# Growing tensions within the EU between the protection of article 4 of the Charter and the principle of mutual trust

## Overview

Since the Greek transfer cases, a line of judgments from both the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) have set out guidance on the circumstances which may give rise to a risk of inhuman or degrading treatment contrary to article 3 of the European Convention on Human Rights (the ECHR) or article 4 of the Charter of Fundamental Rights of the EU (CFR) such as to preclude the transfer of a person from one member state to another member state under the Dublin system. A similar line of cases in the context of the European Arrest Warrant (EAW) system set out guidance on when a member state may be precluded from surrendering a person to another member state under the EAW Framework Decision. This caselaw endeavours to achieve a balance between maintaining the fundamental principle of mutual trust between member states of the EU and ensuring the absolute protection of article 3 ECHR and article 4 CFR.

A recent case of *Ibrahim* (Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17) marks a significant development in this line of caselaw. In this judgment, there is a progression from a consideration of whether expulsion measures may be precluded by article 4 CFR to a consideration of whether this article may require a substantive decision to be taken in respect of a person's immigration status.

This paper provides an overview of the caselaw since the Greek transfer cases and considers the implications of the development marked by the judgment in *Ibrahim*.

## I. Dublin III transfers

The procedure under the Dublin III Regulation 604/2013 is intended to be a summary procedure for the transfer of an international protection applicant to the responsible member state designated in accordance with the criteria set out in that Regulation. For the purposes of this paper, it could be considered as a form of procedural expulsion. It is based on the principle of mutual trust between member states of the EU, that each of these member states will apply the same minimum standards for the processing of international protection applications.

The "Greek transfer" cases identified certain circumstances in which member states could be precluded from transferring an applicant under the then Dublin II Regulation. Such a transfer was precluded where substantial grounds were shown for believing that the person concerned faced a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country contrary to article 3 ECHR.

*M.S.S. v. Belgium and Greece* (app. no. 30696/09) was the first of these cases. The applicant was transferred under the Dublin II Regulation from Belgium to Greece. The ECtHR observed that since 2006, reports had regularly been published by national, international and non-governmental organisations deploring the reception conditions of

asylum-seekers in Greece. These reports included reports from the CPT, Amnesty International, ECRE, the UNHCR and Human Rights Watch. The court summarised some of the key findings of these reports as follows:

> C. Living conditions
> …
> 168. [According to the people interviewed for the reports] it appears that they are given no information about the possibilities of accommodation. In particular, the people interviewed reported that no one told them that they should inform the authorities that they had nowhere to live, which is a prerequisite for the authorities to try to find them some form of accommodation.
> 169. Those persons who have no family or relations in Greece and cannot afford to pay rent just sleep on the streets. As a result, many homeless asylum-seekers, mainly single men but also families, have illegally occupied public spaces, like the makeshift camp in Patras, which was evacuated and torn down in July 2009, or the old appeal court and certain parks in Athens.
> 170. Many of those interviewed reported a permanent state of fear of being attacked and robbed, and of complete destitution generated by their situation (difficulty in finding food, no access to sanitary facilities, etc.).
> 171. Generally, the people concerned depend for their subsistence on civil society, the Red Cross and some religious institutions.
> 172. Having a "pink card" does not seem to be of any benefit in obtaining assistance from the State and there are major bureaucratic obstacles to obtaining a temporary work permit. For example, to obtain a tax number the applicant has to prove that he has a permanent place of residence, which effectively excludes the homeless from the employment market. In addition, the health authorities do not appear to be aware of their obligations to provide asylum-seekers with free medical treatment or of the additional health risks faced by these people.

The court reiterated its caselaw on the interpretation of the protections of article 3 ECHR, "which enshrines one of the most fundamental values of democratic societies and prohibits in absolute terms torture and inhuman or degrading treatment or punishment irrespective of the circumstances and of the victim's conduct" (para. 218). "To fall within the scope of Article 3 the ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim" (para. 219). The court considered treatment to be "inhuman" when it was "premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering". Treatment was considered to be "degrading" when it "humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance" (para. 220).

The court found that Greece had violated article 3 ECHR. By reason of the inaction of the Greek authorities, they were responsible for the situation in which the applicant found himself "for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs". The court considered that the applicant had been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation had, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considered that such living

conditions, combined with the prolonged uncertainty in which he had remained and the total lack of any prospects of his situation improving attained the level of severity required to fall within the scope of article 3 ECHR (para. 263).

The court also found that Belgium had violated article 3 ECHR by transferring the applicant to Greece. The court considered that the general situation in Greece was known to the Belgian authorities and that the applicant should not have been expected to bear the entire burden of proof (para. 352).

In the follow-on "Greek transfer case" before the CJEU, *N. S. and M.E.* (Joined cases C 411/10 and C 493/10), a number of applicants challenged their proposed transfer to Greece under the Dublin II Regulation. The court expressly relied on the findings of the ECtHR in *M.S.S. v. Belgium and Greece* and notably held in the operative part that:

> European Union law precludes the application of a conclusive presumption that the member state which article 3(1) of Regulation No 343/2003 [the Dublin II Regulation] indicates as responsible observes the fundamental rights of the EU.
>
> Article 4 CFR … must be interpreted as meaning that the member states, including the national courts, may not transfer an asylum seeker to the 'member state responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that member state amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.

This latter finding was then incorporated into article 3(2) of the Dublin III Regulation.

The case of *Sharifi and ors. v. Italy and Greece* (app. no. 16643/09) concerned the collective return of a number of Afghan (and other) nationals from Italy to Greece. The court held that no form of collective and indiscriminate returns could be justified by reference to the Dublin system, which had, in all cases, to be applied in a manner compatible with the ECHR. The court reiterated that it was for the State carrying out the return to ensure, even in the context of the Dublin system, that the destination country offered sufficient guarantees in the application of its asylum policy to prevent the person concerned being removed to his country of origin without an assessment of the risks faced. It held that there had been a violation by Greece of article 13, taken together with article 3, on account of the lack of access to the asylum procedure and the risk that the applicants would be deported to Afghanistan, where they were likely to be subjected to inhuman and degrading treatment.

As to Italy's responsibility resulting from the applicants' removal to Greece, the court found no reason to depart from its findings in the judgment in the case of *M.S.S. v. Belgium and Greece*, and held that it had been for the Italian authorities to examine the applicants' individual situations and to verify, before returning them, how the Greek authorities applied their legislation on asylum in practice. The court found that in failing to do this, Italy had violated article 3 ECHR.

With *Tarakhel v. Switzerland* (app. no. 29217/12), the spotlight moved from Greece to Italy. Relying on articles 3 and 8 ECHR, the applicants alleged that if they were returned to Italy they would be exposed to inhuman and degrading treatment on account of the risk of

being left without accommodation or being accommodated in inhuman and degrading conditions. The risk stemmed, in their submission, from the absence of individual guarantees as to how they would be taken charge of, in view of the systemic deficiencies in the reception arrangements for asylum seekers in Italy. According to the applicants, living conditions in the reception centre in which they had previously been held were poor, particularly on account of the lack of appropriate sanitation facilities, the lack of privacy and the climate of violence among the occupants.

The Grand Chamber of the ECtHR set out findings of a number of reports on the conditions for asylum seekers in Italy, notably of the UNHCR, the Commissioner for Human Rights of the Council of Europe and the IOM. The court held that if the applicants were to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, there would be a violation of article 3 ECHR.

In a number of judgments, the CJEU has given further guidance on the circumstances in which a Dublin III transfer may be impermissible as giving rise to a real risk of a breach of article 4 CFR. This is identical in terms to article 3 ECHR: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

In *C.K.* (C-578/16 PPU), the Slovenian authorities sought to transfer the applicants to Croatia under the Dublin III Regulation. The applicants claimed in particular that their transfer would have negative consequences for the state of health of C. K., also likely to affect the well-being of her new-born child. In this regard, they argued, supported by a number of medical certificates, that
C. K. had had a high-risk pregnancy and that she had suffered psychiatric difficulties since giving birth. A specialist psychiatrist, it was stated, had accordingly diagnosed her as having post-natal depression and periodic suicidal tendencies. Furthermore, it was apparent from several medical opinions that the poor state of health of C. K. was mainly caused by uncertainty regarding her status and the resulting stress. It was stated that the deterioration in her psychological state could result in aggressive behaviour on her part towards herself and others, which might require hospital care. The illness suffered by C. K., according to that psychiatrist, required that she and her child remain at the reception centre in Ljubljana to receive care there.

The court notably held in the operative part of the judgment that article 4 CFR must be interpreted as meaning that even where there were no substantial grounds for believing that there were systemic flaws in the member state responsible for examining the asylum application, a Dublin transfer could take place only in conditions which excluded the possibility that that transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment, within the meaning of that article. In circumstances in which the transfer of an asylum seeker with a particularly serious mental or physical illness would result in a real and proven risk of a significant and permanent deterioration in the state of health of the person concerned, that transfer would constitute inhuman and degrading treatment, within the meaning of that article. In such circumstances, that member state could either temporarily suspend the execution of the transfer or choose to conduct its own examination of that person's application by making use of the 'discretionary clause' laid down in article 17(1) of the Dublin III Regulation.

## II. EAW surrenders

The European Arrest Warrant (EAW) framework decision 2002/584/JHA of 13 June 2002 also concerns a summary procedure of surrender of a person from one member state to another in order that a substantive decision may be made in the latter member state. In the EAW framework, the substantive decision concerns the prosecution and/or sentencing of that person. Again, for the purposes of this paper, the surrender decision can be considered as a form of procedural expulsion.

*Aranyosi and Căldăraru* (Joined decisions C-404/15 and C-659/15 PPU) concerned EAWs sent from Hungary and Romania to Germany seeking the surrender of Mr. Aranyosi and Mr. Căldăraru for prosecution and sentence respectively. The German court possessed the following information which suggested that the conditions of incarceration to which both individuals would be exposed would pose a real risk of treatment contrary to article 4 CFR:

> 43. The ECtHR has found Hungary to be in violation by reason of the overcrowding in its prisons (ECtHR, *Varga and Others v. Hungary*, Nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, of 10 March 2015). The ECtHR held that it was established that Hungary was in violation of Article 3 ECHR by imprisoning the applicants in cells that were too small and that were overcrowded. The ECtHR treated those proceedings as a pilot case after 450 similar cases against Hungary were brought before it with respect to inhuman conditions of detention.
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> 44. The [referring court] states that specific evidence that the conditions of detention to which Mr Aranyosi would be subject, if he were surrendered to the Hungarian authorities, do not satisfy the minimum standards required by international law is also to be found in a report issued by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment [CPT]. The findings in that report refer in particular to the significant prison overcrowding identified in the course of visits made between 2009 and 2013.
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> …
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> 60. In a number of judgments issued on 10 June 2014, the ECtHR found Romania to be in violation by reason of the overcrowding in its prisons (ECtHR, *Voicu v. Romania*, No 22015/10; *Bujorean v. Romania*, No 13054/12; *Mihai Laurenţiu Marin v. Romania*, No 79857/12, and Constantin *Aurelian Burlacu v. Romania*, No 51318/12). The ECtHR held it to be established that Romania was in violation of Article 3 ECHR by imprisoning the applicants in cells that were too small and overcrowded, that lacked adequate heating, that were dirty and lacking in hot water for showers.
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> 61. The [referring court] states that specific evidence that the conditions of detention to which Mr Căldăraru would be subject, if he were to be surrendered to the Romanian authorities, do not satisfy the minimum standards required by international law is also to be found in a report issued by the [CPT]. The findings in that report refer in particular to the significant prison overcrowding identified in visits made between 5 and 17 June 2014.

By its questions the referring court sought in essence to ascertain whether article 1(3) of the Framework Decision must be interpreted as meaning that, where there is solid evidence that detention conditions in the issuing member state are incompatible with fundamental rights, in particular with article 4 CFR, the executing judicial authority may or must refuse to execute a EAW issued in respect of a person for the purposes of conducting a criminal prosecution or executing a custodial sentence. The referring court also sought clarity on whether it may or must make the surrender of that person conditional on there being obtained from the issuing member state information enabling it to be satisfied that those detention conditions are compatible with fundamental rights.

Similar to the Dublin III cases set out above, the CJEU emphasised the importance of the principle of mutual trust within the EU:

> 78. Both the principle of mutual trust between the member states and the principle of mutual recognition are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other member states to be complying with EU law and particularly with the fundamental rights recognised by EU law …
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> 79. In the area governed by the Framework Decision, the principle of mutual recognition, which constitutes, as is stated notably in recital (6) of that Framework Decision, the 'cornerstone' of judicial coope ration in criminal matters, is given effect in article 1(2) of the Framework Decision, pursuant to which Member States are in principle obliged to give effect to a European arrest warrant …

The operative part of the decision held that article 1(3), article 5 and article 6(1) of the EAW Framework Decision must be interpreted as meaning that, where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing member state that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a EAW will be exposed, because of the conditions for his detention in the issuing member state, to a real risk of inhuman or degrading treatment, within the meaning of article 4 CFR, in the event of his surrender to that member state.

The CJEU added that in such circumstances the executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtained supplementary information that allowed it to discount the existence of such a risk. If the existence of that risk could not be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.

In *LM* (Case C 216/18 PPU) (*MJE v. Celmer*), Mr. Celmer objected to his surrender to Poland on the basis that wide and unchecked powers of the system of justice in the Republic of Poland were inconsistent with those granted in a democratic State subject to the rule of law and that there was a real risk that he would be subjected to arbitrariness in the course of his trial in the issuing member state. He submitted that his surrender would result in breach of his rights under article 6 ECHR and should, accordingly, be refused, in accordance with

Irish law and with Article 1(3) of Framework Decision 2002/584 read in conjunction with recital 10 thereof.

While that case concerned article 6 ECHR rather than article 3 ECHR, similar comments to those made in *Aranyosi and Căldăraru* were made by the CJEU in respect of the importance of the principle of mutual trust. Also of note is the court's observations on the level of supporting documentation required to establish a requirement on the part of the executing member state to refuse to surrender an individual. Mr. Celmer had relied, in particular, on the Commission's reasoned proposal of 20 December 2017 submitted in accordance with article 7(1) TEU regarding the rule of law in Poland (COM(2017) 835 final) and on the documents to which the reasoned proposal referred. The CJEU held that it was only if the European Council were to adopt a decision determining, as provided for in article 7(2) TEU, that there was a serious and persistent breach in the issuing member state of the principles set out in article 2 TEU, such as those inherent in the rule of law, and the Council were then to suspend Framework Decision 2002/584 in respect of that member state, that the executing judicial authority would be required to refuse automatically to execute any EAW issued by it, without having to carry out any specific assessment of whether the individual concerned runs a real risk that the essence of his fundamental right to a fair trial will be affected.

The court held that in the absence of such a decision of the European Council:

> 73. …the executing judicial authority may refrain, on the basis of article 1(3) of Framework Decision 2002/584, to give effect to a [EAW] issued by a member state which is the subject of a reasoned proposal as referred to in article 7(1) TEU only in exceptional circumstances where that authority finds, after carrying out a specific and precise assessment of the particular case, that there are substantial grounds for believing that the person in respect of whom that [EAW] has been issued will, following his surrender to the issuing judicial authority, run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial.

*R.O.* (Case C-327/18 PPU) was the case in which the implications of Brexit were relied on to challenge a proposed EAW surrender. R.O. raised two principle objections to his surrender to the UK for the purposes of prosecution. First, on the basis of the withdrawal of that member state from the EU and second, on the basis of a risk of treatment contrary to article 3 ECHR. In respect of the latter, he claimed that he could suffer inhuman and degrading treatment if he were to be imprisoned in Maghaberry prison in Northern Ireland.

By its questions the referring court sought to ascertain whether article 50 TEU must be interpreted as meaning that a consequence of the notification by a member state of its intention to withdraw from the EU in accordance with that article was that, in the event that that member state issued a EAW with respect to an individual, the executing member state must refuse to execute that EAW or postpone its execution pending clarification as to the law that will apply in the issuing member state after its withdrawal from the EU.

In his Opinion, Advocate General Szpunar commented that "Brexit constitutes *terra incognita* in
terms of EU law, [but until such time as withdrawal is official], it is still business as usual".

Mutual trust was again a key feature of the decision of the CJEU. The court notably held, however, that the UK was party to the ECHR and had incorporated the provisions of article 3 ECHR into its national law. Since its continuing participation in that convention was in no way linked to its being a member of the EU, the decision of that member state to withdraw from the Union had no effect on its obligation to have due regard to article 3 ECHR and, consequently, could not justify the refusal to execute a EAW on the ground that the person surrendered would run the risk of suffering inhuman or degrading treatment within the meaning of those provisions (para. 52).

The operative part of that decision held that article 50 TEU must be interpreted as meaning that mere notification by a member state of its intention to withdraw from the EU did not have the consequence that, in the event that that member state issued a EAW with respect to an individual, the executing member state must refuse to execute that EAW or postpone its execution pending clarification of the law that will be applicable in the issuing member state after its withdrawal from the EU. In the absence of substantial grounds to believe that the person who was the subject of that EAW was at risk of being deprived of rights recognised by the Charter and the EAW Framework Decision following the withdrawal from the EU of the issuing member state, the executing member state could not refuse to execute that EAW while the issuing member state remained a member of the EU.

## III. Progression from procedural expulsion to substantive decisions

The above caselaw all relates to summary, procedural decisions to transfer a person under the Dublin system or surrender a person under the EAW framework decision: forms of procedural expulsion. The substantive decision on whether to grant international protection or prosecute or sentence that person will be taken by another member state following transfer or surrender.

More recent caselaw of the CJEU has progressed from a consideration of whether expulsion measures may be precluded by article 4 CFR to a consideration of whether this article may require a substantive decision to be taken in respect of a person's immigration status.

### *Jawo* (C-163/17)

While *Jawo* (C-163/17) again concerned a proposed Dublin III transfer to Italy, the German referring court believed that in considering whether there was a real risk of exposure to inhuman or degrading treatment contrary to article 4 CFR, not only should the living conditions of applicants in Italy while their application remained pending be considered, but also their living conditions post-grant of international protection. The referring court submitted as follows:

> 44. Finally, the referring court is uncertain as to whether, in order to assess the lawfulness of the transfer, it must take account of the living conditions to which the applicant would be subject in the requested Member State if his request for international protection were accepted there and, *inter alia*, the serious risk of his being subjected to treatment contrary to Article 4 CFR.
> 45. That court considers, in that regard, that the examination of whether there are systemic flaws, within the meaning of the second subparagraph of Article 3(2)

of the Dublin III Regulation, cannot be confined to the asylum procedure and the reception conditions during that procedure, but must also include the situation thereafter. Thus, the granting of optimal reception conditions during that procedure would be insufficient if, having been granted international protection, the person concerned is subsequently threatened with destitution. The obligation to carry out such an overall examination of the applicant's situation before his transfer is the necessary reverse side of the Dublin system, which denies those seeking protection a free choice of country of refuge. In any event, that obligation stems from Article 3 ECHR.

…

47. The referring court refers, *inter alia*, to the report of the Swiss Refugee Council, entitled '*Reception Conditions in Italy*', of August 2016, which contains specific information supporting a conclusion that beneficiaries of international protection in that Member State are exposed to a risk of becoming homeless and reduced to destitution in a life on the margins of society. According to that report, the inadequately developed social system of that member state is, in respect of the Italian population, offset by support in family structures, which is lacking in respect of the beneficiaries of international protection. That report also states that there are almost no countervailing integration programmes in Italy and that, in particular, access to essential language courses is left more or less to chance. Finally, it is apparent from that report that, in view of the sharply increased refugee numbers in Italy in the past few years, the major structural deficiencies of the State social system cannot be effectively compensated for by non-governmental organisations and churches.

In considering the third question referred by the German court, whether article 4 CFR must be interpreted as precluding a Dublin III transfer where, in the event of protection being granted in the receiving member state, the applicant would be exposed to a serious risk of suffering inhuman or degrading treatment, within the meaning of Article 4 CFR, on account of the living conditions that he could be expected to encounter as a beneficiary of international protection in that member state, the CJEU recalled some fundamental principles of EU law:

80. … it should be recalled that EU law is based on the fundamental premise that each member state shares with all the other member states, and recognises that they share with it, a set of common values on which the EU is founded, as stated in article 2 TEU. That premise implies and justifies the existence of mutual trust between the member states that those values will be recognised, and therefore that the EU law that implements them will be respected … and that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised by the Charter, particularly Articles 1 and 4 thereof, which enshrine one of the fundamental values of the Union and its member states …

81. The principle of mutual trust between the member states is, in EU law, of fundamental importance given that it allows an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly as regards the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other member states to be complying with EU law and particularly with the fundamental rights recognised by EU law …

82. Accordingly, in the context of the [CEAS], and in particular the Dublin

III Regulation, which is based on the principle of mutual trust and which aims, by streamlining applications for international protection, to accelerate their processing in the interest both of applicants and participating States, it must be presumed that the treatment of applicants for international protection in all member states complies with the requirements of the Charter, the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 …

83. It is not however inconceivable that that system may, in practice, experience major operational problems in a given member state, meaning that there is a substantial risk that applicants for international protection may, when transferred to that member state, be treated in a manner incompatible with their fundamental rights …

84. In those circumstances, the application of an irrebuttable presumption that the fundamental rights of the applicant for international protection are observed in the member state which, pursuant to the Dublin III Regulation, is designated as responsible for examining the application is incompatible with the duty to interpret and apply that regulation in a manner consistent with fundamental rights …

The court agreed with the referring court that the Common European Asylum System (CEAS) and the principle of mutual trust depend on the guarantee that the application of that system will not result, at any stage and in any form, in a serious risk of infringements of article 4 CFR. "It would, in that regard, be contradictory if the existence of such a risk at the stage of the asylum procedure were to prevent a transfer, while the same risk would be tolerated when that procedure has been completed with the recognition of international protection" (para. 89).

The CJEU held that the particularly high level of severity required for a breach of article 4 CFR to be established was attained "where the indifference of the authorities of a member state would result in a person wholly dependent on state support finding himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, *inter alia*, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity" (para. 92).

The operative part of the decision held that article 4 CFR must be interpreted as not precluding the transfer of an applicant for international protection to the member state which was responsible under the Dublin III Regulation for examining the application, unless the court hearing an action challenging the transfer decision found, on the basis of information that was objective, reliable, specific and properly updated and having regard to the standard of protection of fundamental rights guaranteed by EU law, that that risk was real for that applicant, on account of the fact that, should he be transferred, he would find himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty. Such analysis must include the living conditions that he could be expected to encounter as a beneficiary of international protection in that member state.

*Ibrahim* (Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17)

The decision in *Ibrahim* (Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17) was delivered by the CJEU on the same day as *Jawo* and at first sight seems to flow naturally from the latter. The applicants in *Ibrahim* were applicants for asylum who were stateless

Palestinians that had resided in Syria. They left Syria and were granted subsidiary protection in Bulgaria. They travelled on to Germany and lodged new applications for asylum in that member state.

By the third and fourth questions, the referring court sought to ascertain, first, whether article 33(2)(a) of the recast Procedures Directive 2013/32/EU must be interpreted as precluding a member state from exercising the option granted by that provision to find an application inadmissible on the ground that the applicant had already been granted subsidiary protection by another member state, where the living conditions of those granted subsidiary protection in that other member state were in breach of article 4 CFR, or did not satisfy the provisions of Chapter VII of the Qualification Directive, without however being such as to be in breach of article 4 CFR.

A second limb to these questions was whether article 33(2)(a) of the Procedures Directive (recast) must be interpreted as precluding a member state from exercising that option where the asylum procedure in the other member state was and continued to be vitiated by systemic flaws.

The court recalled the fundamental principles of EU law that it had set out in *Jawo* (C-163/17), notably the implications of the principle of mutual trust in the CEAS. That principle applied, in particular, to the application of article 33(2)(a) of the Procedures Directive (recast) (a finding of inadmissibility), which constituted an expression of the principle of mutual trust.

Against that background and having regard to the general and absolute nature of the prohibition laid down in article 4 CFR, which was closely linked to respect for human dignity, the court notably held that "it is immaterial, for the purposes of the application of article 4, that it is at the very time of transfer, in the course of the asylum procedure or on the conclusion of that procedure, that the person concerned would be exposed to a serious risk of suffering such treatment" (para 87). This is significant. This finding served to extend the protection of article 4 from decisions on expulsion to a decision "in the course of the asylum procedure" such as a decision on admissibility. To make the distinction between these two types of decisions clear, even if the international protection application in *Ibrahim* had been found to be inadmissible, a separate decision on expulsion would still have fallen to be made thereafter. Traditionally, it is in the context of this subsequent expulsion decision that article 4 CFR protection issues arise. It is not clear why the CJEU felt it necessary to extend the scope of article 4 to an initial decision on admissibility and why a consideration of article 4 at the later expulsion stage would not have offered adequate protection. The implications of this considerable leap in the caselaw on article 4 will be considered in the final section of this paper.

The court held that accordingly, in the context of a determination on admissibility, where an applicant produced evidence to establish the existence of a risk of treatment contrary to article 4 in the member state that had previously granted subsidiary protection, a national court was obliged to assess, on the basis of information that was objective, reliable, specific and properly updated and having regard to the standard of protection of fundamental rights guaranteed by EU law, whether there was such a risk.

The court made clear that having regard to the importance of the principle of mutual trust for the CEAS, "infringements of the provisions of Chapter VII of the Qualification Directive

which do not result in a breach of article 4 CFR do not prevent the member states from exercising the option granted by article 33(2)(a) of the Procedures Directive" (para. 92).

In respect of this article 4 CFR submission, the court followed the proposals of Advocate General Wathelet, in his Opinion:

> 90. I consider that it is apparent by analogy from … *M.S.S v. Belgium and Greece* … and … *N. S. and Others* … that a member state would infringe article 4 CFR if beneficiaries of international protection, who are wholly dependent on public aid, were faced with indifference from the authorities such that they found themselves in a situation of serious deprivation or want incompatible with human dignity.
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> 91. In other words, in order to consider that there are substantial grounds for believing that the beneficiaries of international protection would face a real risk of being subjected to inhuman or degrading treatment within the meaning of article 4 CFR, on account of their living conditions in the member state responsible under the Dublin III Regulation, they must find themselves in a situation that is particularly serious resulting from systemic flaws in their regard in that member state.
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> 92. In such a wholly exceptional situation, a member state cannot apply the ground for inadmissibility provided for in article 33(2)(a) of Directive 2013/32 to an application for international protection and must examine the application for international protection that has been lodged with it.
>
> 93. In the light of the foregoing and, in particular, the absolute nature of the inhuman or degrading treatment, laid down in article 4 CFR, I consider that EU law precludes the application by a member state of the ground for inadmissibility provided for in article 33(2)(a) of Directive 2013/32 to an application for international protection where the living conditions of those benefiting from subsidiary protection granted by another State infringe article 4 CFR.

As regards the second limb to these questions as dealt with by the court, it was apparent from the request for a preliminary ruling that the deficiencies in the asylum procedure identified by the referring court consisted, according to that court, in the fact that the member state which granted subsidiary protection (Bulgaria) could be predicted to refuse, contrary to the Qualification Directive, to grant refugee status to applicants for international protection. Contrary to article 40(3) of the Procedures Directive (recast), that member state also did not examine subsequent applications, notwithstanding that there may be new evidence or findings that significantly increased the probability of the applicant satisfying the conditions required to claim refugee status. The court held that "if the asylum procedure in a member state were to lead to a systematic refusal, without real examination, to grant refugee status to applicants for international protection who satisfy the conditions laid down in Chapters II and III of the Qualification Directive, the treatment of applicants for asylum in that member state could not be regarded as compliant with the obligations stemming from article 18 CFR" (para. 99). Nevertheless, the court found that "the other member states may reject a further application submitted to them by the person concerned as being inadmissible, pursuant to Article 33(2)(a) of the Procedures Directive, read with due regard to the principle of mutual trust. In such circumstances, it is for the member state that granted subsidiary protection to resume the procedure for the obtaining of refugee status" (para. 100).

The operative part of this decision notably held as follows:

> Article 33(2)(a) of Directive 2013/32 must be interpreted as not precluding a member state from exercising the option granted by that provision to reject an application … as being inadmissible on the ground that the applicant has been previously granted subsidiary protection by another member state, where the living conditions that that applicant could be expected to encounter as the beneficiary of subsidiary protection in that other member state would not expose him to a substantial risk of suffering inhuman or degrading treatment, within the meaning of article 4 CFR … The fact that the beneficiaries of such subsidiary protection do not receive, in that member state, any subsistence allowance, or that such allowance as they receive is markedly inferior to that in other member states, though they are not treated differently from nationals of that member state, can lead to the finding that that applicant would be exposed in that member state to such a risk only if the consequence is that that applicant would, because of his or her particular vulnerability, irrespective of his or her wishes and personal choices, be in a situation of extreme material poverty.
>
> Article 33(2)(a) of the Procedures Directive must be interpreted as not precluding a member state from exercising that option, where the asylum procedure in the other member state that has granted subsidiary protection to the applicant leads to a systematic refusal, without real examination, to grant refugee status to applicants for international protection who satisfy the conditions laid down in Chapters II and III of the Qualification Directive.

## Recent Irish judgments

The Irish High Court has had occasion to deal with similar issues. In *H.Z. (Iran) v. IPAT and ors.* [2020] IEHC 146. The applicant, an Iranian national, had been granted refugee status in Greece, but had left that country and travelled to Ireland where he made another application for international protection. This application was deemed to be inadmissible at first instance and on appeal and the latter decision was challenged by way of judicial review.

The applicant submitted that his living conditions in Greece amounted to inhuman or degrading treatment contrary to article 4 CFR. He did not speak Greek and suffered from depression for which he was prescribed anti-depressants and was awaiting a psychiatric appointment. He claimed that he had no access to accommodation or healthcare and was living on the streets in the past and relied on a report of the PRO Asyl Foundation "*Protected only on paper: beneficiaries of international protection in Greece*" dated from 23 July 2017 (though the IPAT relied on a more recent country report of the Asylum Information Database (AIDA), which, it found, showed certain progress on the social and economic facilities available to persons in the applicant's situation). The applicant also claimed that accommodation that could be available was overcrowded.

Of particular relevance is the court's observation that "article 4 CFR cannot be infringed merely because of a decision declaring an application inadmissible. That possibility only arises at the expulsion stage" (para. 14; see also para. 22).

The court proceeded to distinguish *Ibrahim* on this issue:

> 14. … As against that, *Ibrahim* notes the right to asylum in article 18 CFR (see para. 6), and, unlike article 4, that right can arise at the inadmissibility stage. That presumably explains the reference in *Ibrahim* to the consideration of conditions in the country in which asylum was granted as being something that can arise at the admissibility stage of the process rather than the removal stage.

Difficulties in distinguishing *Ibrahim* from the facts in *HZ (Iran)* on the basis of the right to asylum in article 18 CFR (*i.e.* in the former, only subsidiary protection had been granted in the first member state, whereas in the latter full refugee status had been granted) are considered in the next section.

It is of note here however that despite having raised the issue of the traditional point of protection for article 4 CFR purposes being an expulsion decision rather than an earlier decision on admissibility, the court nevertheless proceeded to make findings in accordance with the rationale of *Ibrahim*. The court held that, in its decision on admissibility, the IPAT had not acted irrationally in finding that substantial grounds of a risk of treatment contrary to article 4 were not established (para. 18). The court also held that there was no need for the IPAT to seek assurances from Greece as to how the applicant would be treated in that member state as it was "inherent in the system of mutual confidence between members of the EU that member states do not seek assurances from each other or make enquiries regarding conditions, unless a significant threshold is first overcome. Had the applicant demonstrated a *prima facie* case that article 4 rights would be breached, the question of undertakings or information might have arisen, but he did not do so" (para. 34).

The fact that the High Court proceeded in this manner may have been on a "but if I am wrong on this issue, I will consider the remaining arguments in this case" basis. However, it renders the position unclear as to whether article 4 issues may be considered in the context of an admissibility decision where full refugee status has been granted by an initial member state or whether article 4 issues should be considered at the later expulsion stage.

More recently, the Irish High Court has made a preliminary reference which remains pending in *MS (Afghanistan) and ors.* [2019] IEHC 477 (C-616/19). This case concerns a number of applicants from Afghanistan and Georgia who had all be granted subsidiary protection in Italy but who had left that member state and applied for international protection in Ireland. Their applications in Ireland were deemed to be inadmissible and the applicants took judicial review proceedings to challenge these decisions on inadmissibility. These cases primarily concern an anomaly between the initial Procedures Directive 2005/85 (into which Ireland has opted) and the recast Procedures Directive 2011/95 (into which Ireland has not opted). However, the second question referred by the High Court is of relevance for the purposes of this paper. This question essentially asks whether it is an abuse of rights under EU law for a person who has been granted international protection in the form of subsidiary protection in one member state to make a second such application in another member state.

In his Opinion delivered on 3 September 2020, Advocate General Saugmandsgaard Øe found that, given his analysis of the other questions referred, there was no need to address the 'abuse of rights question'. Nevertheless, he briefly pointed out that in his view "an application for international protection made by a third-country national after being granted subsidiary protection in a first Member State does not constitute an abuse of rights *per se*. The EU legislature has recognised that third-country nationals may lawfully seek protection within

the European Union where circumstances compel them to do so" (para. 94). The next section of this paper will consider the implications of *Ibrahim* and will include issues that are relevant to this 'abuse of rights question' and which may need to be considered by the CJEU if it determines that this question needs to be addressed.

## IV. Implications of *Ibrahim*

### A. Implications of the move from expulsion to substantive immigration status

The progression in *Ibrahim* from a consideration of whether expulsion measures may be precluded by article 4 CFR to a consideration of whether this article may require a substantive decision to be taken in respect of a person's immigration status marks a significant development of the jurisprudence on both article 3 ECHR and article 4 CFR. Traditionally, both were confined to situations where a person was faced with such treatment in the country in which he was present or faced being expulsed to such a country. *Ibrahim* has opened this up to precluding a member state from finding an international protection application to be inadmissible, from which it flows that that member state must proceed to carry out a substantive examination of the application.

It is worth recalling here what an application for international protection entails, as this will highlight that it is not a remedy targeted to the concerns of a third country national fearing treatment contrary to article 4 CFR in another EU member state. The definition of a refugee under the initial Qualification Directive 2004/83/EC and the recast Qualification Directive 2011/95/EU is the same and is broadly based on the definition in the Geneva Convention on the Status of Refugees 1951. "Refugee" means "a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it".

"Subsidiary protection" is a newer concept and is broadly based on the protection of article 3 ECHR. In accordance with both Qualification Directives, a "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 and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country".

"Serious harm" consists of:

(a) death penalty or execution; or
(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.

So, where an applicant has a nationality, the protection relates to their country of nationality or origin. Where they are stateless, the protection relates to their country of former habitual residence.

Two particular facts in *Ibrahim* are notable: the applicants were stateless and they had been granted subsidiary protection, as opposed to refugee status (in circumstances where there was evidence to suggest that Bulgaria could be predicted to refuse refugee status and did not examine subsequent applications, even where there was a material change in circumstances).

The relevant operative part of *Ibrahim* was two-fold. First, article 33(2)(a) (the inadmissibility provision) of the recast Procedures Directive 2013/32 could be exercised to find an application inadmissible where the applicant had been granted subsidiary protection in another member state where the living conditions that that applicant could be expected to encounter as the beneficiary of subsidiary protection in that other member state would not expose him to a substantial risk of suffering inhuman or degrading treatment, within the meaning of article 4 CFR. Essentially, a member state was not permitted to find an application inadmissible if there were substantial grounds of a risk of treatment contrary to article 4 in the member state in which the person benefits from international protection (the 'article 4 limb').

Second, this inadmissibility provision did not preclude a member state from exercising that option where the asylum procedure in the other member state (that had granted subsidiary protection) led to a systematic refusal, without real examination, to grant refugee status to applicants for international protection who satisfied the conditions for that status laid down in the Qualification Directive (the 'right to asylum limb').

So, from the 'article 4 limb', if substantive grounds are established for a real risk of exposure to treatment contrary to article 4 CFR in the member state in which the person benefits from international protection, an applicant is entitled to have an inadmissibility decision overturned. This would result in a second international protection application being processed in the second member state.

A number of issues arise from these two limbs of this operative part of *Ibrahim*. First, the 'article 4 limb' may result in a proliferation of international protection decisions in different member states in respect of the same person, the same country of origin and the same original fear of persecution or serious harm. If the 'right to asylum limb' had been determined to the contrary, this might have confined the decision to situations where a person never had an opportunity to have their application for refugee status (as opposed to subsidiary protection) fully processed, but that is not the case. It is not clear how the court sought to distinguish *Ibrahim* on this basis in *H.Z. (Iran) v. IPAT and ors.* [2020] IEHC 146. To recall, in that case, the High Court noted that the possibility of article 4 CFR being infringed only arose at the expulsion stage, whereas the "right to asylum in article 18 CFR … unlike article 4,

[could] arise at the inadmissibility stage". In *Ibrahim*, however, the CJEU expressly rejected that the second member state could be precluded from finding an application inadmissible where the first member state was routinely not granted refugee status (*i.e.* routinely not protecting the right to asylum under article 18 CFR) as "with due regard to the principle of mutual trust … it is for the member state that granted subsidiary protection to resume the procedure for the obtaining of refugee status".

Second, the question arises as to whether the principle of the 'article 4 limb' would apply if the first member state had granted refugee status as opposed to subsidiary protection. This would essentially be a "subsequent application". This seems contrary to the express terms of both Procedures Directives. Both the initial Procedures Directive 2005/85/EC (article 32(1)) and the recast Procedures Directive 2013/32/EU (article 40(1)) seem to define a "subsequent application" as being confined to a single member state: "where a person who has applied for asylum in a member state makes further representations or a subsequent application in the same member state, that member state may examine these further representations or the elements of the subsequent application …". While these Directives must be applied in accordance with the protections of article 4 CFR, the difficulty is that *Ibrahim* does not make any reference to or acknowledge this anomaly.

Both the judgment of the CJEU and the Opinion of Advocate General Wathelet set out article 40 subss. (2) to (4) of the recast Procedures Directive 2013/32/EU, but both omit article 40(1). It is arguable that article 40(1) (which confines a "subsequent application" to a subsequent application made in the same member state as where the initial application was made) should inform the interpretation of article 40(2) to (4).

Third, the decision in *Ibrahim* seems contrary to the premise of the Dublin system that only one member state may be responsible for examining an application for international protection. Furthermore, it does not sit easy with the fact that beneficiaries of international protection do not enjoy the right to free movement across the territory of the EU. The difficulty here is that, not only is the judgment in *Ibrahim* contrary to the traditional means of ensuring article 4 protection at the stage of an expulsion decision, but it also seems contrary to these features of the functioning of the CEAS, in opening the door to international protection applications being made in more than one member state. Given that these issues were not addressed by the CJEU or advocate general in *Ibrahim*, a concern arises that this significant development has happened by accident rather than by design.

*Ibrahim* marks a considerable development in EU law from a consideration of whether expulsion measures may be precluded by article 4 CFR to a consideration of whether this article may require a substantive decision to be taken in respect of a person's immigration status. In *H.Z. (Iran) v. IPAT and ors.* [2020] IEHC 146, the High Court sets out the traditional position: "article 4 CFR cannot be infringed merely because of a decision declaring an application inadmissible. That possibility only arises at the expulsion stage". In *Ibrahim*, there is no reason given as to why a later decision on expulsion, which would follow as of course from a decision finding an international application to be inadmissible, would not have offered adequate protection from treatment contrary to article 4 CFR.

## B. An exceptional remedy for exceptional circumstances

While not clear in the reasoning of the CJEU or of Advocate General Wathelet, the decision in *Ibrahim* may serve to acknowledge the existence of a protection lacuna in some exceptional cases where substantial grounds for a real risk of treatment contrary to article 4 CFR can be established.

Even where a person has been refused international protection in an initial member state, it has been recognised from the initial Greek transfer cases that there may be legitimate reasons for a person to challenge their expulsion and return to that member state. Where a person has in fact been granted international protection in an initial member state, there must be some significant reason for them to then seek to abandon this in making a later application in another member state. While this may be for any number of different significant reasons, included among these may be a legitimate fear of being exposed to treatment contrary to article 4 CFR in the initial member state.

If a person in the latter scenario does move on to another member state and does have a well- founded fear of treatment contrary to article 4 CFR in the former member state, what application are they to make in the second member state? While making an application for international protection is not an ideal, targeted remedy addressing their current fears (being confined to protection in respect of their country of nationality / origin or former place of habitual residence for stateless persons), it would in fact serve to give them effective protection from being returned to the former EU member state. Advocate General Wathelet in his Opinion described the circumstances in which article 4 concerns would require a second member state to find a second international protection application as admissible as "a wholly exceptional situation". This may have been to recognise that this less than ideal remedy may be the best exceptional yet effective remedy that may be offered to a person in such exceptional circumstances.

Alternatively, should they be required to enter the deportation process and make submissions in respect of their article 4 fears in that context (e.g. under Irish law, representations pursuant to s. 3 of the Immigration Act 1999)? If a person has genuine protection needs, it is at least arguable that they should be entitled to make an application for some form of substantive immigration status and have this processed before facing the prospect of the deportation process.

## C. Evidence of the limits of the principle of mutual trust

It is not only individual applicants who have submitted that article 4 risks arise for them if they are returned to a member state of the EU. There is increasing evidence published by international human rights bodies, NGOs and the European Court of Human Rights that such risks arise. Furthermore, while the CJEU cannot make findings on whether or not substantial grounds of a real risk of treatment contrary to article 4 CFR have, on the facts of a given case, been established, it can make similar findings in the context of infringement proceedings brought by the European Commission against member states.

In *M.S.S. v. Belgium and Greece* (app. no. 30696/09) the ECtHR relied on reports from the CPT, Amnesty International, ECRE, the UNHCR and Human Rights Watch in making its finding of a violation of article 3 ECHR by both Belgium and Greece. In *N. S. and M.E.* (Joined

cases C 411/10 and C 493/10), the CJEU in turn relied on the findings of the ECtHR in *M.S.S. v. Belgium and Greece*. *Tarakhel v. Switzerland* (app. no. 29217/12), the ECtHR set out findings of a number of reports on the conditions for asylum seekers in Italy, notably of the UNHCR, the Commissioner for Human Rights of the Council of Europe and the IOM. In the EAW context, in *Aranyosi and Căldăraru* (Joined decisions C-404/15 and C-659/15 PPU) the CJEU relied on factual findings set out in judgments of the ECtHR in respect of prison conditions in Hungary (*Varga and Others v. Hungary*, Nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, of 10 March 2015) and prison conditions in Romania (ECtHR, *Voicu v. Romania*, No 22015/10; *Bujorean v. Romania*, No 13054/12; *Mihai Laurenţiu Marin v. Romania*, No 79857/12, and Constantin *Aurelian Burlacu v. Romania*, No 51318/12). The CJEU also relied on reports of the CPT in respect of both Hungary and Romania. In *Jawo* (C-163/17), the CJEU referred to a report of the Swiss Refugee Council, entitled '*Reception Conditions in Italy*', of August 2016, which contained specific information supporting a conclusion that beneficiaries of international protection in that Italy were exposed to a risk of becoming homeless and reduced to destitution in a life on the margins of society.

The European Commission has also stepped up to the mark in initiating infringement proceedings against member states who fail to ensure that basic minimum standards of human rights protection in the sphere of the CEAS are in place. On 21 December 2018, the Commission lodged an action before the CJEU against Hungary (*European Commission v. Hungary*, (Case C-808/18)) seeking declarations that by taking a series of actions, Hungary had failed to fulfil its obligations under a number of provisions of the Procedures Directive, the Reception Conditions Directive and the Charter. On 8 November 2019, the Commission lodged an action against Hungary (*European Commission v. Hungary*, (Case C-821/19) seeking declarations that by adding a new ground of inadmissibility of asylum applications to those expressly established in Directive 2013/32/EU in relation to the inadmissibility of asylum applications, Hungary had failed to fulfil its obligations under article 33(2) of that directive and that by adopting measures which criminalise organising activity carried out to assist international protection applicants, Hungary had failed to fulfil its obligations under a number of provisions of the Procedures Directive and the Reception Conditions Directive. Following actions brought by the Commission against Poland, Czech Republic and Hungary (Joined Cases C 715/17, C 718/17 and C 719/17), the CJEU delivered its judgment on 2 April 2020 making declarations and adverse costs orders against these member states for failing to fulfil their relocation obligations under Council Decisions 2015/1523 and 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. While these infringement proceedings do not relate to concerns under article 4 CFR, they demonstrate that the Commission is active in seeking to ensure that member states fulfil their obligations under the CEAS. Where real concerns arise in respect of a violation of article 4 CFR by a member state, steps should be taken to inform the Commission of this. The Commission has an important role in ensuring that exceptions to the principle of mutual trust remain the exception

The above reports and caselaw have a two-fold utility: in the long-term, they assist in ensuring that minimum standards are respected by member states across the EU. In the short-term, they can assist individuals in demonstrating the well-founded nature of their claims to fear adverse treatment, amounting in exceptional cases to treatment contrary to article 4 CFR, if returned to the member state in question. They demonstrate the circumstances which may compel third country nationals to seek protection within the EU (as relied upon

by Advocate General Saugmandsgaard Øe in his opinion in *MS (Afghanistan)* (C-616/19) to form the view that an application for international protection made by a third-country national after being granted subsidiary protection in a first Member State does not constitute an abuse of rights *per se*). This growing source of evidence is not an implication of *Ibrahim* but sets this judgment in context. It gives the CJEU cause to reflect carefully on how it will further progress its caselaw concerning the balance between the absolute protection of article 4 CFR and the fundamental principle of mutual trust on which the European project is based.