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**NOTE**

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| from: | Presidency |
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| Subject: | Key cases of the European Court of Human Rights (ECtHR) and of the Court of Justice of the European Union relevant to the proposal for a revised Reception Conditions Directive |

Delegations will find in Annex an overview of key cases of the European Court of Human Rights (ECtHR) and of the Court of Justice of the European Union relevant to above mentioned proposal.

**ANNEX**

**Key cases of the European Court of Human Rights (ECtHR) and of the Court of Justice of the European Union relevant to the proposal for a revised Reception Conditions Directive**

## 1. Principle of effectiveness

**Articles 6(6) and 15(2) of the proposal**

In Case C-63/08 *Pontin v. T-Comalux SA* and Joined Cases C-145/08 and C-149/08 *J Club Hotel Loutraki and Others*, the ECJ held that:

"*The detailed procedural rules governing actions for safeguarding an individual's right under Community law must not render practically impossible or excessively difficult the exercise of rights conferred by Community law*."

## 2. Detention

### a) Scope of application

**Article 3 and recital 8 of the proposal**

In the Case of *Amuur v France*[1], the ECtHR held that a violation of Article 5 may occur in transit areas:

*"The mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty, the right to leave any country, including one's own, being guaranteed, moreover, by Protocol No. 4 to the Convention (P4).*

[1] ECtHR Application no. 19776/92, 25 June 1996

*The Court concludes that holding the applicants in the transit zone of Paris-Orly Airport was equivalent in practice, in view of the restrictions suffered, to a deprivation of liberty. Article 5 para. 1 (art. 5-1) is therefore applicable to the case"* (Para 48&49)

Also in the recent case of *Abou Amer v Romania*[2] the ECtHR held that:
*"the measure of taking the applicant into public custody affected him de facto from the moment when he arrived at the airport, on 6 April 2003, and was refused entry to Romania. It therefore cannot agree with the Government that the time spent in the airport transit zone was not "detention".*

**b) lawfulness of detention**

See in particular ECtHR cases of *Saadi v UK*[3], *Amuur v France*[4], *Chahal v UK*[5] *and A and others v UK*[6].

- detention rules must be laid down in national law and they must be sufficiently accessible and precise especially for asylum seekers; [**mainly Articles 8 and 9 of the proposal**]

*"Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law (...)'. In order to ascertain whether a deprivation of liberty has complied with the principle of compatibility with domestic law, it therefore falls to the Court to assess not only the legislation in force in the field under consideration, but also the quality of the other legal rules applicable to the persons concerned. Quality in this sense implies that where a national law authorises deprivation of liberty - especially in respect of a foreign asylum-seeker - it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness. These characteristics are of fundamental importance with regard to asylum-seekers at airports, particularly in view of the need to reconcile the protection of fundamental rights with the requirements of States' immigration policies*."(See *Ammur*, & 50)

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2 ECtHR Application no. 14521/03, 24 May 2011
3 ECtHR Application no. 13229/03, 29 January 2008
4 See n.1
5 ECtHR Application no. 70/1995/576/662, 11 November 2006
6 ECtHR Application no. 3455/05, 19 February 2009

- Detention must not be arbitrary. Namely:

"*To avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country" (see Amuur, § 43); and the length of the detention should not exceed that reasonably required for the purpose pursued*" (see *Saadi*, & 74)

- Principle of due diligence **[Article 9(1) of the proposal]**

"*any deprivation of liberty under Article 5 § 1(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible*"

See in particular, cases of *Chahal v UK*[7], *Saadi v UK*[8], *M. and others v Bulgaria*[9].

- Living conditions in detention facilities **[Articles 10 and 11 of the proposal]**

See *inter alia RU v Greece*[10], *Tabesh v Greece*[11], *Mikolenko v Estonia*[12], *S.D. v Greece, A.A v Greece, Saadi v UK and Koktysh v Ukrain.*

7 See n.5
8 See n.3
9 ECtHR Application no. 41416/08, 26 July 2011
10 ECtHR Application no. 2237/08, 7 September 2011
11 ECtHR Application no. 8256/07, 26 November 2009
12 ECtHR Application no. 10664/05, 8 October 2009

- Vulnerable persons in detention [**Articles 10, 11 and 18(3) of the proposal]**

In the case of *Rahimi v Greece*[13] the ECtHR held that Member states must ensure the health and well-being of persons in detention (See also *Kudła v Poland*[14]*).*

In the case of *Muskhadzhiyeva et autres v Belgique*[15] the ECtHR held that:

*"Compte tenu du bas âge des enfants requérants, de la durée de leur détention et de leur état de santé, diagnostiqué par des certificats médicaux pendant leur enfermement la Cour estime que les conditions de vie des enfants requérants au centre 127 « bis » avaient atteint le seuil de gravité exigé par l'article 3 de la Convention et emporté violation de cet article".*

Moreover, in the case of *Mubilanzila Mayeka et Kaniki Mitunga c. Belgique*[16]the ECtHR held that:

*"In view of the absolute nature of the protection afforded by Article 3 of the Convention, it is important to bear in mind that this (*vulnerability*) is the decisive factor and it takes precedence over considerations relating to the second applicant's status as an illegal immigrant". (...)*

*The Court is in no doubt that the second applicant's detention in the conditions described above caused her considerable distress. Nor could the authorities who ordered her detention have failed to be aware of the serious psychological effects it would have on her".*

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13 ECtHR Application no. 8687/08, 5 April 2011
14 ECtHR Application no. 30210/96, 26 October 2000
15 ECtHR Application no. 41442/07, 19 January 2010
16 ECtHR Application no. 13178/03, 12 October 2006.

## 3. Access to effective remedy

### a) General principles governing access to a remedy

See *inter alia Pontin v. T-Comalux SA*, Case C-63/08, *J Club Hotel Loutraki and Others*, Joined Cases C-145/08 and C-149/08

*The detailed procedural rules governing actions for safeguarding an individual's right under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).*

In *Abdolkhani and Karimnia*[17] the ECtHR further stipulated the right of access to legal advice by stating that:

*"A remedy must be effective in practice as well as in law. In the present case, by failing to consider the applicant's requests for temporary asylum… and to authorise them to have access to legal assistance… the national authorities prevented the applicants from raising their allegations under Article 3 within the framework of the temporary asylum procedure.*

The case of *Muminov v Russia*[18] concerned access to effective remedy in cases of detention. The ECtHR held that:

"*A remedy must be made available during a person's detention to allow that person to obtain speedy judicial review of its lawfulness. That review should be capable of leading, where appropriate, to release. The existence of the remedy required by Article 5 § 4 must be sufficiently certain, not only in theory but also in practice, failing which it will lack the accessibility and effectiveness required for the purposes of that provision*".

See also *Louled Masoud v Malta*[19] (issue of speedy judicial review of detention).

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17 ECtHR Application no. 30471/08, 22 September 2009.
18 ECtHR Application no. 42502/06, 11 December 2008
19 ECtHR Application no. 24340/08, 27 July 2010

**b) Time limits for accessing proceedings before a court or tribunal**

**[Article 9(2) and 9(4) of the proposal]**

*[A provision on access to remedy] requires actual access within a reasonable period to a court or tribunal as defined by Community law.*

*Wilson*, Case C-506/04 and *Pontin* Case C-63/08

**c) Scope of judicial review**

**[Article 26(1) of the proposal]**

*[A provision of a directive] requires actual access to a remedy before a court or tribunal which is competent to give a ruling on both fact and law.*

*Wilson*, Case C-506/04

**d) Free legal assistance and the link with "effective access to justice":**

**Articles 9(6) and 26(2) of the proposal**

Article 47 of the Charter of Fundamental Rights concerning access to an effective remedy before a tribunal states that:

*"Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice"*

ECtHR has examined the meaning of free legal assistance in the light of the principle of effective access to justice and "in the interest of justice" as stipulated in Article 6 of the Convention. Whereas Article 6 of the Convention mentions the provision of free legal assistance in criminal proceedings, the Court applied the same reasoning also for civil proceedings (*Airey v Ireland*[20]). According to the Court, the test for allowing legal aid is linked to the principle of ensuring equality of arms and should be examined on the basis of the particular facts and circumstances of each case. In this respect, access to legal aid will depend, *inter alia*, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him- or herself effectively. Legal aid should not be automatic and restrictions, such as the person's financial situation can be imposed (See inter alia *Benham v UK*[21] and *Perks and others v UK*[22]*).*

In the cases of *Benham v UK* and *Perks and others v UK and recently in the* case of *Shabelnik v Ukraine* the ECtHR reiterates that where a deprivation of liberty is at stake, the interests of justice in principle call for legal representation.

The ECtHR has also held that compliance with the obligation of maintaining a legal-aid scheme depends on the quality of that scheme. Such schemes must offer individuals substantial guarantees to protect them from arbitrariness. [See *inter alia* ECtHR cases of *Del Sol v France*[23]*and Essaadi v France*[24]*]*

[20] ECtHR Application no. 6289/73, 9 October 1979
[21] ECtHR Application no.19380/92, 10 June 1996
[22] ECtHR Application no. 25277/94, 12 October 1999
[23] ECtHR Application no. 46800/99, 26 February 200*0*
[24] ECtHR Application no. 49384/99, 26 February 2002

Finally, in the case of *Evans, C-63/01*, the European Court of Justice states that:

*"it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, in conformity with the principles of equivalence and effectiveness. (...)*

*In particular, it should assess whether, in view of the less advantageous position in which victims find themselves vis-à-vis the MIB and the conditions under which such victims are able to submit their comments on matters that may be used against them, it appears reasonable, or indeed necessary, for them to be given legal assistance."*