



**Vulnerable Asylum Seekers in the Common European Asylum System – The jurisprudence of the Court of Justice of the European Union**

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## **Abstract:**

This thesis presents an in-depth analysis of the jurisprudence of the Court of Justice of the European Union (CJEU) concerning vulnerable asylum seekers. The CJEU, acting as the judicial body of the EU, provides clearance and guidance in the interpretation of EU Migration Law, upon request by Member States and it oversees the compliance with the EU Fundamental Charter of Human Rights when Member States carry out asylum application procedures. In order to provide a full picture of the issues at stake, first, the thesis identifies the legal definition of vulnerable persons in EU secondary legislation and the special procedural tools that shall be implemented throughout the asylum application process of these individuals. Then, this thesis explores the EU system of protection of human rights and how the CJEU guides the interpretation of secondary legislation norms by Member States as they implement the asylum acquis norms regarding vulnerable persons. Further on, there is an analysis of several rulings by the CJEU on vulnerable asylum seekers. The thesis is concluded by remarks stressing the main findings and a reflection on other individuals that could be added to the legal definition of vulnerable persons. This research hopes to present a rather new approach by focusing on vulnerable asylum seekers and on the impact that the jurisprudence of the CJEU has had in the practical implementation of the Common European Asylum System.

**Keywords:** EU Migration Law; vulnerable persons; Court of Justice of the European Union; Asylum seekers; EU Charter of Fundamental Rights.

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## Table of Contents

CHAPTER I - Introduction .....	6
1.1. Research Question and preliminary argument .....	6
1.2. Research Outline .....	7
1.3. Methodology .....	8
1.4. Theoretical Framework .....	9
CHAPTER II - The concept of vulnerability within the European Common Asylum System (CEAS).....	10
2.1 Creation of CEAS - Historical developments .....	10
2.2. Legal instruments of secondary legislation.....	13
2.2.1. Qualification Directive and its recast .....	14
2.2.2. Asylum Procedures Directive and its recast .....	15
2.2.3. Reception Conditions Directive and its recast .....	18
2.2.4. Dublin II Regulation and its recast .....	20
Chapter III – The EU system of protection of fundamental rights.....	24
3.1. The Charter of Fundamental Rights and the right to asylum .....	24
3.2. The Court of Justice of the European Union as the guardian of the Charter .....	27
Chapter IV – Vulnerable asylum seekers in the jurisprudence of the CJEU .....	32
4.2. Disabled people based on serious illness .....	39
4.3. Victims of torture & situation in the country of origin .....	41
4.4. The plight of unaccompanied minors and the right to family reunification.....	44
Chapter V - Conclusion .....	51
Bibliography .....	55
International & Regional Human Rights Treaties and Recommendations .....	61
Index of case law – CJEU .....	62

## **Abbreviations**

APD - Asylum Procedures Directive

APD recast - Asylum Procedures Directive recast

CEAS – Common European Asylum System

CJEU – Court of Justice of the European Union

FRD – Family Reunification Directive

ECHR – European Convention of Human Rights

ECtHR – European Court of Human Rights

EU – European Union

MS – Member States

PTSD – Post traumatic Stress Disorder

QD – Qualification Directive

QD Recast – Qualification Directive Recast

RCD – Reception Conditions Directive

RCD recast - Reception Conditions Directive recast

RD – Return Directive

TCNs – Third Country Nationals

TEU – Treaty of the European Union

TFEU – Treaty of Functioning of the European Union

UAMs – Unaccompanied minor

UDHR - Universal Declaration of Human Rights

UNHCR - The Office of the United Nations High Commissioner for Refugees

## **CHAPTER I - Introduction**

### **1.1 Research Question and preliminary argument**

This thesis aims at analyzing how the jurisprudence of the Court of Justice of the European Union (CJEU) on vulnerable asylum seekers has impacted the way Member States implement the Common European Asylum System (CEAS) while respecting and taking into consideration the special circumstances of these sub-group of individuals in the realm of forced migration. The research question which will guide the structure of this thesis is: “How is the CJEU growing jurisprudence about vulnerable asylum seekers impacting on the interpretation and implementation of CEAS by Member States?” For that purpose, the following sub-questions will be answered:

1. Which legal instruments are used to assess vulnerability of asylum seekers within the CEAS?
2. What does the category of vulnerable persons mean to asylum seekers in terms of the asylum application process?
3. How has the EU incorporated the right to seek asylum into its own system of protection of fundamental rights?

The answer to those questions serves the objective of critically assessing the content of provisions concerning the special procedures and guarantees accorded to vulnerable persons within the EU asylum acquis. Additionally, it intends to understand how the right to asylum has been shaped as a fundamental right within EU law. Ultimately, this thesis aims to help understanding the line of reasoning of the judges of the Court of Justice of the European Union. In the cases analyzed, the Court was expected to examine situations in which the applicants were, at the time of examination, either asylum seekers or refugees and fit into the category of vulnerable persons, according to the legal provisions in the EU asylum acquis. The departing

point for this research will be the following preliminary argument: “The CJEU is endorsing a role of human rights adjudicator since the entry into force of the Charter of FR. The jurisprudence of the Court has adopted a group-focused approach towards vulnerability. Concerning vulnerable asylum seekers, the judgments of the Court have highlighted the importance of prioritizing the personal circumstances that rend these individuals more vulnerable than their peers in the context of the application of the CEAS.”

## **1.2 Research Outline**

This thesis consists of three chapters after this introductory chapter. The second chapter starts by elucidating the different legal instruments that make up the current asylum acquis and explaining where the legal provisions aimed at the recognition and protection of vulnerable persons, in the context of forced migration, can be found. Furthermore, this chapter provides for an historical overview of these instruments, since they have been amended at least once. These developments, which include betterments and more favorable procedures and guarantees for vulnerable individuals are important to grasp the growing attention given to the circumstances of vulnerable individuals by European legislators. This chapter answers the first two sub-questions of the thesis.

The third chapter is divided into two sections. The first one focuses on answering the third sub-question. It places prominence on the Charter of Fundamental Rights of the EU as a source of primary law and on the particularities of the right to asylum enshrined in article 18 CFR. The second section of the chapter is dedicated to explaining the functioning and supervising role of the CJEU, concerning both EU secondary law and the Charter. For this purpose, I will focus on the different principles and tools for interpretation used by the CJEU and thus, paving the way to the development of positive EU law.

Chapter four answers the research question of this thesis. To do so, this chapter provides a thorough analysis of the pertinent case-law of the CJEU, in which the applicants fit the definition of vulnerable persons, as provided in EU law and discussed in the second chapter. This research seeks to understand whether the line of reasoning of the judges has found an equilibrium between the relevance of personal circumstances, and the current rules of application of the asylum acquis. Furthermore, it assesses the possible impact of the analyzed rulings on future reforms and sheds a light on how Member States might be compelled to rethink the application of the established rules.

Finally, the conclusion of this thesis gathers the main findings of this research. It reaffirms the unique character of the CEAS, the supervising role of the CJEU in monitoring the compliance of MS with the Charter when implementing the asylum acquis, while identifying the underlying shortcomings of the current system that are proving to be a source of additional vulnerability.

### **1.3 Methodology**

The overall aim of this thesis is to identify the body of norms specifically directed at ensuring protection of vulnerable asylum seekers, and to understand the role of supervision by the CJEU on the respect and implementation of such provisions by the Member States. In order to do so, different research methods have been employed. This thesis consists mainly in descriptive and analytical legal research. First, a descriptive approach is necessary to assess the relevant European legislation on asylum matters and to define vulnerability in such a context. This descriptive approach is evident throughout the first chapter. The second and third chapters contain a more in-depth legal research. From the perspective of the fundamental rights of asylum seekers, it is relevant to provide a critical assessment of the current state of the right to



asylum provided by the EU. This thesis analyses the scope and content of EU legislation on asylum and refugee protection in light of the decisions of the CJEU.

Not less importantly, this thesis makes use of a variety of legal sources external to the EU legal system, such as international and regional human rights treaties. The reason to mention these instruments is the influence that international refugee law and international human rights law have had in the creation and developments of EU Migration law. As for the regional instruments, I considered it to be essential to refer to legal definitions of the right to asylum in different world regions and compare them to the EU version present in the Charter of Fundamental Rights.

#### **1.4 Theoretical Framework**

I have used throughout this research the studies and publications of academic scholars such as L. Peroni, Sofia Ippolito, H. Baatjes and Peter Boeles on different aspects concerning the legal instruments and the regulation of the process to obtain international protection within the EU realm constitute the non-legal sources. These authors' critical contributions were essential to understand the current legal framework and its shortcomings which led to the way this thesis was delineated. This thesis aims at contributing to the field of EU Migration Law and the CEAS by looking at the relation between the evolution of provisions on vulnerability of the EU asylum acquis, human rights standards as enshrined in the Charter and the jurisprudence of the CJEU. To do so, a considerable amount of attention was given to the process of amendments leading to the second generation of the CEAS instruments.

In terms of legal frameworks, this thesis, to a larger extent, refers to instruments of European Migration Law and to the Charter of Fundamental Rights of the EU to fully explain the principles that guide the system of protection of asylum seekers and refugees in the EU.

## **CHAPTER II - The concept of vulnerability within the European Common Asylum System (CEAS)**

Asylum seekers and refugees are naturally considered to be vulnerable persons due to the serious risk of harm faced in their country of origin and the hazardous journeys they embark on to escape and find safety. However, EU law has adopted a specific approach to safeguard individuals whose personal characteristics exacerbate the vulnerability inherent to this general group of asylum seekers and refugees. Normative responses to vulnerability focus on adopting special measures of protection and granting priority in asylum procedures to vulnerable persons. This welcome a reflection around the following sub-questions: “*Which legal instruments are used to assess vulnerability of asylum seekers within the CEAS?*” and “*What does the category of vulnerable persons mean to asylum seekers in terms of the asylum application process?*” The answers to these questions will be examined in this chapter.

### **2.1 Creation of CEAS - Historical developments**

The current regime applicable to third-country nationals (hereinafter TCNs) who seek asylum in the EU is based on the full incorporation and inclusion of the 1951 Refugee Convention and international human rights law into the EU asylum law system. The legal basis allowing member states to adopt common measures on asylum is article 78 TFEU. This provision of EU primary law paves the way for member states to create uniform status of asylum for TCNs, uniform common asylum procedure and to establish the criteria mechanisms to decide which member state is responsible for processing asylum applications as well as setting standards for reception conditions.<sup>1</sup> The Treaty of Maastricht of 1992 recognized the

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<sup>1</sup> Article 78 TFEU reads as following: “1. 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. 2. For the purposes of paragraph 1, the European Parliament and the Council,

area of asylum law as one of ‘common interest’. Yet, at that time, this field remained under the 3<sup>rd</sup> pillar devoted to the field of Justice and Home affairs, meaning that the recommendations of the European Parliament were non-binding.<sup>2</sup>

The ratification of the Treaty of Amsterdam in 1997 represented a major shift in the field of asylum as it became part of the first pillar leading to the communitarisation of this area. The legal basis for Member States to adopt binding measures on the field of asylum was created (ex-art 63 TEC). This change materialized essentially in the development of the harmonization process through binding legislation and the power of review of the CJEU.

The CEAS was first and foremost created due to the need for standardization of national asylum regulations at EU level. The main challenge faced by the Member States was asylum shopping, which is the phenomenon where an asylum seeker applies for asylum in more than one EU State or chooses one EU State in preference to others on the basis of a perceived higher standard of reception conditions or social security assistance.<sup>3</sup> To reduce such a risk of secondary movement in the EU in a context of abolition of frontiers between Member States, additional measures of European asylum law took off as “flanking measures”.<sup>4</sup> The main goals of these measures were to create harmonized protection standards, to ensure the same level of protection in all countries and to establish effective cooperation and more solidarity and responsibility between Member States and also towards third countries. In the aftermath of the introduction of these first legal measures there was a set of discussions by the European Council such as the Tampere conclusions (1999), the Hague Program (2005) and the Stockholm

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acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising: (a) a uniform status of asylum for nationals of third countries, valid throughout the Union; (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection; (c) a common system of temporary protection for displaced persons in the event of a massive inflow; (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status; (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection; (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection.”

<sup>2</sup> Hans van Oort in cooperation with Hemme Battjes & Evelien Brouwer - Amsterdam Evaluation of the Common European Asylum System under Pressure and Recommendations for Further Development, page 10.

<sup>3</sup> Definition taken from [https://ec.europa.eu/home-affairs/content/asylum-shopping\\_en](https://ec.europa.eu/home-affairs/content/asylum-shopping_en). [Accessed on 5 February 2019].

<sup>4</sup> Boeles, P. et al. (2014) European Migration Law. Morsel: Intersentia. 2nd edition, page 246.

Program (2010). As a consequence, the European Commission also took as fundament for the drafting of proposals of future legislation the consulting and guidelines issued by UNHCR.<sup>5</sup> Community rules were then set to develop into a system in which ‘individuals, regardless of the Member State in which their application for asylum is lodged, are offered an equivalent level of treatment as regards reception conditions, and the same level as regards procedural arrangements and status determination’.<sup>6</sup> Indeed, the notion of the CEAS was introduced by the European Council in its Tampere Conclusions. Hence, these conclusions are considered to be the founding act of the CEAS.<sup>7</sup>

The CEAS was developed in two stages. The first series of instruments was adopted between 2001-2005. The CEAS set down the mechanism for allocating asylum seekers amongst the different Member States; established the minimum standards for the reception of asylum seekers and minimum common standards for asylum procedures, as well as minimum standards for granting asylum. To achieve and enforce these common rules four Directives and two Regulations were adopted.<sup>8</sup> Among these was the 2003 Dublin II Regulation, replacing the 1990 Dublin Convention<sup>9</sup> and the Eurodac Regulation establishing a database of asylum applicants to aid the implementation of the Dublin system. The Dublin mechanism was further backed up by the Reception Conditions Directive, the Qualification Directive and the Asylum Procedures Directive. The second phase of developing CEAS started in 2007, with the signature of the Treaty of Lisbon and was concluded in 2013. The main goal of this second

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<sup>5</sup> Zwaan, K., UNHCR and the European Asylum System, p. 10.

<sup>6</sup> Presidency Conclusions, Tampere European Council, (1999) para. 15; The Hague programme: strengthening Freedom, Security and Justice in the European Union (2005) OJ C 53/1, para. 1.3 and the Stockholm Programme – An Open and Secure Europe serving and protecting citizens (2010) OJ C 115/1, para. 6.2.1..

<sup>7</sup> Hans van Oort in cooperation with Hemme Battjes & Evelien Brouwer - Amsterdam Evaluation of the Common European Asylum System under Pressure and Recommendations for Further Development, page 10.

<sup>8</sup> These instruments are the following: The Eurodac Regulation (Council Regulation (EC) No 2725/2000); the Dublin II Regulation (Council Regulation (EC) No 343/2003); the Asylum Procedure Directive (Council Directive 2005/85/EC); the Reception Conditions Directive (Council Directive 2003/9/EC); the Qualification Directive (Council Directive 2004/83/EC) and the Temporary Protection Directive (Council Directive 2001/55/EC).

<sup>9</sup> The 1990 Dublin Convention was an agreement reached at the intergovernmental level and signed by Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain and the United Kingdom.

phase was to take another step towards full harmonization and to amend some of the initial instruments.<sup>10</sup>

The Treaty of Lisbon is the most recent amendment to the founding treaties of the EU. Amongst the changes, it introduced article 78 TFEU as the new legal basis for the development of the CEAS. The provision refers now to ‘uniform statuses’ instead of ‘minimum standards’ and it also uses the expression ‘common procedures’ to boost complete standardization amongst Member States. Thus, this norm has empowered the Community with the competence to fully harmonize asylum law, although Member States seem reluctant to agree on such a move.

Even though full harmonization has not been achieved until today, the CEAS will provide better access to the asylum procedure for those who seek protection; to quicker and better-quality asylum decisions. It will also ensure that people in fear of persecution will not be returned to danger and guarantee decent conditions both for those who apply for asylum and those who are granted international protection within the EU.<sup>11</sup>

## **2.2. Legal instruments of secondary legislation**

Through a presentation of the relevant EU asylum acquis (both the first phase and the recast), it will be possible to see the evolution of the approach towards vulnerable asylum seekers, the development of provisions and the special treatment reserved to these individuals.

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<sup>10</sup>Boeles, P. et al. (2014) European Migration Law, Intersentia. 2nd Edition, page 245.

<sup>11</sup> Statement by Cecilia Malmström, European Commissioner for Home Affairs from 2010 to 2014, (2014) A Common European Asylum System, Home Affairs, page 1.

### **2.2.1. Qualification Directive and its recast**

The first Qualification Directive (QD Directive) was adopted in 2004.<sup>12</sup> Later in 2011, it was amended into the Recast Qualification Directive.<sup>13</sup> The aim of both instruments is to ensure that Member States ‘introduce common criteria for recognizing applicants for asylum as refugees within the meaning of Article 1(A) of the Geneva Convention’. That is why this directive and its recast are, very often, considered to be the European version of the Geneva Convention.<sup>14</sup> The conditions that need to be fulfilled in order for an individual to be granted refugee status are contained in Chapter III. The articles in this chapter relate to the definition of acts of persecution, their seriousness and length in time<sup>15</sup>; and the reasons for persecution, such as race, religious beliefs, nationality, membership to a particular social group and political opinion.<sup>16</sup> Moreover, the original QD and the recast both have a broad range of protection and, in some areas, the scope goes further than the Refugee Convention. For instance, when the QD recognizes non-State actors as being capable of persecution.<sup>17</sup> The QD establishes the common standards for the qualification of individuals as beneficiaries of international protection, either as refugees or as persons eligible for subsidiary protection. This instrument was hailed as a milestone for the fact that it introduced a list of vulnerable persons - such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.<sup>18</sup> These categories of vulnerable individuals were

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<sup>12</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

<sup>13</sup> Recast Directive 2011/95/EU of the European Parliament and the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

<sup>14</sup> Sidorenko, O., *The Common European Asylum System – Background, current state of affairs, future directions*, p. 70.

<sup>15</sup> Qualification Directive recast 2011/95/EU, article 9.

<sup>16</sup> Qualification Directive recast 2011/95/EU, article 10.

<sup>17</sup> Qualification Directive 2004/83/EC, article 6 (c).

<sup>18</sup> Qualification Directive 2004/83/EC, article 20 (3) reads as following: “When implementing this Chapter, Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women,

reproduced in the Reception Conditions Directive (RCD) and in the Asylum Procedures Directive (APD). Furthermore, the original QD implemented the obligation of Member States to conduct individual evaluations to assert the special needs of individuals.<sup>19</sup>

A few years into the adoption of the directive by Member States, the Commission issued a report highlighting problematic issues identified in the practical application of the QD.<sup>20</sup> This document concluded that the goal of harmonization concerning the qualification and statuses of beneficiaries of international protection had not yet been completely achieved. More specifically, the report found that EU states had not fulfilled their obligations towards vulnerable persons and minors as some of them failed to transpose the provisions concerning these individuals.<sup>21</sup> The different blind spots found by the report were in the origin of the adoption of the recast directive in 2011. The amended directive expands on the notion of vulnerability to include victims of human trafficking and persons with mental disorders.<sup>22</sup>

### **2.2.2. Asylum Procedures Directive and its recast**

In order to establish common rules for asylum procedures, the Council adopted, in 2005, a Directive on minimum standards on procedures in the Member States for granting and withdrawing refugee status, to create a fair and efficient asylum procedure across the EU.<sup>23</sup> The Asylum Procedure Directive (APD) only proposed minimum standards on refugee status, thus leading to low standards, great complexity and wide derogation from its essential

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single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.”

<sup>19</sup> Qualification Directive 2004/83/EC, article 20 (4).

<sup>20</sup> Report from the Commission to the European Parliament and the Council on the application of the Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection, page. 11.

<sup>21</sup> *Idem*, pages 11-13.

<sup>22</sup> Directive 2011/95/EU, article 20 (3) reads as following: “When implementing this Chapter, Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.”

<sup>23</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

guarantees for Member States.<sup>24</sup> According to the EU legislators, the APD aimed at reducing disparities between national procedures and at safeguarding the quality of decision-making. In the first ADP, vulnerability is vaguely touched upon in article 13, which concerns personal interviews and states that vulnerable applicants have special needs and thus interviewers have to have a basic training on the issue.<sup>25</sup> The APD only highlights the special needs of unaccompanied minor asylum-seekers (UAM), pointing out that they are in a vulnerable position and adding that the best interests of the child should be a primary consideration.<sup>26</sup> The definition of unaccompanied minor is written down in chapter 1, Article 2 (h) as “*a person below the age of 18 who arrives in the territory of the Member States unaccompanied by an adult responsible for him/her whether by law or by custom, and for as long as he/she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he/she has entered the territory of the Member States.*” Furthermore, the same article also provides the definition of ‘representative’ meaning “*a person acting on behalf of an organization representing an unaccompanied minor as legal guardian, a person acting on behalf of a national organization which is responsible for the care and well-being of minors, or any other appropriate representation appointed to ensure his/her best interests.*”<sup>27</sup> The instrument introduces some guarantees to assure an effective communication between the representative and the UAM.<sup>28</sup> Moreover, the Directive states that the interview and the final decision shall be made by individuals with knowledge of the special needs of minors.<sup>29</sup> Finally, a medical examination is also mentioned as a legitimate source of age-determination with some procedural guarantees, like the need of providing information to the applicant of the asylum

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<sup>24</sup> Costello, C. & Hancox, E, “The Recast Asylum Procedures Directive 2013/32/EU : Caught between the stereotypes of the abusive asylum-seeker and the vulnerable refugee” in *Reforming the Common European Asylum System, The New European Refugee Law, Series Immigration and Asylum Law and Policy in Europe, Volume 39*, page 378.

<sup>25</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, article 13 (3)(a).

<sup>26</sup> *Idem*, Article 17 (6).

<sup>27</sup> *Idem*, Article 2 (i).

<sup>28</sup> *Idem*, Article 17 (1)(b).

<sup>29</sup> *Idem*, Article 17 (4)(b).



procedure process and getting the consent of the asylum-seeker.<sup>30</sup> In the first APD there were no further examples of vulnerable persons with special needs.

The Council issued a proposal for a recast of the APD in 2009.<sup>31</sup> Amongst the reasons why Member States felt the need to readjust the asylum procedure process was the proliferation of disparate procedural arrangements at national level and deficiencies regarding the level of procedural guarantees for asylum applicants. These deficiencies mainly resulted from the fact that the Directive allowed Member States a wide margin of discretion.<sup>32</sup>

The recast APD upgrades the provisions concerning vulnerable applicants, since it includes special procedural guarantees for their protection.<sup>33</sup> Furthermore, the list of reasons for applicants to need such guarantees is quite vast, including age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as consequence of traumas. According to the guidance in the recitals, Member States should identify these individuals and provide adequate support in the process of their application.<sup>34</sup> The APD sets the requirements for a personal interview establishing that the person conducting the interview shall be competent to take account of the circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability.<sup>35</sup> Article 24 sets down the obligations towards applicants in need of special procedural guarantees and, Article 25 the guarantees for unaccompanied minors.

The APD allows for the prioritization of an examination under two situations: 1) where the application is likely to be well-founded and 2) if the applicant is vulnerable or in need of

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<sup>30</sup>*Idem*, Article 17 (5)(a)(b).

<sup>31</sup> Proposal for a directive of the European Parliament and of the council on minimum standards on procedures in Member States for granting and withdrawing international protection (2009).

<sup>32</sup> *Idem*, page 2.

<sup>33</sup> Directive 2013/32/EU, article 24 sets the provisions for applicants in need of special procedural guarantees.

<sup>34</sup> Directive 2013/32/EU, recital 29.

<sup>35</sup> Article 15 3 (a) Directive 2013/32/EU.

special procedures guarantees, within the meaning of Article 22 of Directive 2013/33/EU<sup>36</sup>, in particular unaccompanied minors.<sup>37</sup> In this context, prioritization means that these individuals are entitled to have an earlier start of their examination.

The APD recast has been applied since July 2015. The changes introduced seemed necessary to enhance a higher standard of harmonization in the EU. Although the final goal was to come up with a ‘common asylum procedure’, the procedural standards remain flexible enough to accommodate the specificities of each member state.<sup>38</sup> However, the EU continues to strive for full harmonization of all legislative instruments of the asylum acquis to ensure a fair and effective common procedure in all Member States. In 2016, the European Parliament and the Council issued a proposal for the establishment of a regulation that would repeal the current APD recast. In this proposal, there is a clear will to make procedures shorter and clearer by giving Member States the possibility to prioritize and examine quickly any application; and to strengthen procedural guarantees for vulnerable applicants and unaccompanied minors by introducing more detailed rules on assessing, documenting and addressing the applicants’ special procedural needs.<sup>39</sup>

### **2.2.3. Reception Conditions Directive and its recast**

The Council Directive 2003/9/EC of 27 January 2003, also known as Reception Conditions Directive (RCD), was also among the first instruments of the CEAS and laid down the standards for the reception of asylum seekers within Member States while the applicants

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<sup>36</sup>Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international Protection.

<sup>37</sup>Directive 2013/32/EU - Article 31 (7)(a) (b).

<sup>38</sup>Boeles, P. et al. (2014) European Migration Law, Intersentia. 2nd edition, pp. 275-276.

<sup>39</sup>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/EU page 4.

await an official decision on their application. This first Directive was dotted with the same list of vulnerable persons to be found in the first QD.<sup>40</sup>

In 2007, the European Commission issued a green paper highlighting several insufficiencies in the procedures of definition and identification concerning particularly vulnerable asylum-seekers. The Commission also concluded that addressing the needs of vulnerable persons constituted one of the main deficiencies in the application of the 2003 Directive.<sup>41</sup>

As part of the second phase, the first instrument was replaced with Directive 2013/33/EU. This new instrument was meant to be more suitable to address the needs of vulnerable asylum applicants. It entered into force in 2015 and its legal basis is article 78 (2)(f) TFEU. First of all, the recast RCD provides for a list of applicants whose specific situations deem them as vulnerable persons, in line with the QD.<sup>42</sup> Another significant improvement in the recast RCD is the obligation for Member States to individually assess the needs of vulnerable people, not only at the moment of lodging the application, but at any given time throughout the procedure. To assure effectiveness, the recast RCD stipulates that the asylum procedure must include a preliminary identification of the applicant to determine if the individual has special reception needs.<sup>43</sup> It was also established that vulnerable asylum seekers must have access to psychological care.<sup>44</sup> Furthermore, gender and age-specific concerns shall be a matter of focus for the authorities. Member States are required to take appropriate

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<sup>40</sup>Council Directive 2003/9/EC of 27 January 2003, article 17 reads as following: “1. Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, in the national legislation implementing the provisions of Chapter II relating to material reception conditions and health care.”

<sup>41</sup> Green Paper on the future Common European Asylum System, p. 7.

<sup>42</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, article 21 reads as following: “Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national law implementing this Directive.”

<sup>43</sup> Directive 2013/33/EU, article 22.

<sup>44</sup> *Idem*, article 19 (2).

measures to prevent assault and gender-based violence in the reception facilities.<sup>45</sup> In line with respecting and protecting the rights of minors, family unity was also indicated as reason for protection.<sup>46</sup> The recast RCD contains provisions to restrict the detention of vulnerable people. If still, vulnerable applicants find themselves in detention, Member States are required to take specific measures to protect and address their special needs and to regularly monitor and provide adequate support, in consideration of the particular situation of these individuals, specially their health.<sup>47</sup> Concerning the detention of minors, this shall only occur as a measure of last resort and after having established that less coercive measures cannot be effectively applied.<sup>48</sup> This requirement is in line with article 37 of the Convention on the Rights of the Child (CRC).<sup>49</sup>

#### **2.2.4. Dublin II Regulation and its recast**

The current Dublin III Regulation (Regulation 604/2013) sets down the criteria and mechanisms for determining the Member States responsible for examining an asylum system application lodged by a third-country national or a stateless person.<sup>50</sup> It follows the footsteps of the Dublin Convention (1990), which was replaced by Dublin II Regulation (Council Regulation (EC) No. 343/2003). The system of distributing asylum seekers in all Member States set by the Dublin III Regulation and its predecessors is a very special trait of the EU

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<sup>45</sup> *Idem*, article 18 (3) & (4).

<sup>46</sup> *Idem*, article 23 (2) (b).

<sup>47</sup> *Idem*, article 11 (1).

<sup>48</sup> *Idem*, Article 11 (2).

<sup>49</sup> Article 37 CRC reads as following: “States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age; (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances; (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.”

<sup>50</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless persons (recast), article 1.

asylum law and, by being a Regulation, it is a legal document that does not require transposition into the national legal frameworks, providing for a full harmonization of the set of rules to be applied nationally. The legal basis for the Dublin Regulation is article 78 (2)(e) TFEU. It works on the basis of the mutual trust principle between Member States, meaning that there is a presumption that “all participating States [to the Dublin system] observe fundamental rights”.<sup>51</sup>

The current rules in the Dublin III Regulation comprise a series of criteria for allocating responsibility of examining asylum application amongst Member States. The criteria are based on three overarching principles of allocation: special guarantees for minors and families<sup>52</sup>; the Member State that has facilitated legal entry into the Union,<sup>53</sup> and the Member State where illegal entry into the Union was effectuated.<sup>54</sup> Although the Regulation does not explicitly use the term ‘vulnerable persons’, it does contain provisions concerning individuals who are deemed as needing special procedures, such as unaccompanied minors (UAMs). For instance, when assessing asylum applications of UAMs, the Dublin III Regulation requires Member States to investigate and find out if the underage applicants have family members lawfully residing in the territory of any Member State. If the UAM has indeed a family member or a sibling legally residing in the EU, then that MS becomes responsible for the asylum application process to facilitate family unity.<sup>55</sup>

On the other hand, the Dublin III Regulation also foresees situations in which the overarching criteria for allocation might be put aside in order to better respond to the needs of certain individuals. These provisions can be found under chapter IV, which include rules on dependent persons, and the discretionary clause. To begin with, the Regulation provides special guarantees for applicants who are dependent on third persons based on different accounts, such

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<sup>51</sup> Rizcallah C., (2017) “The Dublin system: the ECJ Squares the Circle Between Mutual Trust and Human Rights Protection” <http://eulawanalysis.blogspot.com/2017/02/the-dublin-system-ecj-squares-circle.html> [Accessed 11th March 2019].

<sup>52</sup> Regulation (EU) No 604/2013, articles 8 to 11.

<sup>53</sup> *Idem*, articles 12 and 14.

<sup>54</sup> *Idem*, article 13.

<sup>55</sup> *Idem*, article 8 (1) 3.

as pregnancy, new-born child, serious illness, severe disability or old age, on the assistance of a child, sibling or parent that is legally residing in one Member State (or the other way around: if the child, sibling or parent are dependent on the .applicant). In all these cases, the Member State shall normally keep or bring together these family members when processing asylum applications.<sup>56</sup>

Furthermore, in the process of transfers of asylum seekers in between Member States, the transferring Member State shall, as much as possible, transmit to the receiving MS information on any special needs of the person to be transferred, including information on that person's physical or mental health. The information, transmitted on the sole purpose of medical care or treatment towards disabled persons, elderly people, pregnant women, minors and persons subjected to torture, rape or other forms of violence, shall be contained in a health certificate. Moreover, once a person has been identified as vulnerable, the responsible Member State shall ensure that those special needs are adequately addressed.<sup>57</sup>

## **Conclusion**

After conducting an analysis on the different instruments in the asylum acquis, it is possible to conclude that the amendments brought further harmonization in the provisions related to vulnerable persons. The factors amounting to the category of vulnerable persons have expanded from the first to the second phase of the CEAS. Overall, the key instrument mentioned throughout the different texts to assess the vulnerability of asylum seekers is the personal interview conducted by professionals who shall have the capacity to understand the special needs of vulnerable applicants. In addition, the provisions also allow for medical

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<sup>56</sup>*Idem*, article 16 (1).

<sup>57</sup>*Idem*, article 32.

examinations to determine the age of applicants and therefore, establish if the applicants are to be considered vulnerable for being under-age. As for the reception conditions, legislation imposes both individual assessments to identify the needs of vulnerable persons and a preliminary identification to determine if these needs request special reception conditions. Regarding the application process, vulnerable individuals are granted special procedure guarantees. All persons deemed vulnerable can have their examination prioritized and are entitled to psychological help. Given their particular situation they shall also be the object of regular monitoring and support. Other guarantees arise for certain individuals like minors, such as the appointment of a representative as legal guardian if they arrive to the EU territory unaccompanied, and the respect for family unity when assessing asylum applications. In the context of Dublin transfers, the dependency or vulnerability of an individual might require the established criteria to be set aside. Under these circumstances, the responsibility to conduct the asylum application might fall upon a Member State, where the vulnerability of the individual will be better tackled, mainly in reasons of family support.

### **Chapter III – The EU system of protection of fundamental rights**

Following the analysis of EU secondary legislation on international protection and the specific provisions related to vulnerable persons, this chapter focus on the instrument of EU primary law, the EU Charter of Fundamental Rights, containing one of the elements that constitute the legal basis of the EU common asylum policy, article 18.<sup>58</sup> This article lays down the EU version of the right to asylum. Furthermore, the field of international protection in the EU consists of a multi-layered system composed of primary and secondary legislation, which application is monitored by the judicial body of the EU, the Court of Justice of the European Union (hereinafter CJEU). This chapter aims to explain how article 18 has been defined and analyse how the CJEU can contribute to the development of positive asylum law, especially in relation to vulnerability. This reflection will help to answer the following question “*How has the EU incorporated the right to seek asylum into its own system of protection of fundamental rights?*”

#### **3.1 The Charter of Fundamental Rights and the right to asylum**

The entering into force of the Treaty of Lisbon<sup>59</sup> marked a breakthrough in the EU’s approach to human rights as it established the Charter as the primary binding source on rights, freedoms and principles for all situations within the scope of application of EU law in the Member States.<sup>60</sup> As Velluti argues, with the entry into force of the Treaty of Lisbon, the entitlement to rights no longer depends on national constitutional settlements or on international human rights treaties.<sup>61</sup> This major change is expressed in article 6(1) TEU

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<sup>58</sup> The other provisions of primary law that lay the legal basis for the MS to develop a common european asylum system are articles 67(2), 78 and 80 of the TFEU.

<sup>59</sup> The Treaty of Lisbon (Treaty on European Union) was signed by the EU member states on 13 December 2007 and entered into force on 1 December 2009.

<sup>60</sup> Treaty of Lisbon (Treaty on European Union), article 51(1).

<sup>61</sup> Velluti, S., & Ippolito, F., (2014) The relationship between the ECJ and the ECtHR: the case of asylum, p. 158



declaring that the Charter shall have the same legal value as the Treaties.<sup>62</sup> Compliance with the Charter is a requirement for the legality and validity of the Union's secondary legislation, including all legal instruments in the field of asylum.

The Charter contains a very broad spectrum of rights: civil, political, economic, social rights, as well as the rights attached to European citizenship. It seeks to reaffirm existing fundamental rights as they result, in particular, from a plurality of external sources, including international obligations common to the Member States.<sup>63</sup> Briefly explained, whenever a situation falls in the scope of application of Union law, the provisions of the Charter are applicable and must be abided by the Member states and by the EU institutions. The Charter also sets the terms of the relation with the European Convention of Human Rights (hereinafter Convention or ECHR) to which all EU Member States are state parties.<sup>64</sup> The Charter establishes that the meaning and scope of its provisions, when correspondent to rights guaranteed by the ECHR shall be equivalent to those provided by the latter.<sup>65</sup> Yet, Union law can offer more extensive protection.<sup>66</sup> Furthermore, the text of the preamble of the Charter states that "the Charter reaffirms [...] the rights as they result in particular, from [...] the case-law of the Court of Justice of the European Union and of the European Court of Human Rights."

The right to asylum is enshrined in article 18 of the Charter. This article reads as following: "*The right to asylum shall be guaranteed with due respect for the rules of the Geneva*

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<sup>62</sup> Treaty of Lisbon (Treaty on European Union), article 6 (1) reads as following: "The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union 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."

<sup>63</sup> Such as those in the European Convention on Human Rights (ECHR), the Social Charters adopted by the European Community and by the Council of Europe and the case law of the European Court of Human Rights (ECtHR).

<sup>64</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was opened for signature in Rome on 4 November 1950 and came into force in 1953.

<sup>65</sup> Hemme Battjes (2006) in *European Asylum Law & International Law*, p. 109.

In the EU Charter of Fundamental Rights this provision is in article 52 (3) which reads as following: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

<sup>66</sup> Treaty of Lisbon (Treaty on European Union), article 53 (3).

*Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union.”*

As Nicolosi points out, this provision has a constitutional relevance within the CEAS. In support of this argument lies the fact that the Preamble to all relevant legislative instrument recalls a clear purpose: to give effect to the right to asylum.<sup>67</sup>

The interpretation and the scope of application of article 18 CFR are far from being consensual amongst scholars and theorists. First of all, a major particularity of this article is that it lacks an explicit subject. In terms of the guarantees provided for in the article, there is not an obligation to grant asylum to TCNs. Hemme Battjes defends that there ought to be a distinction between the refugee's claim to asylum, recognized by the Charter and the obligation of Member States to grant asylum, which the Charter does not impose.<sup>68</sup> Still in the realm of the guarantees provided by article 18 CFR, Gil-Bazo argues that it is not clear whom this obligation falls upon nor who is entitled to it. Therefore, the author reflects on the question as to whether it is a right of States to grant asylum or a right of individuals to have recognized the right to be granted asylum.<sup>69</sup> Upon observation of international law, the right of States to grant asylum is a well-established principle. However, the right of individuals to be granted asylum is only enshrined in international treaties of regional scope.<sup>70</sup> To accommodate both possibilities of analysis, Nicolosi considers that asylum ought to be seen as a twofold concept: the prerogative of a State to grant asylum and the right of an individual to seek and be granted asylum, respectively. This debate allows to draw a comparison between the regional concepts

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<sup>67</sup> Nicolosi, S., (2017) in “Going Unnoticed? Diagnosing the Right to Asylum in the Charter of Fundamental Rights of the European Union”, p. 97.

<sup>68</sup> Hemme Battjes (2006) in *European Asylum Law & International Law*, p. 113.

<sup>69</sup> Gil-Bazo, M.T., (2008) “The Charter of Fundamental Rights of the EU and the right to be granted asylum in the Union's law”, p. 37.

<sup>70</sup> The American Convention on Human Rights recognizes “the right to seek and be granted asylum”, article 22 (7).

The African Charter on Human and People's Rights refers to the right of every individual “to seek and obtain asylum”, article 12(3).

of the right to asylum and to conclude that the complexity of interpretation also mirrors the difficulty to find consensus when drafting provisions of secondary law related to international protection in the EU. I consider that, the right to asylum can be understood as the right to have the refugee status determined in the EU. Member States are expected to implement the CEAS, including the provisions concerning vulnerable persons, while taking into account Article 18 CFR, as the right to asylum is meant to guide the interpretation of EU secondary legislation.

### **3.2 The Court of Justice of the European Union as the guardian of the Charter**

This sub-section will analyse how the judicial body of the EU relates to the national judicial systems and how it plays a prominent role in assuring that MS interpret and implement EU secondary legislation while respecting the provisions of the Charter.

The Court of Justice of the European Union is the judicial body of the EU. It interprets EU laws - including the provisions of the Charter and the Directives of the CEAS - and ensures that EU legislation is applied in the same way across Member States.<sup>71</sup> In order to guarantee a uniform interpretation and application of EU law, the Court has created legal principles, such as the principle of direct effect enabling individuals to immediately invoke a European provision before a national court. When certain conditions are met, this principle can apply in relation to treaty provisions, regulations, decisions and directives.<sup>72</sup> Another principle that the CJEU uses to secure this uniformization in all Member States, is the principle of primacy of EU law. This principle is crucial to resolve possible matters of conflict between national and

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<sup>71</sup> Treaty of Lisbon (Treaty on European Union), article 19 reads as following: “The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialized courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.”

<sup>72</sup> The term ‘direct effect’ was first used by the Court of Justice of the European Union (CJEU) in a judgement on 5 February 1963 when it attributed, to specific treaty articles, the legal quality of direct effect in the case of *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* (Case 26/62 ECLI:EU:C:1963:1). In this judgement, the Court stated that European law not only engenders obligations for EU countries, but also rights for individuals who may therefore take advantage of these rights and directly invoke European acts before national and European courts. However, it laid down the conditions that the obligations must be precise, clear and unconditional and that they do not call for additional measures, either national or European. Information taken from “The direct effect of European Law” [Online] available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A114547> [Accessed 19<sup>th</sup> March 2019].

European legislation as it guarantees priority of European law over national laws. It is not inscribed in the Treaties but has been enshrined by the CJEU.<sup>73</sup>

The CJEU has the role to clarify interpretations of EU law and provide national authorities with guidance in the implementation of norms and rights stemming from the European legal order. The preliminary ruling procedure<sup>74</sup> has proved to be the most effective instrument to elucidate Member States on unclear provisions of EU law, including those in the field of asylum. Through this mechanism, national courts can refer questions to the Court on interpretation of EU law. The main positive aspect of the CJEU's preliminary rulings is that it has the potential to contribute significantly to the harmonization of the implementation of EU legislation at a national level and guarantee that Member States respect the international legal obligations which constitute the cornerstone of the European asylum policy.

The intervention of the CJEU in the area of protection of fundamental rights has been considered as remarkable and far-reaching.<sup>75</sup> It was in the beginning of the 1970s that the Court referred specifically to human rights for the first time.<sup>76</sup> The most groundbreaking recognition of the CJEU's pioneering role in the protection of such rights came in with the Maastricht Treaty on the European Union under the current Article 6(2) TEU.<sup>77</sup> The inclusion of this provision was not only a matter of symbolic significance, but also clearly imposed a legal obligation upon the EU institutions and set the ground for Court's jurisprudence to become the basis of a whole corpus of rules on fundamental rights incorporated into primary EU law.<sup>78</sup>

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<sup>73</sup>Precedence of European Law [Online] available at <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=LEGISSUM:l14548> [Accessed 19<sup>th</sup> March 2019].

<sup>74</sup> Treaty of Lisbon (Treaty on European Union), article 19 (3)(b) reads as following: "The Court of Justice of the European Union shall, in accordance with the Treaties: (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;"

<sup>75</sup>Tizzano, A., (2009) in "The Role of the ECJ in the Protection of Fundamental Rights", in Arnall, A., Eeckhout, P., Tridimas, T., (ed.), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs*, Oxford Scholarship Online, pag. 130.

<sup>76</sup>Case 11/70, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114.

<sup>77</sup>Treaty of Lisbon (Treaty on European Union), article 6(2) reads as following: "[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law".

<sup>78</sup>Tizzano, A., in "The Role of the ECJ in the Protection of Fundamental Rights", in Arnall, A., Eeckhout, P., Tridimas, T., (ed.), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs*, Oxford Scholarship Online p. 131.

The number of preliminary rulings issued by the CJEU concerning provisions of the CEAS has increased in recent years. Until 2015, the CJEU had issued over twenty judgments on provisions of the EU asylum acquis.<sup>79</sup> According to Peers, the enhanced legal effect of the Charter and its subsequent immediate pre-eminence in the relevant case law of the CJEU will make it a key role player in the development of EU immigration and asylum law.<sup>80</sup> It is also important to stress that article 18 CFR is always analyzed in conjunction with other articles, such as article 4 CFR and 7 CFR.<sup>81</sup>

Before conducting the in-depth analysis on case-law of the CJEU concerning vulnerable asylum seekers, I believe it is pertinent to reflect on the central role that the Court has in interpreting the CEAS in general. To do so, I have chosen to first look into the Saciri case.<sup>82</sup> In this case, the Saciri family sought asylum in Belgium in 2010. At the time, the agency responsible for providing reception to asylum seekers could not provide the family, including adults and children, with accommodation. Unable to find private housing, the family sought financial aid from another agency. This request was refused because they were not staying in state reception facilities, despite this being unavailable. The initial reception agency was ordered by a judicial authority to provide financial assistance to the family. On appeal against this order, the Brussels Higher Labour Court resorted to the CJEU and requested clarification on the state's obligations under the RCD to provide a financial allowance to asylum seekers.<sup>83</sup> Even though, the circumstances of this family do not amount to any of the categories of vulnerable persons as enshrined in the secondary legislation discussed in chapter II, there are

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<sup>79</sup>Until May 2015, the Court at issued 24 judgments in total: 1 judgment in 2008; 2 judgments in 2009; 3 in 2010; 3 in 2011; 6 in 2012; 7 in 2013; and 5. Data found in Bank, R. The potential and limitations of the court of justice of the European union in shaping international refugee law, page 222.

<sup>80</sup> Peers, S, (2012) in Immigration, Asylum and the European Union Charter of Fundamental Rights in Immigration and asylum policy in Europe - The first decade of EU migration and asylum law, p. 437

<sup>81</sup> Charter of Fundamental Rights of the EU, article 4 reads as following: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Charter of Fundamental Rights of the EU, article 7 reads as following: "Everyone has the right to respect for his or her private and family life, home and communications."

<sup>82</sup> Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and Others (Case C-79/13) ECLI:EU:C:2014:103.

<sup>83</sup> Council Directive 2003/9/EC (RCD), article 13(5) reads as following: "Material reception conditions may be provided in kind, or in the form of financial allowances or vouchers or in a combination of these provisions."

still elements of vulnerability such as the existence of minors and the possibility of the family being separated due to the inability of the MS to provide for accommodation, thus undermining the principle of family unity. The CJEU considered that if a Member State chooses to provide material reception to asylum seekers in the form of a financial allowance instead of direct public services, the allowance must be enough to ensure a dignified standard of living and enable the asylum seekers to find housing in the private market, if necessary.<sup>84</sup> Moreover, the judges declared that the financial allowance must be sufficient to guarantee that the minor children of asylum seekers are housed with their parents, thus fulfilling the principles of the best interest of the child and that of family unity.<sup>85</sup> In doing so, the judges ruled that denying asylum seekers the basic material conditions to assure their survival could impede the effectiveness of the right to asylum, even in the light of unavailability of state-run facilities.<sup>86</sup>

The line of reasoning followed by the judges in this case sheds a light in the CJEU's approach to the right to asylum. The judges seem to put an emphasis on the effectiveness of the right to asylum. This implies respecting the provisions contained in the RCD and recognizing that this family would become much more vulnerable if the MS did not guarantee enough financial support to secure housing and family unity.

## **Conclusion**

The Charter of Fundamental Rights of the EU represents the primary legal source for the protection of fundamental rights across all MS. The right to asylum present in article 18

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<sup>84</sup> Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and Others (Case C-79/13) ECLI:EU:C:2014:103, paragraph 42.

<sup>85</sup> *Idem*, paragraph 41.

<sup>86</sup> Ippolito, S. (2015) in "Migration and Asylum Cases before the Court of Justice of the European Union: Putting the EU Charter of Fundamental Rights to Test?" European Journal of Migration and Law 17 (2015) pp. 1-38, p. 22.

In the CJEU judgement this obligation to comply with the minimum standards set in the RCD can be found in paragraph 50 which reads as following: "In that regard, it must be pointed out that it is for the Member States to ensure that those bodies meet the minimum standards for the reception of asylum seekers, saturation of the reception networks not being a justification for any derogation from meeting those standards."

CFR is one of the tools used to guide the interpretation of secondary law in the field of asylum in the EU. As it has been mentioned, Member States are required to comply with the articles of the Charter when implementing EU law at the national level, including the CEAS. This unique common asylum system represents the EU reinterpretation of the Geneva Convention and its Protocol, while adding an unparalleled scheme of allocation of asylum seekers through the Dublin III Regulation. Given the multi-layered system of international protection, there is a constant interaction between primary and secondary legislation, making it vital that the application of regulations and directives by EU Member States respects the fundamental rights enshrined in the Charter.

The Court has a variety of tools to enforce the uniformization of implementation of EU law. Moreover, the resort to the mechanism of preliminary rulings has enlightened MS on how to interpret the different provisions in the CEAS and the CJEU has contributed to the development of positive EU asylum law. On the basis thereof, the next chapter will show in-depth how the concept of vulnerability present in the CEAS has been transposed into practice through the several preliminary rulings issued by the judges.

## **Chapter IV – Vulnerable asylum seekers in the jurisprudence of the CJEU**

Following the analysis on the provisions of the CEAS that establish the special procedures and responsibilities MS must uphold when handling asylum applications of vulnerable asylum seekers and the explanation of how the CJEU contributes to the correct interpretation of these instruments in light with the CFR, this present chapter contains the main innovative contribution of this thesis: an in-depth analyses of the most important cases concerning vulnerable asylum seekers in the jurisprudence of the CJEU. For that reason, the following pages will also provide an answer to the research question of this thesis: *How is the CJEU growing jurisprudence about vulnerable asylum seekers impacting on the interpretation and implementation of the CEAS by Member States?*

First of all, it is relevant to assert that the CJEU has acknowledged a common standard level of vulnerability to asylum seekers as a group.<sup>87</sup> The CJEU has adopted a group-focused approach to vulnerability, much in line with the case law of the ECtHR. According to Peroni and Timmer, the use of the term vulnerability by the Strasbourg judges allows to address different aspects of equality in a more substantive manner.<sup>88</sup> Overall, these authors consider that the importance given to the concept of vulnerability is a positive development in the case law of the ECHR.<sup>89</sup> I will argue that the same inference can be concluded in relation to the CJEU. An analysis conducted by U. Brandl and P. Czech demonstrates that the two European Courts share a line of reasoning when judgements concern vulnerable asylum seekers. Moreover, both jurisprudences acknowledge different gradations of vulnerability within this group and the further existence of personal factors, as well as the affiliation to another

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<sup>87</sup> CJEU - Joined Cases C-411/10 and C-493/10, ECLI:EU:C:2011:865, paragraph 80.

<sup>88</sup> Substantive equality refers to equality of results through the elimination of practices and structures that maintain indirect discrimination.

<sup>89</sup> Peroni, L. & Timmer, A., (2013) in "Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law, I•CON (2013), Vol. 11 No. 4, 1056–1085, page 1057.



vulnerable group that may give rise to an increased vulnerability.<sup>90</sup> In order to support this position already present in literature, I will conduct a detailed analysis of the CJEU's case law on vulnerable asylum seekers following the categories of persons that make this sub-group listed in the different secondary legislation scrutinized in chapter II.<sup>91</sup>

#### **4.1 Family dependency: persons with mental disorders & victims of rape**

In February 2017, the Court rendered its decision following a preliminary ruling from the Supreme Court of Slovenia.<sup>92</sup> The latter asked whether the risk faced by an asylum seeker of being victim of inhuman and degrading treatment due to individual circumstances, shall prevent a transfer to the Member State responsible for examining the asylum claim pursuant to the Dublin III Regulation. The case involved two applicants (a couple), originally from Syria and Egypt, who entered EU territory by means of a visa validly issued by the Republic of Croatia, thus making this Member State responsible state to examine a possible asylum application.<sup>93</sup> Following a short-stay in Croatia, the couple fled to Slovenia using false Greek identification documents. There, they were accepted into a Slovenian reception centre for asylum seekers, having submitted an asylum application soon after with the national authorities. At the time of entry into Slovenia, the woman was pregnant; therefore, the responsible authorities delayed the transfer to Croatia until the child was born, in late 2015. The applicants claimed that their transfer would have negative consequences for the state of

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<sup>90</sup> Brandl, U., and Czech, P. (2015) in "General and Specific Vulnerability of Protection-Seekers in the EU: Is there an Adequate Response to their Needs?" in *Protecting vulnerable groups – The European Human Rights Framework* by Sofia Ippolito & Sara Iglesias Sánchez (ed) *Modern Studies in European Law*, pp. 247-270, p. 269.

<sup>91</sup> The cases analyzed have as applicants individuals who fall within one or more categories featured on Article 20 (3) of the Qualification Directive recast which reads as following: "When implementing this Chapter, Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence."

<sup>92</sup> CJEU - C-578/16 PPU, C.K. and others v Slovenia, ECLI :EU:C:2017:127.

<sup>93</sup> This provision can be found in the Dublin III Regulation, article 14 which reads as following: "If a third-country national or a stateless person enters into the territory of a Member State in which the need for him or her to have a visa is waived, that Member State shall be responsible for examining his or her application for international protection."

health of C.K. (the mother), also likely to affect the well-being of the new-born child. Furthermore, C.K. had had a high-risk pregnancy and suffered from psychiatric difficulties since giving birth and experienced suicidal tendencies, according to medical reports. Medical experts were also of the opinion that the mother's poor state of health was caused by the uncertainty regarding her status and the resulting stress. The illness suffered by C.K., according to the psychiatrist who evaluated her case, required that both mother and baby remained at the reception centre in Ljubljana to receive adequate care.<sup>94</sup>

Concerning the situation of reception of asylum seekers in Croatia, there was no reason to believe that mother and child would not be guaranteed the medical care needed. This was corroborated by a report issued by UNHCR proving that Croatia had accommodation centers designed specifically for vulnerable persons with free access to medical care and regular medical monitoring.<sup>95</sup> Furthermore, there were no substantial grounds to believe that Croatia was facing systemic flaws in the asylum procedure and in the reception conditions of asylum seekers that were likely to give rise to a risk of inhuman or degrading treatment within the meaning of Article 3(2) of the Dublin III Regulation.<sup>96</sup> Until this ruling, systemic flaws in national asylum systems as a whole were the considerate ground to halt transfers of asylum seekers, as stated in the MS & NE case.<sup>97</sup>

In this CK case, the Court considered that, even though, Croatia did not appear to have systemic deficiencies in its asylum application system and in reception centers, the referring Member State was required to suspend the transfer due to the applicant's poor medical condition, which presented a serious risk of irremediable further deterioration of her health. The suspension should prevail for such a time as the state of health renders the person unfit for

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<sup>94</sup> CJEU - C-578/16 PPU, C.K. and others v Slovenia, ECLI:EU:C:2017:127, paragraph 37.

<sup>95</sup> *Idem*, paragraph 39.

<sup>96</sup> *Idem*, paragraph 40.

<sup>97</sup> Joined cases C-411/10 and C-493/10, ECLI:EU:C:2011:611, paragraph 106.

the transfer.<sup>98</sup> The transfer could, indeed, amount to inhumane and degrading treatment in accordance with article 4 CFR. The CJEU stressed the different responsibilities of the requesting Member States when envisaging the transfer of vulnerable asylum seekers, such as the national authorities guaranteeing that the individual is accompanied during transportation;<sup>99</sup> also, under such circumstances, the requesting Member State shall inform the responsible Member State of the delay of the transfer due to deterring health conditions of the asylum seeker; and if in a similar situation, the requesting Member State would opt to carry out the transfer, the resulting inhuman and degrading treatment would fall solely on its authorities.<sup>100</sup>

The CJEU took a valuable step in favor of vulnerable asylum-seekers' fundamental rights protection by deciding that it is not only in case of systemic flaws in the asylum system of a responsible Member State that a transfer may be halted. Specially, in circumstances in which the transfer of an asylum seeker with serious mental or physical illness would result in a real and proven risk of a significant permanent deterioration in the state of health of the person concerned, then that transfer in itself would amount to inhuman and degrading treatment incompatible with Article 4 CFR.<sup>101</sup>

Similarly, in the *K v Bundesasylamt*<sup>102</sup>, the Court also decided to prioritize the situation of vulnerability before the criteria established to assert the Member State responsible to examine asylum applications. This case concerned a TCN woman who entered Poland irregularly and lodged an asylum application. However, before the Polish authorities could reach a decision, the applicant made her way into Austria illegally, where her adult sons had already obtained refugee status alongside their spouses and children. The applicant lodged a

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<sup>98</sup> CJEU – C-578/16 PPU, C.K. and other, paragraph 85.

<sup>99</sup> *Idem*, paragraph 81.

<sup>100</sup> *Idem*, paragraph 87.

<sup>101</sup> *Idem*, paragraph 96.

<sup>102</sup> CJEU - C-245/11 *K v Bundesasylamt*, ECLI:EU:C:2012:685.

second asylum application in Austria hoping to be allowed to join her family. The Austrian authorities refused to examine the claim and sent a take charge request to the Polish authorities, who promptly accepted to examine the application once the applicant was transferred back. The applicant lodged an appeal against the refusal of protection. This appeal was based on the following facts – there was a relationship of dependence between her and her daughter-in-law, who due to a combination of circumstances was an extremely vulnerable person. The daughter-in-law had been raped during the civil war in Chechnya and, as a result, became infected with HIV. In the aftermath of that incident, she sought to take her own life on several occasions but was convinced not to by the applicant. The applicant was the only person in the family who was aware of the rape, and soon after arriving in Austria, she became her daughter-in-law's closest adviser and provider of emotional support and counseling. This support was not only on the basis of the family relationship but also because, the applicant had acquired professional experience as a teacher and child psychologist, in her country of origin. The applicant's son was aware of his wife being infected with HIV; but he was convinced it was the result of dental treatment carried out under unhygienic conditions. Furthermore, the daughter-in-law was at risk of serious violence or even death at the hands of the male members of the family, aiming to restore the honor of their name, if they found out she had been raped. Moreover, the daughter-in-law suffered from a severe form of post-traumatic stress disorder (PTSD) and was under permanent psychiatric and psychological supervision. In addition, as a result of several strokes, she developed severe kidney problems and had become paralyzed. Due to her multiple health problems, she was deemed unfit to manage her household. Given these facts, the Austrian child protection authorities had initiated a process for the children to be placed under official care. The procedures were temporarily halted once the applicant arrived in Austria and

moved in with her son and daughter-in-law, because she took principal responsibility for the minor children's care, including a new-born.<sup>103</sup>

Since this was a matter concerning a Dublin transfer to the Member State responsible for the applicant's asylum claim, the Austrian Asylgerichtshof requested the interpretation of the humanitarian and sovereignty clause of the Dublin II Regulation to the CJEU.<sup>104</sup> The national authorities wished to know if the humanitarian clause<sup>105</sup> should be interpreted as meaning that a Member State who was originally not responsible for an asylum application becomes responsible in the case when the asylum applicant has a daughter-in-law who is seriously ill and at risk on account of cultural factors. The second question was whether the sovereignty clause<sup>106</sup> should be interpreted as meaning that in a situation such as in this case, the Member State originally not responsible becomes responsible if the responsibility otherwise provided for by the Dublin Regulation would infringe articles 3 or 8 of the ECHR, respectively articles 4 and 7 CFR.<sup>107</sup>

Several reflections arose from these requests. First of all, the Court addressed the argument of 'dependency'. The judges found that article 15 (2) applies to both situations where the asylum seeker was dependent on a relative residing in a Member State, as well as to situations where the person dependent on the asylum seeker enjoyed refugee status.<sup>108</sup> This

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<sup>103</sup> Opinion of Advocate General Trstenjak delivered on 27 June 2012, case C-245/11, paras. 9-13.

<sup>105</sup> Dublin II Regulation, article 15 (1), also known as humanitarian clause, reads as following: "Any Member State, even where it is not responsible under the criteria set out in this Regulation, may bring together family members, as well as other dependent relatives, on humanitarian grounds based in particular on family or cultural considerations. In this case that Member State shall, at the request of another Member State, examine the application for asylum of the person concerned. The persons concerned must consent."

<sup>106</sup> Dublin II Regulation, article 3(2), also known as sovereignty clause, reads as following: "By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant."

<sup>107</sup> ECHR, article 3 reads as following: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."  
ECHR, article 8 reads as following: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

<sup>108</sup> CJEU, C- 245/11, ECLI:EU:C:2012:685, paragraph 33.

interpretation is in line with the goal of article 15 (2) – for all States to bring families together where necessary on humanitarian grounds.<sup>109</sup>

On the other hand, the judges also clarified the meaning of terms such as ‘family’ and ‘family members’. According to article 2(i) of the 2003 Dublin II Regulation, family members was a term confined to spouses or long-term partners, dependent minor children and parents if the asylum seeker was a minor child.<sup>110</sup> The judges considered that, for the purposes of article 15, the notion of ‘family’ must have a wider meaning than the definition abovementioned. The CJEU adopted a teleological reading of the provision and concluded that, even though neither the daughter-in-law nor the grandchildren fell within the category of ‘family members’, these relatives were covered under the term ‘another relative’ also implied in article 15(2).<sup>111</sup>

In sum, the Court considered that the conditions stated in article 15(2) were satisfied. The Member State “[...] is obliged to take charge of the asylum seeker, becoming the Member State responsible for the examination of the application for asylum.” Furthermore, in terms of the scope of discretion of article 15 (2), the Court stated that the term ‘normally keep’ entailed an obligation: “a Member State may derogate from that obligation to keep persons concerned together only if such a derogation is justified because an exceptional situation has arisen”<sup>112</sup> Moreover, the judges considered that, in the Dublin II Regulation, the humanitarian clause is a *lex specialis* that takes precedence over general rules established in Chapter III of the Regulation.<sup>113</sup>

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<sup>109</sup> Dublin II Regulation, article 15 (2) reads as following: “In case in which the person concerned is dependent on the assistance of the other on account of pregnancy of a new born child, serious illness, severe handicap or old age, Member States shall normally keep or bring together the asylum seeker with another relative present in the territory of one of the Member States, provided that family ties existed in the country of origin.”

In the latest version, Dublin III Regulation, article 16 (1) reads as following: “Where, on account of pregnancy, a new-born child, serious illness, severe disability or old age, an applicant is dependent on the assistance of his or her child, sibling or parent legally resident in one of the Member States, or his or her child, sibling or parent legally resident in one of the Member States is dependent on the assistance of the applicant, Member States shall normally keep or bring together the applicant with that child, sibling or parent, provided that family ties existed in the country of origin, that the child, sibling or parent or the applicant is able to take care of the dependent person and that the persons concerned expressed their desire in writing.”

<sup>110</sup> This definition remains unaltered for the purpose of analysis in Dublin Regulation III (2013) under article 2 (g).

<sup>111</sup> CJEU, C 245/11, ECLI:EU:C:2012:685, paragraph 38.

<sup>112</sup> *Idem*, paragraph 46.

In the latest version, Dublin III Regulation, the humanitarian clause can be found in article 17 (2) and it reads as following: “The Member State in which an application for international protection is made and which is carrying out the process of determining the Member State responsible, or the Member State responsible, may, at any time before a first decision regarding the substance is taken, request another Member State to take charge of an applicant in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations, even where that other Member State is not responsible under the criteria laid down in Articles 8 to 11 and 16. The persons concerned must express their consent in writing.”

<sup>113</sup> CJEU, C 245/11, ECLI:EU:C:2012:685, paras 22-23.

## **4.2 Disabled people based on serious illness**

In 2014, the CJEU interpreted the Return Directive<sup>114</sup> in a case concerning a Nigerian citizen diagnosed with AIDS, against whom the Belgian authorities issued a return decision, meaning he would have to leave EU territory following a period of illegal stay. The judges considered that due to his health vulnerability, sending him back to his country of origin could amount to degrading treatment and infringe the principle of *non-refoulement*.<sup>115</sup> The applicant, Mr. Abdida was receiving social assistance from CPAS since 2009, in line with national legislation, on the basis that he was suffering from a particularly serious illness.<sup>116</sup> Nonetheless, in 2011, Mr Abdida's application for leave to reside was rejected on the ground that his country of origin had adequate medical infrastructure to care for persons suffering from his illness and he was later notified to leave the country. As a consequence, his social assistance benefits were equally withdrawn. Furthermore, the applicant was not granted with remedy having suspensive effect when appealing against the decision. The Higher Labor Court in Brussels referred the case to the CJEU. The two questions presented aimed to clarify whether Member States had the responsibility to provide for a remedy with suspensive effect in respect of that decision and

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<sup>114</sup> The Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third country nationals is part of the European asylum acquis. The standards and procedures on returns must be in accordance with fundamental rights as principles of Union Law as well as international law, including refugee protection and human rights obligations (article 1).

<sup>115</sup> The principle of non-refoulement is part of customary international law and can be found in the article 33 of the 1951 Geneva Convention. This principle prohibits the expulsion, deportation, return or extradition of an alien to his state of origin or another state where there is a risk that his life or freedom would be threatened for discriminatory reasons. It has been enshrined in article 19 CFR which reads as following: "1. Collective expulsions are prohibited. 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

<sup>116</sup> The Centres Publics d'Action Sociale (public social services centres, CPAS) are tasked with guaranteeing dignified living conditions for all. According to Article 9b of the Law of 15 December 1980 on entry to Belgian territory, residence, establishment and removal of foreign nationals, in the version applicable at the material time ('the Law of 15 December 1980'), provides in paragraph 1 thereof as follows: 'A foreign national residing in Belgium who can prove his identity in accordance with paragraph 2 and who suffers from an illness occasioning a real risk to his life or physical integrity or a real risk of inhuman or degrading treatment where there is no appropriate treatment in his country of origin or in the country in which he resides may apply to the Minister or his representative for leave to reside in the Kingdom of Belgium'.

whether Member States must make provision for the basic needs of the TCN to be met pending a ruling on his appeal against that decision.

The Court first clarified that, in line with its previous M'Bodj judgment<sup>117</sup>, an application under national legislation granting leave to remain due to serious illness and a lack of treatment in the country of origin was not covered as grounds for claiming international protection within the meaning of article 2(g) of the QD.<sup>118</sup> Notwithstanding, in this case the Court relies on several provisions of the Return Directive to assert the right to an effective remedy against a return decision and uphold the principle of *non-refoulement*. Regarding suspensive effect of an appeal against a return decision in itself and regardless of level of vulnerability, the Court cited articles 12 (1) and 13 (1) of the Return Directive stating that “*a third country national must be afforded an effective remedy to appeal against or seek review of a decision ordering his return.*”<sup>119</sup> However, the Court also resorts to the jurisprudence of the ECtHR to justify the importance of the principle of *non-refoulement* when it concerns the removal of an individual suffering from a serious illness to a country where appropriate treatment is not available.<sup>120</sup> The CJEU considered this previous judgment by the ECtHR to be in line with article 5 of the Return Directive.<sup>121</sup> The judges considered that in such case a removal could lead to serious and irreparable damage. For that reason, the CJEU concluded that a TCN should be able to avail himself, in such circumstances, of a remedy with suspensive effect, in order to assure that a return decision is not enforced before a competent authority has had the opportunity to examine an objection alleging infringement of *non-refoulement* in both the Return Directive and article 19 (2) of the Charter.<sup>122</sup> Therefore, the Court ruled that when

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<sup>117</sup> C-542/13 Mohamed M'Bodj v État belge, ECLI:EU:C:2014:2452.

<sup>118</sup> Qualification Directive Recast, article 2 (g) reads as following: “*‘subsidiary protection status’ means the recognition by a Member State of a third-country national or a stateless person as a person eligible for subsidiary protection.*”.

<sup>119</sup> C-562/13, ECLI:EU:C:2014:2453, paras 43-44.

<sup>120</sup> See ECtHR judgment of case N v UK, paragraph 33.

<sup>121</sup> Article 5 of the Return Directive reads as following: ‘When implementing this Directive, Member States shall take due account of: (a) the best interests of the child; (b) family life; (c) the state of health of the third-country national concerned, and respect the principle of *non-refoulement*.’.

<sup>122</sup> C-562/13, ECLI:EU:C:2014:2453, paragraph 50.



national legislation does not give suspensive effect to an appeal challenging a return decision, and when that decision entails the possibility of the individual to be faced with serious risk of grave and irreversible deterioration of his state of health, such legislation must be precluded, according to articles 19 (2) and 47 of the Charter.<sup>123</sup> Finally, regarding the health and social security benefits that Mr. Abdida lost over his appeal, the Court found basis to declare that the Member State is required to provide *“for the basic needs of a third country national suffering from a serious illness where such a person lacks the means to make such provision for himself”*. This obligation was based on article 14 (1)(b) of the Return Directive<sup>124</sup> and recital 12, which reads *“The situation of third-country nationals who are staying illegally but who cannot yet be removed should be addressed. Their basic conditions of subsistence should be defined according to national legislation.”*<sup>125</sup>

#### **4.3 Victims of torture & situation in the country of origin**

The case *MP v Secretary of State for the Home Department*<sup>126</sup> relating to the return of a vulnerable asylum seeker to his country of origin refers to a Sri Lankan national, who lodged an application for asylum and for subsidiary protection in the UK. The applicant claimed to have been detained and tortured by the Sri Lankan security forces in the past, because he had been a member of the *‘Liberation Tigers of Tamil Eelam’* (LTTE). MP argued that if he was returned to his country of origin, he would be at risk of further ill-treatment for the same reason. The UK immigration authorities rejected his application, because there was no convincing evidence that the applicant would be still of interest to the Sri Lankan authorities or that he was at risk of further ill-treatment upon his return. MP brought an action against that decision before

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<sup>123</sup> *Idem*, paragraph 53.

<sup>124</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, article 14 (1)(b) reads as following: “Member States shall, with the exception of the situation covered in Articles 16 and 17, ensure that the following principles are taken into account as far as possible in relation to third-country nationals during the period for voluntary departure granted in accordance with Article 7 and during periods for which removal has been postponed in accordance with Article 9: (b) emergency health care and essential treatment of illness are provided.”

<sup>125</sup> C-562/13, ECLI:EU:C:2014:2453, *parags 54-55*.

<sup>126</sup> Case C-353/16 *MP v Secretary of State for the Home Department*, ECLI:EU:C:2018:276.

the Upper Tribunal and presented medical evidence that he was suffering the after-effects of torture, such as severe PTSD and serious depression, marked suicidal tendencies, and he appeared to be particularly determined to kill himself if he had to return to Sri Lanka. The national court upheld the decision not to grant subsidiary protection but considered that there was indeed a breach of article 3 ECHR because, if returned to Sri Lanka, he would not receive appropriate care for his mental illness.<sup>127</sup> The Supreme Court of the UK asked the CJEU whether previous torture by the authorities of the country of origin that caused severe psychological after-effects which, upon return, could be substantially aggravated and lead to the applicant committing suicide, requires EU Member States to grant subsidiary protection status according to articles 2(e) and 15(b) of the QD.<sup>128</sup>

The Court started by referring to the aims of the subsidiary protection system. According to article 15(b) of the QD. It applies when TCN or stateless persons fear serious harm consisting a) of death penalty or execution; b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.' Following this provision, the judges concluded that the fact that a person has in the past been tortured by the national authorities in his country of origin, but who is no longer be at risk of such treatment is not enough to obtain subsidiary protection.<sup>129</sup> Nonetheless, the CJEU does acknowledge that there is more to the situation of the applicant, as even though there is no risk of him being tortured again, he continues to suffer psychological

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<sup>127</sup> The national court was provided with information showing that that there are only 25 practicing psychiatrists in the whole of the country and that, even though there are some specialized mental health facilities in Sri Lanka, according to an Operational Guidance Note from the United Kingdom Border Agency, the money that is spent on mental health in fact goes only to the large mental health institutions in major cities, which are inaccessible and do not provide appropriate care for mentally ill people.

<sup>128</sup> Council Directive 2004/83/EC, article 2 (e) reads as following: "‘person eligible for subsidiary protection’ means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;"

Council Directive 2004/83/EC, article 15 (b) on qualification for subsidiary protection, reads as following: "Serious harm consists of: torture or inhuman or degrading treatment or punishment of an applicant in the country of origin;"

<sup>129</sup> C-353/16, ECLI:EU:C:2018:276, paragraph 30.

effects, duly substantiated with medical evidence, as a result of the previous ill treatment. These after effects could amount to a serious risk of suicide.<sup>130</sup> Furthermore, the judges pointed out to the fact that the subsidiary protection system shall be interpreted and applied in line with the rights guaranteed by the Charter.<sup>131</sup> Therefore, the Court concluded that the Charter must be interpreted as meaning that the removal of a non-EU national with a particular serious mental or physical illness amounts to inhuman and degrading treatment, prohibited under article 4 CFR – where such a removal would entail a real and demonstrable risk of significant and permanent deterioration in the state of health of the person concerned.<sup>132</sup>

Although, the CJEU considered that it was for the Supreme Court of the UK to assess if this non-EU national would face a real risk of being intentionally deprived of health care, this preliminary ruling contributes to the enlargement of the scope of application and interpretation of subsidiary protection. This is so, because the ruling opens the way to include in the scope of subsidiary protection victims of torture or inhuman and degrading treatment who, upon return to their country of origin, are deprived of basic and necessary health care by the national authorities. Furthermore, the CJEU elaborates what could be seen as a non-exhaustive list of situations where the applicants are deprived of medical treatment. The list can be used as guidance in future cases concerning analogous cases and includes the following situations: “[...] *That will be the case, inter alia, if, in circumstances where, as in the main proceedings, a third country national is at risk of committing suicide because of the trauma resulting from the torture he was subjected to by the authorities of his country of origin, it is clear that those authorities, notwithstanding their obligation under Article 14 of the Convention against Torture, are not prepared to provide for his rehabilitation. There will also*

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<sup>130</sup> *Idem*, paragraph 35.

<sup>131</sup> *Idem*, paras 36-37.

<sup>132</sup> *Idem*, paras 41-44.

*be such a risk if it is apparent that the authorities of that country have adopted a discriminatory policy as regards access to health care, thus making it more difficult for certain ethnic groups or certain groups of individuals, [...] to obtain access to appropriate care for the physical and mental after-effects of the torture perpetrated by those authorities.*"<sup>133</sup>

#### **4.4. The plight of unaccompanied minors and the right to family reunification**

One of the most particular categories of vulnerable persons amongst asylum seekers and refugees is that of UAMs. Several NGO and international reports show that there has been an exponential growth of unaccompanied minors arriving at the shores of the EU during years of 2015-2017.<sup>134</sup> According to the Dublin III Regulation there are specific principles that shall be applied to these individuals when deciding which Member State is responsible to examine asylum applications. The first and most important principle concerning minors is the best interest of the child, and it shall be a primary consideration for Member States when processing their applications.<sup>135</sup> The following paragraphs refer to the aspects Member States shall take in consideration when cooperating with each other to assess the best interests of the child, such as family reunification possibilities, the well-being and social development of the minor, concerns of safety and security and views of the minor himself, in accordance with age and maturity.<sup>136</sup> The authorities of the Member States are required to take appropriate action to identify the family members, siblings or relatives of the unaccompanied minor on the territory of Member States, whilst protecting the best interest of the child.<sup>137</sup>

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<sup>133</sup> *Idem*, paragraph 57.

<sup>134</sup> To know more about data and statistics collected by UNICEF available at <https://www.unicef.org/eca/emergencies/latest-statistics-and-graphics-refugee-and-migrant-children> [accessed 9th March 2019].

To know more about EU official statistics about unaccompanied minors – Children in migration, available at [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/rights-child/children-migration\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/rights-child/children-migration_en) [Accessed 9th March 2019]

To know more about the Amnesty International country report at <https://www.amnesty.org/en/latest/news/2018/11/stranded-refugees-and-migrants-must-be-immediately-allowed-to-dock-in-italy-or-malta/> [Accessed 9<sup>th</sup> March 2019]

<sup>135</sup> Regulation (EU) No. 604/2013, article 6 (1)

<sup>136</sup> *Idem*, article 6 (3)

<sup>137</sup> *Idem*, article 6 (4)

The first case, in which the CJEU was asked to clarify the scope of protection granted to UAMs, dates back to 2013 following the arrival in the UK of three TCN unaccompanied minors.<sup>138</sup> By the time the case was referred to the CJEU, two of the minors had already been granted asylum in the UK and the application of the third one was being examined. The applications were examined together because none of these minors had relatives living in the UK and they had all lodged asylum applications in other EU states prior to their arrival in the UK. At first, the British authorities decided to send them back to those countries, but later the UK took responsibility for their applications under the sovereignty clause.<sup>139</sup> The question referred to the CJEU concerned the following situation: one or more applicants for asylum, who are UAMs with no member of his or her family legally present in another Member State, had lodged claims for asylum in more than one Member State. Under these circumstances, the national court sought to know which MS was responsible for determining the outcome of the application for asylum. The scope of this question requested the CJEU to interpret article 6 (2) of the Dublin II Regulation.<sup>140</sup>

In this case, the judges followed the reasoning of the Advocate General, who considered that transfers of UAMs would not be appropriated nor in line with the best interest of the child.<sup>141</sup> Furthermore, Advocate General Cruz Villalón refers to recital 4 of the Dublin II Regulation which emphasizes that the method for determining the Member State responsible “*should make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing of asylum applications*”. Accordingly, the judges acknowledged the vulnerability inherent to the fact of being alone and underaged as asylum

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<sup>138</sup> C-648/11 MA, BT and DA v Secretary of State, ECLI:EU:C:2013:367.

<sup>139</sup> Dublin II Regulation, article 3(2).

<sup>140</sup> Dublin II Regulation, article 6 (2) reads as following: “In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum.”

<sup>141</sup> Opinion of Advocate General Cruz Villalón delivered on 21 February 2013, ECLI:EU:C:2013:93, paragraph 75.

seekers and, in consideration of such vulnerability, argued that transfers of UAMs to other Member States should be avoided.<sup>142</sup> It ruled that, since the provision does not explicitly mention any reference to which Member State where the minor lodged his or her application for asylum, then it cannot be inferred that the legislator intended to mean that the Member State responsible is the one in which the unaccompanied minor lodged his or her first application for international protection.<sup>143</sup> The CJEU also stressed the importance of applying European law in accordance with the Charter. In this particular case, the CJEU referred to article 24(2) CFR on the rights of the child.<sup>144</sup> This provision of the Charter must be observed and aligned with the protection of the principle of the best interest of the child enshrined in the Dublin II Regulation, as previously mentioned.<sup>145</sup> As such, the Court concluded that article 6(2) of the Regulation should be interpreted as allocating the responsibility for the child's asylum application to the Member State where the UAM is present, so to avoid unnecessary transfers. This judgement clearly shows that due to the vulnerability of unaccompanied minors, the logic entrenched in the examination of their asylum applications is not the same as the one applied to regular asylum seekers, whose applications shall be examined by the first Member State where they set foot, in case of irregular crossing of frontiers.<sup>146</sup>

Still on the rights and protection of UAMs, in 2018, the CJEU achieved a groundbreaking decision regarding the margin of appreciation of Member States about the right to family reunification of refugees and contributed to further establish the concept of unaccompanied minors as a protected category in the context of the asylum acquis. The case

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<sup>142</sup> *Idem*, paragraph 55.

<sup>143</sup> C-648/11 ECLI:EU:C:2013:367, Paras 51-53.

<sup>144</sup> Charter of Fundamental Rights of the EU, article 24 (2) reads as following: "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration."

<sup>145</sup> C-648/11, ECLI:EU:C:2013:367, paragraph 57.

<sup>146</sup> Dublin II Regulation, article 10.

This provision has been amended in the Dublin III Regulation, article 13 (1) and reads as following: "Where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 22(3) of this Regulation, including the data referred to in Regulation (EU) No 603/2013, that an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection. That responsibility shall cease 12 months after the date on which the irregular border crossing took place."

C-550/16 A. & S. v Staatssecretaris van Veiligheid en Justitie<sup>147</sup> concerned a request for refugee family reunification. The applicants were the parents and three minor siblings of a young adult woman from Eritrea who had been granted refugee status in the Netherlands.<sup>148</sup> This female refugee arrived in the Netherlands as a UAM and submitted an asylum application promptly. However, she reached the age of majority during the process of examination of her asylum claim, hence she was above the age of 18, when she was granted asylum and granted with a five-year residence permit. When the Dutch authorities examined the request of her first-degree relatives and siblings for family reunification, they refused it on the basis that, at the date of submission of that request, the female refugee was no longer a minor. Following an appeal against this decision, a Dutch national court asked the CJEU to interpret article 2 (f) of the Family Reunification Directive (FRD).<sup>149</sup> The national court wished to know if that particular article should be interpreted as meaning that a third-country national or stateless person who is below the age of 18 at the time of entry into the territory of a Member State and at the time of the submission of the asylum application in that State, but who, in the course of the asylum procedure, attained the age of majority and is, thereafter, granted asylum with retroactive effect to the date of the application must be regarded as a ‘minor’ for the purposes of that provision.<sup>150</sup> It is important to note that the FRD contains several preferential provisions for family reunification of refugees under chapter V and recital 8 that calls for special attention to be paid to the situation of refugees.<sup>151</sup> Yet, such requests for family reunification can only be submitted after the individuals are recognized as such by the Member States, according to

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<sup>147</sup> C 550/16, A. and S. v. Staatssecretaris van Veiligheid en Justitie, ECLI:EU:C:2018:248.

<sup>148</sup> C 550/16, A. and S. v. Staatssecretaris van Veiligheid en Justitie, ECLI:EU:C:2018:248.

<sup>149</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification sets out the conditions for family reunification of third country nationals in the EU with their third country national family members. This directive is also a part of the asylum acquis.

<sup>150</sup> Council Directive 2003/86/EC, article 2(f) reads as following: "unaccompanied minor" means third country nationals or stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they entered the territory of the Member States".

<sup>151</sup> Council Directive 2003/86/EC, recital 8 reads as following: "Special attention should be paid to the situation of refugees on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there. More favorable conditions should therefore be laid down for the exercise of their right to family reunification."

the conditions laid down by the recast QD. The FRD establishes that if the refugee is an unaccompanied minor, Member States shall authorize the entry and reside of first-degree relatives in the direct ascending line without any margin of appreciation.<sup>152</sup> This is meant to guarantee an additional protection to the right of family life of refugees who seek to restart their lives in the EU.

The CJEU elaborated on different issues concerning this case. As it occurred in the MA, BT, DA v Secretary of State<sup>153</sup>, the opinion of the Advocate General was in line with the reasoning of the Court.<sup>154</sup> Advocate General Bot reaffirmed the need to observe by the CFR, particularly article 7, which lays down the right for respect for private and family life. He also reminds the fact that, when it comes to family reunification, the Court has preferred interpretations ensuring that the successful outcome of such requests depends mainly on circumstances attributable to the applicant, in detriment to the administration, such as the lengthy processing of the applications by the national authorities.<sup>155</sup> This is corroborated in this final decision because the judges ruled that the applicants were entitled to join their refugee daughter under the special provisions for refugees featured in the FRD, regardless of the change in her status as UAM by the time she was granted asylum. The judges stressed that the main goals of the FRD are to promote family reunification and to provide special protection to refugees and unaccompanied minors in particular.<sup>156</sup> The Court ruled that the Directive in itself does not specify the moment until which a refugee must be a minor in order to be able to benefit from the right to family reunification referred to in Article 10 (3) (a).<sup>157</sup> The CJEU does highlight important points concerning the positive obligation of Member States to grant family reunification for refugees according to the aforementioned article, reinforcing the absolute

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<sup>152</sup> Council Directive 2003/86/EC, article 10 (3)(a) reads as following: “If the refugee is an unaccompanied minor, the Member States: (a) shall authorize the entry and residence for the purposes of family reunification of his/her first-degree relatives in the direct ascending line without applying the conditions laid down in Article 4(2)(a)”.

<sup>153</sup> C-648/11 MA, BT, DA v. Secretary of State for the Home Department, ECLI:EU:C:2013:367.

<sup>154</sup> Opinion of Advocate General Bot delivered on 26 October 2017, ECLI:EU:C:2017:824, paragraph 36.

<sup>155</sup> Idem, paragraph 44.

<sup>156</sup> Case C-550/16, ECLI:EU:C:2018:248, Paragraph 44.

<sup>157</sup> Idem, Paragraph 45.



character of the provision leaving no margin of appreciation.<sup>158</sup> Concerning the date that should be decisive to the validity of the request for family reunification, the judges concluded that it could not be the date of the decision by the authorities on the asylum application but the date of arrival and date of submission of the asylum application.<sup>159</sup> This decision aims to protect possible refugees and their rights from the lack of alacrity with which the authorities of Member States may determine claims and to assure the effectiveness of the provision. The Court also acknowledged that there is a real risk of possible “*mala fide*” by MS that tend to drag through time the processing of asylum applications for unaccompanied minors, if the date when they become eligible for family reunification depends on the date of determination of the asylum status. The judges resorted to the Charter provisions on the rights of the child again to reaffirm that MS must ensure that the best interest of the child remains the primary consideration when applying the FRD.<sup>160</sup>

This case was an unprecedented confirmation that Member States must not engage in tactics to prolong the assessment of asylum applications in order to deprive refugees of their right to family reunification and to assert beyond doubt that unaccompanied refugee minors are entitled to reunification with their nuclear family, more precisely, parents and siblings.

## **Conclusion**

The jurisprudence of the CJEU shows that Member States must take into consideration the special needs of vulnerable applicants. The vulnerability of asylum seekers may lead to derogation from general rules in the CEAS. Situations such as carrying out transfers according to Dublin rules, as a regular process, without taking into primary consideration the vulnerability of applicants, can amount to inhuman and degrading treatment. This is so irrespective of the

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<sup>158</sup> *Idem*, paragraph 43.

<sup>159</sup> *Idem*, paras 55 & 60.

<sup>160</sup> *Idem*, paragraph 58.

existence or not of systemic flaws in the asylum procedures and reception conditions of the receiving Member State. The Court has also made clear that in situations of dependence due to a high level of vulnerability, the Member State where the dependent person legally resides as a refugee becomes the responsible for examining the asylum claim of the individual upon whom the vulnerable person depends, regardless of Dublin criteria. This is so to uphold the goal of bringing families together based on humanitarian grounds. The judges in Luxembourg have also ruled that cases of severe health vulnerability, such as when the applicants suffer from AIDS, may preclude the removal of TCNs irregularly staying in EU territory. The removal proceedings contained in the Return Directive shall be halted if the removal amounts to an infringement of the *principle of non-refoulement*. In cases of return of victims of torture, who still continue to experience psychological effects of past torture, the Court set out a list of situations where the returnees are deprived of basic health care by the authorities of the country of origin. This particular situation also highlights the importance of the individual assessment as a component of protection available to refugees and to beneficiaries of subsidiary protection. Besides, it illustrates the negative consequences that might be triggered – suicidal tendencies - by the process of removal to one's country of origin. When deciding to return an asylum seeker, the authorities of the Member State shall assure that these vulnerable individuals will not suffer inhuman and degrading treatment. Finally, concerning unaccompanied minors, the Court highlighted that the aged-related vulnerability requires Member States to avoid unnecessary transfers, to give primary attention to the best interest of the child and, to grant family reunification of refugee children with their nuclear family without any margin of appreciation. The judgments indicate that the CJEU judges interpret the provisions of the Regulations and Directives of the CEAS in a way which takes the vulnerable situation of applicants into account and as a core factor of concern when Member States examine their claims.

## **Chapter V - Conclusion**

The present LLM dissertation aimed at answering the question “How is the CJEU growing jurisprudence about vulnerable asylum seekers impacting on the interpretation and implementation of CEAS by Member States?” To answer this research question, chapters II and III provided answers to the sub-questions tailored to guide the path of the research. In that sense, I will summarize the findings of this research by stressing the main takeaways from each chapter.

The CEAS is based upon the idea of sharing the responsibility of handling asylum applications amongst MS. The ensemble of the legal instruments, regulations and directives, set, among other issues, the uniform criteria for TCNs to qualify for international protection in the EU and establish minimal procedural standards and reception conditions once these individuals apply for asylum. Moreover, it also sets out a scheme to identify a single EU Member State responsible for processing an asylum application. This procedure enshrined in the current Dublin III Regulation is based on several criteria, including the first country of entry criteria. In the second chapter, I mapped the long process of creation and development of the EU asylum acquis. The adoption of two subsequent packs of secondary legislation (first phase of CEAS from 2001 to 2005 and phase 2 from 2011 to 2013) shows how complex it has been to reach full consensus amongst EU Member States, and how the ‘minimum standard approach’ has been prevailing over full harmonization. Nonetheless, the ultimate goal of the CEAS still is to pave the way towards a unique and common space of Freedom, Justice and Security. As a supranational legal order, the EU asylum acquis requires MS to set out national mechanisms that ensure personal interviews and medical assessments to determine the existence and level of vulnerability of each asylum seeker. This process entails the involvement of well-trained national staff to assess any presumption of vulnerability and the engagement of different

specialists – doctors, psychologists, social workers. Furthermore, national authorities shall carry out the special procedure guarantees these individuals are entitled to after receiving the vulnerable ‘status’. The EU has achieved a uniform definition of vulnerable persons in the different legal acts of the asylum acquis. This prevents uncertainty and avoids the use of different criteria by Member States when deciding the circumstances that create a new layer of vulnerability on top of the inherent disadvantage of being an asylum seeker. Additionally, we have witnessed a broadening of the list of people included in the category of “vulnerable persons” from the first generation to the second of the CEAS. There is still room to progress and claims to extend even further this list will not cease as forced migration reaches new peaks in the EU and worldwide. A specific group I believe should feature in the list of vulnerable persons are LGBTI persons.<sup>161</sup> It is true that the Qualification Directive recast, adopted in 2011, recognizes the persecution based on a person’s sexual orientation or gender identity as a valid ground to be granted asylum.<sup>162</sup> In addition, recital 29 of the Asylum Procedures Directive recast also includes sexual orientation and gender identity, amongst others, as grounds for asylum seekers to be granted special procedural guarantees. Given these current provisions, it seems logical to expect that a possible future expansion of the list of vulnerable persons in the context of the CEAS could include LGBTI persons. In doing so, these individuals would be entitled to the distinct conditions given to vulnerable persons and, eventually, be better protected against discrimination, harassment and violence throughout the asylum application

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<sup>161</sup> LGBTI initialism stands for Lesbian, Gay, Bisexual, Transsexual/Transgender and Intersex individuals.

According to latest “State-Sponsored Homophobia” Report launched by the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) in March 2019, there are currently 70 UN Member States that still criminalize consensual same-sex sexual acts between adults. The death penalty for consensual same-sex sexual acts is imposed in 6 UN member States. The report is available at <https://ilga.org/ilga-launches-state-sponsored-homophobia-2019> [Online] [Accessed 9<sup>th</sup> June 2019].

As of 11 June 2019, the number of UN Member States that criminalize consensual same-sex sexual acts between adults has fallen to 69, after the Botswana High Court decriminalized homosexuality.

<sup>162</sup> Qualification Directive recast, article 10 (1) (d) reads as following: “Member States shall take the following elements into account when assessing the reasons for persecution: (d) a group shall be considered to form a particular social group where in particular: members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States. Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group.”.

process, including in the reception facilities. Acknowledging this intrinsic aspect of vulnerability would also be in line with the various calls from international and regional institutions for the recognition of the specific protection needs of LGBTI asylum seekers.<sup>163</sup>

In the third chapter, this thesis explores how the provisions of the CEAS are connected to respecting fundamental human rights. The EU has adopted the Charter of Fundamental Rights, which secures protection of political, civil, economic and social rights across all MS of the EU. The right to asylum, present in article 18 CFR, represents the legal basis of the CEAS in the primary legislation of the EU. The CJEU has played the crucial role of ‘watchdog’ over the commitment of MS to the Charter, especially when national authorities apply the norms of the CEAS. This chapter presented the different principles and tools that the CJEU uses to provide clarification on provisions of the asylum acquis and ensure harmony in the implementation of such norms throughout the EU.

Finally, the fourth chapter contains the analysis of the relevant cases concerning vulnerable asylum seekers before the CJEU. What these different cases show is that the general rules are not beneficial to vulnerable asylum seekers. The current CEAS is not succeeding in eliminating the paradox that this reality denounces: on the one hand, the EU has become a considerable safe haven for individuals who engage in hazardous journeys to escape war and poverty. MS have reached a compromise through an innovative system of allocation of refugees. The rhetoric of the EU has always stressed the cooperation element of this system and how the EU is committed to provide for all necessary conditions for these individuals to build a new and safer life. On the other hand, what is also possible to conclude is that the

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<sup>163</sup> The UNHCR has issued several instruments relating to the protection of LGBTI asylum seekers. One of the most relevant of these documents are the 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.

In 2010, the Council of Europe issued the Recommendation CM/Rec (2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity. Chapter X of this document X provides guidance in relation to the right to seek asylum stating that “44. *Asylum seekers should be protected from any discriminatory policies or practices on grounds of sexual orientation or gender identity; in particular, appropriate measures should be taken to prevent risks of physical violence, including sexual abuse, verbal aggression or other forms of harassment against asylum seekers deprived of their liberty, and to ensure their access to information relevant to their particular situation.*”.

current process to obtain international protection in the EU may lead to additional hurdles after the submission of asylum applications by vulnerable persons due to the lengthy processes, the precariousness of legal statuses such as subsidiary protection and the Dublin transfer system. While this applies to all asylum seekers, it causes a greater negative impact in vulnerable individuals who arrive in the EU with pre-existing conditions that demand special needs. Furthermore, this research shows that MS tend to prioritize the general rules of the CEAS over the personal circumstances of the individuals, thus exacerbating the level of vulnerability in itself. The different preliminary rulings that arise from questions of national courts also reveal a great deal of uncertainty of interpretation of the rules of the CEAS concerning vulnerable persons. For this reason, the rulings by the judges of the CJEU seem to establish a set of additional normative constraints on MS to prevent the emergence and/or aggravation of vulnerabilities during the asylum procedure process. So far, the jurisprudence of the Court has contributed to highlight the deficiencies inherent to the functioning of the system, the difficulties faced by MS in interpreting EU legislation and it has expanding on the grounds admissible to halt the normal course of Dublin transfers. Indeed, systematic deficiencies in the asylum process and reception conditions of the receiving country are no longer the only reason to stop a Dublin transfer. By deciding that the special situation of vulnerability of the applicants shall take preference over the CEAS scheme, the CJEU is setting out a challenge for Member States to take into account the *lex specialis* of certain provisions of the asylum acquis and to re-evaluate the shortcomings of the current process of granting international protection to vulnerable persons in the EU.

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- ✓ Case 11/70, Internationale Handelsgesellschaft, of 17 December 1970;
- ✓ C-79/13 Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and Others, Judgement of the Court (Fourth Chamber) of 27 February 2014;
- ✓ C-578/16 PPU, C.K. and others v Slovenia, Judgment of the Court (Fifth Chamber) of 16 February 2017;
- ✓ N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform (Joined cases C-411/10 and C-493/10), Judgment of the Court (Grand Chamber) of 21 December 2011;
- ✓ C-245/11 K v Bundesasylamt, Judgment of the Court (Grand Chamber) of 6 November 2012
- ✓ C-562/13 Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida, Judgment of the Court (Grand Chamber), 18 December 2014;
- ✓ C-542/13 Mohamed M'Bodj v État belge, Judgment of the Court (Grand Chamber) of 18 December 2014;
- ✓ C- 353/16 MP v Secretary of State for the Home Department, Judgment of the Court (Grand Chamber) of 24 April 2018;
- ✓ C-648/11 MA, BT, DA v Secretary of State for the Home Department, Judgment of the Court (Fourth Chamber) of 6 June 2013;
- ✓ C-550/16 A. and S. v Staatssecretaris van Veiligheid en Justitie, Judgment of the Court (Second Chamber) of 12 April 2018.