EC) and references in Directives (legislative process + revisions)

RC is part of EU law

Cf. Status of UNHCR Resolutions etc.


The RC (and ECHR and?) in EU Law

- Article 78(1) TFEU provides that ‘The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.’

EU – RC Interfaces

- Informal interventions by UNHCR in refugee law cases before CJEU to date (but consider impact…)

General Principles of EU law

Right to Asylum! Article 18 EUCFR

- Article 14(1) UDHR states that ‘everyone has the right to seek and to enjoy … asylum from persecution.’
- As AG Maduro the QD aims to vindicate ‘the fundamental right to asylum.’ Para 30 C-465/07 Elgafaji v Saatssecreteris van Justitie [2009].

ECHR – RC Interfaces

- ECtHR does not interpret the RC
- But it is acknowledged as forming part of the Contracting Parties’ background legal obligations
- Eg References in ‘flagrant breach’ caselaw

Contrasts between ECtHR and CJEU

1. Contrasting Jurisdictions
2. Contrasting relationships with national courts and legal orders
3. Contrasting decisional autonomy
4. Contrasting interpretative methodologies and jurisprudential outputs

(militates against convergence… we should expect more from Luxembourg?)

Preliminary References

- Lisbon Treaty removes restrictions on preliminary references as regards visas, asylum and immigration

Contrast – relationship -national legal order

- Direct effect of EU law cf. duty to incorporate ECHR
- EU law: The individual is both legally freed from the constitutional confines of her Member State and endowed with what Robert Cover would have called an immediate ‘jurisgenerative’ capacity at the supranational level of governance. (Halberstam)

Contrasting decisional autonomy

Karen Alter, ‘[t]he ECJ is about the most powerful and influential international court that is realistically possible.’ CJEU cf. ECtHR
- Different ‘accommodation strategies’ (Krisch)
- Differently incremental: CC: “The contrast between evolution by ‘creeps’ and ‘jerks’ comes to mind: The ECtHR creeps slowly, while the CJEU sometimes jerkily changes course.”
Bold v Tame?

Virginie Guiraudon:
We have a bold ECJ and a tamer ECHR. One is a separation-of-powers court with many potential allies (the Commission, economic interest groups, varying member-states, courts asking for preliminary rulings) whose decisions have direct effect [sic]. The second is a human rights court that can only rule after all national means of appeal have been exhausted …. We can therefore expect that the ECJ will have less fear of increasing its competence and to issue controversial rulings, while the ECHR will adopt a self-limiting approach to slowly gain legitimacy and avoid provoking nation-states.

Contrasting jurisprudential output

CJEU: deductive, legalistic and magisterial style

ECtHR: inductive, fact-specific, casuistic

PROTECTION – REFUGEE DEFINITION & ‘SUBSIDIARY PROTECTION’

QD Cases

• Case C-465/07 Elgafaji 17 February 2009 - SP
• Cases C-175/08, C-176/08, C-178/08 and C-179/08 Abdulla v Germany 4 March 2010 – Article 1C – cessation – changed circumstances
• Case C-31/09 Bolbol Nawras 17 June 2010 – Article 1D - Palestinians

QD cases (cont.)

• Cases C-57/09 Germany v B and C-101/09 Germany v D 9 November 2010 – Article 1F - exclusion
• Cases C-71/11 and C-99/11 Germany v Y, Z 5 September 2012 – persecution
• Case C-277/11 MM 22 November 2012 – RS / SP procedures
• Case C-364/11 El Kott 19 December 2012 - Article 1D - Palestinians
• Case C-119/12 X, Y, Z - 7 November 2012 – persecution

QD cases (pending)

• Case C-285/12 Diakite, Opinion 18 July 2013 – Article 15(c) – IHL and ‘internal armed conflict’
• Case C-604/12 HN, Opinion 7 November 2013 - consideration of an application for subsidiary protection subject to the prior refusal of an application for refugee status (Ireland) - ok
QD cases (pending)

- Cases C-148/13 to C-150/13 ABC – proving sexual orientation = Article 4 QD / Charter (europeanlawblog.eu/?p=1720_

- Case C-373/13 T – exclusion, residence permit, PKK

PERSECUTION

Cases C-71/11 & C-99/11 Y, Z

If the core area of religious freedom can also comprise certain religious practices in public: Does it (1) suffice in that case, in order for there to be a severe violation of religious freedom, that the applicant feels that such practice of his faith is indispensable in order for him to preserve his religious identity, (2) or is it further necessary that the religious community to which the applicant belongs should regard that religious practice as constituting a central part of its doctrine, (3) or can further restrictions arise as a result of other circumstances, such as the general conditions in the country of origin?

Cases C-71/11 & C-99/11 Y, Z

- Opinion of AG Bot, 19 April 2012
  - Meaning of persecution on grounds of religion
  - Reliance on Strasbourg ‘flagrant breach’ case Z. and T. v United Kingdom


Not cited in Opinion (but general UNHCR Guidance is!)

CJEU:

Rejects ‘core’ notion
Insists on contextual examination, in light of freedom of religion
Strasbourg - Flagrant Breach Test

- Application No 17341/03 F v UK 22 June 2004
- Application No 27034/05 Z and T v UK 28 February 2006
- Application No 8139/09 Othman (Abu Qatada) v United Kingdom 17 January 2012

App. 27034/05 Z & T v UK (2006)

The Contracting States nonetheless have obligations towards those from other jurisdictions, imposed variously under the 1951 United Nations Convention on the Status of Refugees and under the above-mentioned Articles 2 and 3 of the Convention. As a result, protection is offered to those who have a substantiated claim that they will either suffer persecution for, *inter alia*, religious reasons or will be at real risk of death or serious ill-treatment, and possibly flagrant denial of a fair trial or arbitrary detention, because of their religious affiliation (as for any other reason).

App. 27034/05 Z & T v UK (2006)

Where however an individual claims that on return to his own country he would be impeded in his religious worship in a manner which falls short of those proscribed levels, the Court considers that very limited assistance, if any, can be derived from Article 9 by itself. Otherwise it would be imposing an obligation on Contracting States effectively to act as indirect guarantors of freedom of worship for the rest of world. If, for example, a country outside the umbrella of the Convention were to ban a religion but not impose any measure of persecution, prosecution, deprivation of liberty or ill-treatment, the Court doubts that the Convention could be interpreted as requiring a Contracting State to provide the adherents of that banned sect with the possibility of pursuing that religion freely and openly on their own territories.

CJEU

- Comment: Leboeuf & Tsourdi [2013] HRLRev

Case C-119/12 X, Y, Z

- 7 November 2013
- Existence of laws criminalising homosexuality / homosexual acts (various) *supports the finding that those persons must be regarded as forming a PSG*

- Criminalisation *per se* is not persecution; but *‘a term of imprisonment’ is disproportionate and discriminatory = persecution
- Can’t expect applicants to ‘conceal’ homosexuality or ‘exercise reserve in expression of his sexual orientation’
• 70 In that connection, it is important to state that requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person’s identity that the persons concerned cannot be required to renounce it.  
(See AG Sharpston – ‘wrong premise’)

• Cf. Application No 17341/03 F v UK 22 June 2004 – no flagrant breach  
• Cf. HJ (Iran) v. Sec’y of State for the Home Dep’t (HJ and HT), [2010] UKSC 31 – persecution – but handles question of ‘living discreetly’ differently

Conclusion:
• RC ‘persecution’ provides space for progressive development, at present more fruitful than ECtHR ‘flagrant breach’ test  
• Should Strasbourg level up?  
• Key: Acknowledge distinctiveness of ‘persecution’  
• CJEU should not cite Strasbourg ‘flagrant breach’ cases in its ‘persecution’ caselaw

SUBSIDIARY PROTECTION
Case C-465/07 Elgafaji (2009)

The questions referred were as follows:

1. Is Article 15(c) [QD] to be interpreted as offering protection only in a situation in which Article 3 [ECHR], as interpreted in the case-law of the European Court of Human Rights, also has a bearing, or does Article 15(c), in comparison with Article 3 [ECHR], offer supplementary or other protection?

2. If Article 15(c) [QD], in comparison with Article 3 [ECHR], offers supplementary or other protection, what are the criteria in that case for determining whether a person who claims to be eligible for SP status runs a real risk of serious and individual threat by reason of indiscriminate violence within the terms of Article 15(c) [QD], read in conjunction with Article 2(e) thereof?

Eight national governments intervened: the Netherlands, Belgium, Greece, France, Italy, Finland, Sweden and the UK.

Strasbourg & Article 3 Non-refoulement

The Strasbourg caselaw embodies significant shifts, from Vilvarajah to Salah Sheekh, NA v UK, MSS v Belgium and Greece and Sufi and Elmi v UK. The earlier cases tended to demand a high degree of individualisation.

As Durieux explains “the coexistence of the two systems [RC and ECHR] appears to have aggravated the restrictive tendencies of both – in other words, competition between the two systems has resulted in constraining the protection opportunities of asylum seekers, instead of amplifying them.”


Case C-465/07 Elgafaji (2009)

• The problematic term ‘individual’ then, the CJEU read as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the competent national authorities before which an application for SP is made, or by the courts of a Member State to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, face a real risk of being subject to the serious threat referred to in Article 15(c) of the Directive.

(paras 35)

Case C-465/07 Elgafaji (2009)

• Beyond ECHR
• Beyond RC
• Distinctive Article 15(c) protection

Back to the Raad van State...

Note response of the referring Court, the Dutch Raad van State

Held: Fields of application of Article 15(c) QD and Article 3 ECHR post- NA v UK were both catered for in the same domestic provision which referred to the Article 3 ECHR risks.

(Case Number 200702174/2/V2, 25 May 2009, para 2.3.8.)

And then Strasbourg…

Application No 30696/09 MSS v Belgium and Greece [GC], 21 January 2011

Applications Nos. 8319/07 and 11449/07 Sufi and Elmi v UK 28 June 2011, para 226.

Strasbourg stated that Article 15(c) QD and Article 3 ECHR were ‘comparable.’
### Assessment

EU QD embodies uneasy compromise (15(c))

Some governments invite Luxembourg to fold Article 15(c) into Article 3 ECHR, but it (rightly) refuses.

Strasbourg is simultaneously emboldened by yet jealous of Luxembourg?

Overall impact: Extension of Article 3 ECHR protections?

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### Assessment

BUT domestic impact muted ….

- UN High Commissioner for Refugees, Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence, 27 July 2011

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### EXCLUSION – ARTICLE 1.F

- RC as ‘cornerstone of the international legal regime for the protection of refugees’
- ‘Terrorist acts, which are characterised by their violence towards civilian populations, even if committed with a purportedly political objective, fall to be regarded as serious non-political crimes.’

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### Cases C-57/09 & C-101/09 B & D (2010)

- In contrast, membership alone would not warrant exclusion, in light of the references in the text to commission of or culpability for particular acts, a matter requiring individual assessment.
- The facts behind the EU’s listing of an organisation as ‘terrorist’ were to be taken into account, but were not a substitute for individual assessment. In particular, that assessment must allow attribution to the refugee of ‘a share of the responsibility for the acts committed by the organisation in question while that person was a member.’
- The Court rejected an explicit proportionality test, but ….
- Aligns with the German, French, Netherlands and United Kingdom governments and rejects the submissions of UNHCR, the Commission and the Swedish government.
- Cf. Opinion of the General Advocate Mengozzi
Cases C-175/08 ... Abdulla 2010

- Article 11(1)(e) QD provides for cessation where the refugee (cf. Article 1(c) RC)
  “can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of nationality”

Cases C-175/08 ... Abdulla 2010

- The RC as ‘the cornerstone of the international legal regime for the protection of refugees.’ (Recital 3, QD)
- Focus: general scheme and purpose of the QD, to be interpreted ‘while respecting the Geneva Convention and other relevant treaties.’ (para 53)
- Assessment ‘having regard to the refugee’s individual situation.’ (para 70)
- The change of circumstances must be of a ‘significant and non-temporary’ nature (under Article 11(2) QD), meaning that the factors grounding the fear must be ‘permanently eradicated.’ (para 73)


Access to Protection

Strasbourg
- Hirsi and Others v. Italy, Application no. 27765/09 (access - jurisdiction)
- M.S.S. v. Belgium and Greece, June 2010, Application no. 30696/09 (access – Dublin)

Luxembourg
- EU – jurisdiction without territory?
- Case C-411/10 NS C-493/10 ME 21 December 2011
- Case C-648/11 MA & Others v UK ‘best interests’ (2013)

Mirrors Strasbourg BUT
- ‘Systemic Breach’
ASYLUM PROCEDURES

Strasbourg
- Articles 3 + 13
Application No. 9152/09 IM v France
2 February 2012
Application No 33210/11 Singh and Others v Belgium
2 October 2012

Luxembourg
- Case C-69/10 Diouf, 5 February 2010
- Case C-277/11 MM v Ireland, 22 November 2012
- Case C-175/11 HID, BA v Ireland

CONCLUSIONS

<table>
<thead>
<tr>
<th>Protection</th>
<th>Access - Dublin</th>
<th>Procedures</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strasbourg</td>
<td>Article 3 + flagrant breaches of other rights</td>
<td>Strong - Illegal</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>RS + SF Luxembourg leads on 150; now 'persecution' protects more than 'flagrant breach' test</td>
<td>Strong - follows internal/external reduction BUT systemic breach Achilles Heel</td>
</tr>
</tbody>
</table>