Refugee from one Member State to Another: Towards Automatic Mutual Recognition?

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In two judgments delivered by the Grand Chamber on 18 June 2024, the Court of Justice of the European Union (CJEU) clarified the question of the extraterritorial effects in one Member State of a decision granting refugee status taken in another Member State (*QY*, C-753/22 and *A.*, C-352/22). In both cases, the applicants sought recognition of the *binding* effect of the decision taken by a Member State on proceedings in another Member State. In *QY/Bundesrepublik Deutschland*, a Syrian woman was granted refugee status in Greece and applied for asylum in Germany, which granted her only subsidiary protection. In *A./Generalstaatsanwaltschaft Hamm*, a Turkish citizen of Kurdish origin, who was granted refugee status by Italy, was subject to an extradition request from Turkey, his country of origin, in Germany. The two cases have already been widely commented (Michel; Boucheron; Pahladsingh; Fratea; Simon and Rigaux; Peers). Here, we focus on the binding effects of a decision granting refugee status by an EU Member State in another Member State. We take a three-stage approach: firstly, we focus on the past, which reveals an EU law aporia on the (non-)mutual recognition of positive refugee status decisions (1); secondly, through the analysis of the two cases and the recognition of some limited effects of decisions granting refugee status we explore the present (2); and thirdly, we look at the future. Under the paradoxical influence of the Pact on Migration and Asylum, we can imagine a possible evolution towards mutual recognition of decisions granting refugee status (3).

1. Past: The Aporia of the Recognition of Positive Decisions from Another Member State

EU law aporia is clear. A decision refusing refugee status made in one Member State has a binding effect in another Member State. Conversely, a decision granting refugee status is not recognised in the other Member States. Here are a few examples. In 2021, the *M and Others* case (C-673/19) concerned the detention of refugees irregularly staying in a Member State other than the one that granted protection with a view to their forcible transfer to the Member State of protection. The Court stated that neither detention decisions nor transfer decisions to the State of protection were governed by the common rules and procedures laid down in the Return Directive. These decisions are the sole responsibility of the Member State, as the common rules and procedures set out in the Directive relate only to the adoption and enforcement of return decisions.

This case, like those examined below (C-753/22 and C-352/22), perfectly illustrates the aporia of EU asylum law about the recognition of decisions taken in another Member State. In short, a negative decision refusing refugee status taken in one Member State will be "recognised" in the other Member States inasmuch as it will lead to the rejection of any new application on the basis of an accelerated procedure. As Advocate General Laila Medina emphasised in her Opinion on the first case (C-753/22), the Dublin mechanism makes "the principle of mutual recognition fully effective and operational but only with respect to negative decisions" (para 56 of her Opinion). Even a positive decision granting refugee status obtained in one Member State will mainly have a *negative* effect in another. This was the case in *Ibrahim and Others* (C-297/17 and

others) and in *Commissaire général aux réfugiés and aux apatrides* (C-483/20) in which the Court highlighted this negative effect: another Member State may declare a new application inadmissible on the grounds that "international protection has been granted by another Member State" (according to art. 33 of the Procedures Directive), except in exceptional circumstances such as systemic flaws in the asylum procedure and in the reception conditions in the Member State which granted protection, which would expose the applicant to a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter (on this subject, see Frasca and Rizzuto).

2. Present: Some Positive but Limited Effects?

Does this mean that a decision granting refugee status will have zero positive effect in another Member State? No. In *QY* (C-753/22) and *A.* (C-352/22), the Court clarified some positive effects of a refugee status obtained in another Member State. The effects are "positive" in protecting the person concerned. In *QY*, the positive effect on a potential new asylum procedure is limited to the obligation to an exchange of information between Member States.

By contrast, in *A.*, the Court identifies more binding effects on the extradition procedure undertaken by another Member State. The Court ruled that Article 21 of the Qualification Directive, entitled "Protection from refoulement", must be read in light of Articles 18 and 19(2) of the EU Charter of Fundamental Rights, with the consequence that the extradition of a refugee to the country of origin "would have the effect of depriving that individual of the effective enjoyment of the right afforded to him or her by Article 18 of the Charter", since this article "precludes the extradition of that individual to the third country which he or she fled and in which he or she risks being persecuted", as long as he or she "satisfies the criteria for *being* a refugee" (para 58, emphasis added). Going beyond the conclusions of Advocate General Richard de la Tour, the Court inferred from this a precondition for extradition: the revocation of refugee status by the authorities of the first Member State. The Court held that "provided that that refugee status has not been revoked or withdrawn by the Member State that granted it", extradition cannot be carried out (para 64). In this case too an exchange of information is required, in accordance with the principle of sincere cooperation (Art. 4 (3) TEU). This exchange is a two-way process. On the one hand, it enables the authority responsible for extradition to carry out the checks required under Articles 18 and 19(2) of the Charter and, on the other, it enables the authority of the other Member State to revoke or withdraw refugee status.

Two expressions are particularly striking in these paragraphs. On the one hand, the expression "depriving [a refugee] of the effective enjoyment of the right" afforded by the Charter (para 58). This remind us the mantra allowing the Court to examine purely internal situations since *Ruiz Zambrano* (C-34/09). In these cases, the Court verifies whether an EU citizen is at risk of being excluded from the "effective enjoyment of [his or her] rights". The Court gradually clarifies the content of these rights referencing certain provisions of the Charter. It is interesting to note that the CJEU speaks simply of the genuine enjoyment of 'the rights' and not of 'the essence of the rights', as in the *Zambrano* mantra. The Court did the same in 2024 in a case concerning a EU citizen in a purely internal situation (joined cases *NW* and *PQ*, C-420/22 and 528/22). This shows the extent to which the mantra is becoming a variable concept with evolving content that can be applied to EU citizens and third-country nationals, but with nuances (on this subject, see Carlier). The Court has progressively clarified the content of the rights protected by reference to certain provisions of the Charter. In doing so, the Court is using this mantra as a standard reference to a principle at the heart of fundamental rights. On the other hand, the second striking expression is "as long as that individual qualifies as a refugee" (para 58). It refers a distinction introduced by the Court, in 2019, about the consequences of the revocation of refugee status: the distinction between "being a refugee" and "being granted refugee status" (in French between "*la* qualité *de réfugié*" and "*le* statut *de réfugié*") (see C-159/21, C-391/16 and C-663/21). The granting of refugee status can be revoked for reasons that are not in the Geneva Convention but, the fact of "being a refugee" still protects the person in their core rights as a refugee, such as the principle of non-refoulement. The Court seems to follow the same approach here.

While we can approve of the Court's concern to safeguard minimum guarantees for a person who has been granted refugee status, the fact remains that the grey areas and legal limbo into which these distinctions leave fugitives should be addressed. For example, the withdrawal of the granted refugee "status" by the first Member State is required by the Court as a condition for allowing the second Member State to consider extradition. However, nothing indicates that this would enable the latter to extradite the person to the country of origin. According to the Court's own case law, if the grounds for withdrawal do not comply with the Geneva Convention, the individual would lose the refugee "status" but should still "be" a refugee. Consequently, this person would not be subject to *refoulement* to the country of origin in breach of Article 33 of the Geneva Convention and, therefore, could not be extradited. These complex solutions aim to respect international law without calling into question EU law provisions. Will it be possible, in the future, to shed some light on these grey areas?

3. Future: Towards Automatic Mutual Recognition with the Pact?

The question of mutual recognition of decisions on refugee status remains open under the Pact. As EU law stood at the time of its decision, i.e. before the Pact, the Court recalled that Member States remained free to lay down more favourable provisions, including on the automatic recognition of decisions granting protection status adopted by another Member State (*QY*, para 69 and Art. 3 of the Qualification Directive and Art. 5 of the Procedures Directive).

Although hardly realistic today given the competition between Member States, each determined to ensure that it is not more welcoming than the other, this possibility of transposing EU law by adding more favourable provisions will disappear tomorrow, in view of the new form of secondary EU law introduced by the provisions of the Pact. These are now regulations that are directly applicable, rather than directives that need to be transposed. The new Procedures Regulation (2024/1348) is the only one to provide, in its recital 6, for the possibility of more favourable national provisions "where provided for by this Regulation". However, there is no point in searching for more favourable provisions in the Regulation that would allow for mutual recognition of decisions on refugee status. As with Article 61(2), which allows exceptions to be made for parts of the territory or categories of persons in the context of safe countries of origin, these articles are more concerned with making exceptions to strict provisions on which there is no unanimous agreement rather than providing for more favourable provisions. Moreover, the new Qualification and Procedures Regulations contain no substantive provisions on mutual recognition, as had been suggested de lege ferenda. This is not to say that the entry into force of the Pact would not facilitate mutual recognition. It could be argued that, using the form of regulations, the Pact has reinforced the standardisation of EU asylum law (see Barbou des Places). As a result, we should consider, in practice and in theory, the consequences of this increased integration within a common area.

From Practical to Principled Arguments

The decisions examined here thus confirm that, for the most part, a positive decision granting refugee status in one Member State will not be recognised in another. In practice, the aim of avoiding secondary movements of refugees from certain Member States to others is understandable. However, there is no statistical evidence to suggest that this is even a real problem. In contrast to asylum seekers' secondary movements, which are in part limited by the Dublin mechanism, secondary movements of recognised refugees do not appear to represent a much more significant challenge than those of EU citizens or long-term resident third-country nationals. The number of recognised refugees remains limited, so these secondary movements, which could partly overlap, do not appear insurmountable. In addition, we should bear in mind that people fleeing Ukraine are not only free to choose the Member State in which they apply for temporary protection status, but, once they have obtained this status, they can keep it and move around the Union, carrying it like a backpack, to settle in another Member State where this status is fully recognised. Practical arguments aside, the absence of mutual recognition of refugee status decisions is above all debatable from a point of view of principle, both in private international law and in EU law.

Private International Law Arguments

In private international law, more and more, the principle is that acts and decisions relating to civil and commercial matters are recognised *ipso jure*, whether they are issued by another Member State or even by a third country. Beyond the rules of conflict of jurisdictions and conflict of laws, the dominant approach in private international law is becoming the recognition of situations (voy. Azoulai *e.a.*; Lagarde; Baratta; d'Avout; Pfeiff; Fulli-Lemaire). It is true that in EU private international law, the Brussels I bis regulation (1512/2012) excludes from its material scope "the status and legal capacity of natural persons" (Art. 1(2) under a). However, in accordance with the principle of mutual trust, civil status documents, including birth certificates and documents establishing nationality established in one Member State, are recognised *ipso jure* in another Member State. A large body of case law on recognition of nationality granted by another Member State, dating back to the *Micheletti* judgment (C-369/90), confirms this.

Even more than the recognition of refugee status, which is based on common rules of international and EU law, the granting of nationality is an exercise of national sovereignty. Why should nationality granted by another Member State be recognised, with the sole exception of a disproportionate infringement of EU law, and not refugee status granted by the same Member State, which replaces the nationality of the State of origin that no longer protects the person?

In addition to nationality, the case law also requires mutual recognition of other civil status documents, even if the public policy of the requested Member State is at stake. These may include same-sex marriage (*Coman*, C-673/16), the birth

certificate of a child born to a lesbian couple (*Stolichna obshtina, rayon "Pancharevo"*, C-490/20), or, in 2024, the obligation of the Member State of origin (Romania) to recognise and enter in the birth certificate the change of first name and gender identity of a woman who became a man after the change was established in another Member State of which the person concerned was also a national (United Kingdom) (*Mirin*, C-4/23). The mutual recognition of civil status documents is also facilitated by Regulation promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the EU (2016/1191). While this regulation concerns only the recognition of the *instrumentum*, not the document's content, it does contribute to the free movement of statuses. Of course, these instruments and decisions concern EU citizens and are linked to the free movement of persons. However, there is nothing to suggest that these grounds for recognition cannot be extended to third-country nationals, particularly when they are recognised refugees. What is at issue is not the recognition of a person's nationality, but the "nationality" of the document, i.e. the State of origin of the document examined in the requested State, both of which are EU Member States. As refugees, all identity documents are necessarily issued by the authorities of the host country in accordance with the Geneva Convention (Arts. 25 and 27). Besides, as we have seen, private international law as a whole is moving towards this "recognition of situations", including as a result of acts or decisions issued in third countries, which is not even the case for our subject, which is limited to decisions on refugee status issued in a Member State.

EU Law Arguments

Beyond private international law, the absence of mutual recognition of refugee status decisions also raises questions in terms of EU law. The contradiction with other aspects of EU law, and the Area of Freedom, Security and Justice in particular, is equally apparent. Free movement and mutual recognition are at the heart of the construction of this area, which the Court has been led to call "the territory of the Union taken as a whole" (*Dereci*, C-256/11, para 66). Beyond the free movement of people, the very principles of a common area – a common territory – are being called into question. Although unpleasant, a comparison with goods is enlightening. In the classic case law of the Court since *Cassis de Dijon* (120/78), not only is any disproportionate obstacle to the free movement of goods produced in another Member State, whatever its form, outlawed, but even goods imported from third countries benefit, after inspection in a Member State, from the free movement known as "release for free circulation" ("*biens en libre pratique*"). For instance, a car produced in a non-EU country (Japan) and legally imported into a Member State (Germany), in compliance with the required quality criteria and customs duties, will be considered "release for free circulation". In other words, having undergone the requisite quality controls in one Member State, this car can move, be located, used or sold in another Member State. Does a refugee, officially recognised as such according to criteria common to all Member States and enshrined in the Qualification Directive, deserve any less to be in "free circulation" and to be able to move and reside freely throughout the territory of the Union?

Admittedly, this freedom of movement is possible for long-term residents, given that the personal scope of the Long-term Residents Directive has been extended to refugees (Art. 3 (3) under c). However, its application requires a prior legal and continuous residence condition of five years in the first Member State for everyone, including refugees. This condition could be abolished, or at the very least reduced, to two years, for example, as certain States have done in terms of access to nationality, in line with the Geneva Convention's express invitation to facilitate the naturalisation of refugees (Art. 34). In the communication of 23 September 2020 on "A new pact on migration and asylum", the Commission proposed to "amend the Long-term Residents Directive so that beneficiaries of international protection would have an incentive to remain in the Member State which granted international protection, with the prospect of long-term resident status after three years of legal and continuous residence in that Member State" (p. 7). This idea was not included in the proposal for a recast Long-term Residents Directive, currently under negotiation.

However, the non-mutual recognition of refugee status decisions may not withstand the entry into force of the Pact on Migration and Asylum in the future. In her Opinion in the first case (C-753/22), after noting the aporia of the sole recognition of negative decisions on refugee status and the absence of a principle of mutual recognition of all decisions on refugee status, Advocate General Medina stated that "[w]hile legal scholars have made convincing '*de lege ferenda*' arguments in support of the need for the adoption of such a principle, the EU legislature, despite the Commission's efforts, has not taken definitive steps in that direction". Following the Advocate General's Opinion, the Court held, both on the basis of EU primary law, including the Charter, and on the basis of EU secondary law, that "the EU legislature has not, **at this stage**, established a principle that Member States are obliged to recognise automatically the decisions granting refugee status that have been adopted by another Member State, nor has it specified the detailed arrangements for implementing such a principle" (*QY*, para 68 of the judgment, emphasis added).

Will the Court maintain this statement of principle once the Pact is in force? Can it still merely observe that "as the Common European Asylum System currently stands, the EU legislature has not yet fully achieved the objective pursued by Article 78(2)(a) TFEU, namely a uniform status of asylum for nationals of third countries, valid throughout the European Union" (para 68)? Or, conversely, should the Court declare the existence of a "uniform" asylum status and, consequently, allow automatic recognition of any decision granting refugee status that might be *de plano* deduced from the principle of mutual recognition?

With the Pact, have we not reached the level of integration of EU asylum policy wished for in 2018 by former Advocate General Melchior Wathelet in his Opinion in *Jawo* (C-163/17)? He wrote:

"It is true that only the adoption of a genuine policy on international protection within the European Union with its own budget which would ensure uniform minimum living conditions for the beneficiaries of such protection would reduce, if not eliminate, the occurrence of cases such as that at issue in the main proceedings, by ensuring that the principle of solidarity and the fair sharing of responsibilities between Member States enshrined in Article 80 TFEU is a reality for the benefit not only of Member States, but above all of the human beings concerned. However, until then (the wait is likely to be a long one!), it is for Member States – including national courts – to ensure the full effectiveness of the rules currently in force" (point 145).

We feel that this approach, which was prompted at the time by the excesses of the Dublin mechanism, can be transposed to the question of recognition of decisions granting refugee status, and indeed to the whole of the Union's migration and asylum policy, following the adoption of the Pact. Just as Article 72 TFEU provides, according to the Commission, for certain derogatory national measures on grounds of internal security, such as pushbacks of instrumentalized migrants, so the Pact could allow for the mutual recognition of decisions. It could be argued that the content of the Pact has not yet reached the level of a genuine common policy, given legal scholars' analyses (see the Special Collection in this blog). However, regarding the form of EU secondary law (regulations) and the objectives expressly enshrined in the instruments, it could also be argued that the conditions for mutual recognition of refugee status decisions have been met. After all, is the aim not to "reinforce mutual trust between Member States" through "a comprehensive approach to asylum and migration management" (AMMR Regulation 2024/1351, recital 2, replacing the Dublin regulation)?

We can certainly agree with Daniel Thym that by endorsing derogations on the grounds of national security on the basis of Article 72 TFEU, the Commission has "crossed the Rubicon" and that there is a "reversal of the interpretative dynamics" in that "the time of dynamic interpretation to the benefit of migrants may have come to an end" (Thym, in this blog). But the Court of Justice of the European Union, in conjunction with the European Court of Human Rights and national courts, will have the final role in interpreting the instruments.

Conclusion

At the end of January 2025, during the formal sitting of the President and Members of the European Commission before the Court of Justice of the European Union, President Koen Lenaerts recalled in his address that

"The last few years have also been characterised by the undermining, both within and outside Europe, of the values of the rule of law and fundamental rights and freedoms. In the face of such undermining, which threatens our democratic systems and institutions, and which is often exacerbated by campaigns aimed at disinformation and destabilisation conducted through certain social networks, it is the collective duty of the EU institutions to continue to strive daily to safeguard the core values underlying our common legal order".

This also extends to the role of the Court of Justice. While ensuring a balance between, on the one hand, the realism of an EU migration policy that respects sovereignty and, on the other, the protection of the fundamental rights of the persons concerned, the Court must maintain consistency in the interpretation of EU law, including the Area of Freedom, Security and Justice in its various components. One of the basic principles of this consistency is mutual recognition.