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AN ANALYSIS OF CJEU CASE C-216/22: DEFINING 'NEW ELEMENTS' IN SUBSEQUENT ASYLUM APPLICATIONS

Abstract

*This paper** analyses the Court of Justice of the European Union's (CJEU) ruling in Case C-216/22, which addresses interpreting "new elements" in subsequent asylum applications under the Recast Asylum Procedures Directive (Recast APD). The case concerns a Syrian national who sought refugee status in Germany, citing a previous CJEU judgment in case C-238/19 as a "new element" in his subsequent application. The paper examines the legal background, the Advocate General's opinion, and the CJEU's ruling, which clarified that any CJEU judgment, whether it interprets existing EU law or establishes a new legal precedent, may constitute a "new element" if it significantly increases the likelihood of the applicant qualifying for international protection. The implications of this ruling for national asylum procedures and the principle of legal certainty are also discussed.*

Keywords**:** *Subsequent asylum applications, Recast Asylum Procedures Directive, Court of Justice of the EU (CJEU), Case C-216/22, asylum law*

1. Introduction

In recent years, EU member states have witnessed a noticeable increase in subsequent applications for international protection. These applications are subject to a special procedure outlined in the Recast Asylum Procedures Directive (Hereinafter: Recast APD)[1]. Article 33(2) of the Recast APD provides an exhaustive list of criteria based on which an application may be deemed inadmissible. Member states are precluded from introducing additional grounds for inadmissibility but may choose not to reject an application based solely on the listed criteria—

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[1] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), Official Journal of the European Union, OJ L 180, 29.6.2013, p. 60. (Directive 2013/32/EU).

they may still approve it.[2] As a result, member states may offer greater protection to applicants than the Recast APD requires.

The subsequent application is defined in Article 2(q) of the Recast APD as any further application for international protection made after a final decision has been made on a previous application. Article 33(2)(d) of the Recast APD[3] allows national authorities to declare such applications inadmissible, but only under specific conditions, primarily where no 'new elements or findings' are found. However, the Recast APD does not define what constitutes a 'new element.

This analysis focuses on CJEU case C-216/22 Federal Republic of Germany, concerning the interpretation of the concept of 'new elements' in subsequent applications (*Case C-216/22 A. A. v. Federal Republic of Germany, 2024*). The applicant, A.A., a Syrian national, sought international protection, specifically, refugee status, in Germany in 2017. His application was denied, but he was granted 'subsidiary protection,' given that there were reasonable grounds to believe that returning to Syria threatened suffering serious harm. In its decision, the competent office emphasised that conscription was not the real reason for A.A.'s departure from Syria, as he had left the country before receiving a mobilisation notice, and that his claim was solely based on the general dangers posed by the ongoing war.

Following the CJEU ruling in C-238/19 (C-238/19 E.Z. v. Federal Republic of Germany, 2020), which relaxed the burden of proof for asylum seekers coming from war-torn third countries, A.A. submitted another subsequent application, referring to said ruling as a 'new element.' In its C-216/22 judgment, the CJEU primarily addressed the preliminary questions referred by the Administrative Court in Sigmaringen (regarding A.A.'s appeal against the administrative authority's decision). However, the CJEU also interpreted the scope of its prior ruling in joined cases C-924/19 PPU and C-925/19 PPU in which it held that its decision can, under certain circumstances, constitute the aforementioned 'new element.' [4]

2. Factual and Legal Background

A.A. left Syria in 2012 and has been residing in Germany since 2017, where he applied for asylum, citing fear of being recalled to military service (he had completed a round between 2003 and 2005) or imprisoned for refusal. On 16 August 2017, the German Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*) rejected his application

[2] European Council on Refugees and Exiles (ECRE), Information Note on Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast) (2014), p. 39. (hereinafter: ECRE, Information note).

[3] Art. 33. par. 2 pt. d) *the application is a subsequent application, where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95/EU have arisen or have been presented by the applicant*

[4] Joined Cases C-924/19 FMS and Others v. Országos Idegenrendészeti Főigazgatóság et al., 2020; Broeberg, Morten, and Niels Fenger. Preliminary references to the European Court of Justice, Oxford, Oxford University Press, 2010. pp. 390–395; Petrašević, 2010, pp. 427-463; Petrašević, Tunjica. "Ubrzani i hitni prethodni postupak pred Europskim sudom." In Prethodni postupak u pravu Europske unije – suradnja nacionalnih sudova s Europskim sudom, edited by Tamara Ćapeta, Iris Goldner Lang, Tamara Perišin, and Siniša Rodin, 103–124. Narodne novine, 2011. pp. 103-124.

but granted subsidiary protection. A.A. did not appeal the Federal Office's decision, making it final.

On 15 January 2021, A.A. submitted a subsequent application, citing the CJEU ruling in C-238/19. He argued that this judgment represented new elements and findings in his case, i.e., altered his legal position, which should compel the Federal Office to reconsider his application. However, on 22 March 2021, the Federal Office rejected his subsequent application as inadmissible, reasoning that the cited judgment did not change his legal position under German law. Consequently, A.A. filed an administrative complaint with the Administrative Court in Sigmaringen, requesting the annulment of the Federal Office's decision and admission of his application, i.e., recognition of his refugee status.

During the proceedings before the Administrative Court in Sigmaringen, questions arose regarding the application of EU law, specifically, the interpretation of the Recast APD. The Administrative Court referred the following (verbatim) preliminary questions to the CJEU:

1. (a) Is a national provision which considers a subsequent application admissible only if the factual or legal position on which the original rejection decision was based has subsequently changed in favour of the applicant compatible with Article 33(2)(d) and Article 40(2) of Recast APD?

   (b) Do Article 33(2)(d) and Article 40(2) of Recast APD preclude a national provision that does not treat a decision of the Court of Justice of the European Union (here: in preliminary ruling proceedings under Article 267 TFEU) as a 'new element' or 'new circumstance' or 'new finding' if the decision does not establish the incompatibility of a national provision with EU law but is limited to the interpretation of EU law? In what circumstances, if any, can a judgment of the Court of Justice of the European Union that merely interprets EU law be considered a "new element", "new circumstance", or "new finding"?

2. If Questions 1a and 1b are answered in the affirmative: must Article 33(2)(d) and Article 40(2) of Recast APD be interpreted as meaning that a judgment of the Court of Justice of the European Union which has ruled that there is a strong presumption that a refusal to do military service under the conditions set out in Article 9(2)(e) of Directive 2011/95/EU is linked to one of the five grounds listed in Article 10 of that directive must be taken into account as a 'new element' or 'new circumstance' or 'new finding'?

3. (a) Must Article 46(1)(a)(ii) of Recast APD be interpreted as meaning that the judicial remedy against an inadmissibility decision taken by the determining authority within the meaning of Article 33(2)(d) and Article 40(5) of Recast APD is limited to examining whether the determining authority has correctly concluded that the conditions for the subsequent application for asylum to be considered inadmissible under Article 33(2)(d) and Article 40(2) and (5) of Recast APD have been met?

   (b) If Question 3a is answered in the negative: must Article 46(1)(a)(ii) of Recast APD be interpreted as meaning that the judicial remedy against an inadmissibility decision also covers the examination of whether the conditions for the grant of international protection within the meaning of Article 2(b) of Directive 2011/95/EU have been met

if the court finds, after conducting its own examination, that the conditions for the rejection of the subsequent application for asylum as inadmissible are not met?

(c) If Question 3b is answered in the affirmative: does such a decision by the court require that the applicant has first been granted the special procedural guarantees under the third sentence of Article 40(3) in conjunction with the rules in Chapter II of Recast APD? May the court conduct that procedure itself, or must it delegate it to the determining authority, where necessary after suspending the court proceedings? Can the applicant waive compliance with those procedural guarantees?

3. Opinion of Advocate General

In his opinion on the matter, Advocate General Nicholas Emiliou (AG (Emiliou)) focused on two main themes derived from the questions posed by the German court. First, the German court sought the CJEU's interpretation of 'new element' within the meaning of Article 33(2)(d) and Article 40 of the Recast APD.[5] Second, it asked about the scope of legal remedies to which A.A. is entitled in contesting the decision on inadmissibility.[6]

Specifically, the ambiguity centered on whether the appellate court should only review the validity of the rejection of the subsequent application as inadmissible or if it must engage in a more thorough review and decide the case (whether the application should be granted) based on its merits.

The Recast APD contains specific procedural rules for handling subsequent applications to avoid unnecessary administrative burden on the member states' competent authorities.[7] The AG noted that these rules aim to prevent situations where unsuccessful asylum seekers repeatedly file applications without any change in their factual or legal circumstances, which could constitute an abuse of rights.[8] To this end, Article 33(2)(d) of the Recast APD allows national authorities to reject subsequent applications as inadmissible, but only under two cumulative conditions: (1) there is a final decision on the previous (initial) application, and (2) there are no 'new elements.[9]

The AG emphasized that the list of grounds for declaring a subsequent application inadmissible under Article 33(2) of Recast APD is exhaustive, meaning that member states are precluded from introducing additional grounds for inadmissibility in their national legislation. However, member states are permitted to expand the list of grounds on which an application can be reconsidered, as this is in the applicant's favour.[10]

[5] Opinion of Advocate General Nicholas Emiliou in Case C-216/22 A. A. v. Federal Republic of Germany, ECLI:EU:C:2023:646, p. 26. (hereinafter: Opinion of AG in C-216/22, 2023)
[6] Opinion of AG in C-216/22, 2023, p. 26.
[7] Directive 2013/32/EU, recital 36.
[8] Opinion of AG in C-216/22, 2023, ft. 9.
[9] Opinion of AG in C-216/22, 2023, p. 30.
[10] Opinion of AG in C-216/22, 2023, p. 31; ECRE, p. 39.

Furthermore, Article 40 of Recast APD regulates the handling of subsequent applications by national authorities. AG Emiliou points out that the competent national authorities must follow a two-step process,[11] as confirmed by the CJEU itself, citing its decision in C-921/19.[12]

The first step is to determine whether one or more new elements or findings exist, which are relevant to assessing whether the applicant meets the conditions for international protection. Only if new elements are found will the authorities proceed to the second step: evaluating whether the new element increases the likelihood that the applicant qualifies for refugee or international protection status.[13]

As mentioned earlier, the Recast APD does not define what constitutes 'new elements' or 'findings.' However, AG Emiliou argues that for an element or finding to be considered 'new,' it must have either arisen after the decision on the previous (initial) application or been introduced for the first time during the subsequent application. In other words, a 'new element' is one that a prior decision could not have been based upon.[14]

Furthermore, under Article 40(3) of the Recast APD, member states may choose to apply the 'no fault system,' under which the subsequent application will only be further examined if the applicant could not, through no fault of their own, have relied on these 'new elements' in the previous application.[15] However, not every new element can or must prevent the rejection of a subsequent application as inadmissible—only those elements that significantly increase the likelihood of international protection being granted.[16]

AG Emiliou also touched upon the CJEU's prior judgment in the joined cases C-924/19 PPU and C-925/19 PPU that confirmed that a CJEU ruling can constitute a 'new element.'[17] . Since the German court had requested (through the preliminary questions submitted in C-216/22), an interpretation of the scope of its ruling in the joined cases, the AG considered it necessary to elaborate on the respective CJEU's decision.

Namely, Hungarian authorities had invoked a ground for inadmissibility not found in Article 33(2) of the Recast APD, leading to a situation where the Hungarian implementing legislation was directly contrary to EU law.[18] The CJEU initially stated that the competent authorities of member states are not required *ex officio* to reopen proceedings concluded by a final decision, even if that decision conflicts with EU law. The CJEU justified this by citing legal certainty and the importance of the principle of *res judicata*, arguing that it is not permissible to allow legal acts producing legal effects to be questioned indefinitely.[19] Despite this, the CJEU concluded that a final decision must be reconsidered at the request of the applicant if there is a 'new element,' which, in the cases under review, was the CJEU's own judgment.

[11] Opinion of AG in C-216/22, 2023, p. 32
[12] C-921/19 Staatssecretaris van Justitie en Veiligheid, 2021, paras. 34-37.
[13] Opinion of AG in C-216/22, 2023, p. 32.
[14] Opinion of AG in C-216/22, 2023, p. 34; C-921/19 Staatssecretaris van Justitie en Veiligheid, 2021, par. 50
[15] ECRE, Information note, p. 47.
[16] Opinion of AG in C-216/22, 2023, p. 35.
[17] Joined Cases C-924/19 PPU & C-925/19 PPU, 2020, par. 203.
[18] Joined Cases C-924/19 PPU & C-925/19 PPU, 2020, paras. 185–186.
[19] Joined Cases C-924/19 PPU & C-925/19 PPU, 2020, paras. 185–186; Opinion of AG in C-216/22, 2023, paras. 40–41.

The AG indirectly criticized this approach but sought to explain it by highlighting the distinction between administrative and judicial decisions.[20] Administrative decisions, such as those made by administrative bodies in international protection procedures (and in the case analysed herein), do not enjoy the same protection as judicial decisions, particularly those of the CJEU.[21] Being shielded by the principle of *res judicata*, judicial decisions are harder to overturn compared to administrative ones, which are generally made by administrative bodies such as the Federal Office for Migration and Refugees in the case at hand.[22]

The AG also discussed the principle of *non-refoulement*, which prevents the forced removal or return of an individual to a place where they may face persecution.[23] He stressed that this principle significantly limits the possibility of declaring an application inadmissible. Both the AG and the European Commission emphasised that the purpose of the Recast APD is to facilitate access to the asylum procedure, not to impede it.[24] Therefore, the provisions on subsequent applications and inadmissibility should be interpreted in that light.

In concluding, the AG argued that reviewing the admissibility of an application does not impose an excessive administrative burden on national authorities.[25] He further advocated for interpreting the concept of 'new element' broadly enough to encompass CJEU judgments that, much like in the case at hand, increase the likelihood of protection being granted.[26]

Regarding C-216/22, the AG noted that while German national law was not directly contrary to EU law, the CJEU'S ruling in C-238/19 led to a different interpretation of German legislation. In the case at hand, A.A. claimed that the CJEU's ruling in C-238/19 constituted a 'new element,' and that his application should be reviewed. The AG, however, argued that no distinction should be made between judgments that establish a conflict between national law and EU law and those that merely provide interpretative guidance for national law.[27]

The AG rightly emphasised that the CJEU, in the context of preliminary rulings under Article 267 TFEU, is not authorised to interpret or assess the validity of national law norms.[28] It is the responsibility of the national courts to determine, in light of the interpretation provided by the CJEU, whether national law is contrary to EU law, and if so, to set aside the national law and apply EU law directly. This principle stems from the doctrines of direct effect and supremacy of EU law over national legal provisions.

4. Judgement of the Court

In its ruling, the CJEU first revisited several key facts of the case, highlighting that A.A.'s primary claim was not related to conscription—he had left Syria before receiving (his second)

[20] Opinion of AG in C-216/22, 2023, par. 43.
[21] Opinion of AG in C-216/22, 2023, par. 52.
[22] Opinion of AG in C-216/22, 2023, par. 53.
[23] Opinion of AG in C-216/22, 2023, par. 55.
[24] Opinion of AG in C-216/22., 2023, par. 58.
[25] Opinion of AG in C-216/22, 2023, par. 61.
[26] Opinion of AG in C-216/22, 2023, par. 64.
[27] Opinion of AG in C-216/22, 2023, par. 74.
[28] Opinion of AG in C-216/22, 2023, par. 61.

mobilisation notice—but rather, his departure in 2012 was based on the general dangers posed by the ongoing war.[29] Also highlighted was the fact that A.A. had not appealed the 16 August 2017 decision of the Federal Office for Migration and Refugees (rejecting A.A.'s application for refugee status), rendering the decision final under German law.[30] In subsequent years, a key development occurred: the CJEU ruling in case C-238/19, delivered in November 2020, which eased the burden of proof for applicants claiming protection based on their refusal to perform military service, particularly when refusal is linked to persecution based on Article 10 of Directive 2011/95.[31]

On January 15, 2021, A.A. submitted a subsequent application, arguing that the CJEU's ruling in C-238/19 had significantly changed his legal position, and thus his subsequent application should be reconsidered.[32] However, the Federal Office for Migration and Refugees rejected this subsequent application on 22 March 2021, citing German implementing legislation, including Article 71 of the Asylum Act (*Asylgesetz*)[33] and Article 51(1)(1) of the Administrative Procedures Act (*Verwaltungsverfahrensgesetz*), and prevailing case law, according to which the decision-making authority is required to reopen the procedure only if the factual or legal situation on which the administrative decision is based has subsequently changed in favour of the individual concerned.[34]

According to the interpretation of prevailing national case law, only a change in the applicable provisions could generally be considered as a new element, but not a judicial decision, such as the CJEU's ruling. A judicial decision, it was argued, is confined to the interpretation and application of the relevant provisions in effect at the time of the decision on the previous application, without altering those provisions.[35]

Thus, A.A. filed a lawsuit with the Administrative Court in Sigmaringen, seeking the annulment of the decision of 22 March 2021 and recognition of refugee status. Faced with the dilemma of whether German legislation and administrative and judicial practice were consistent with EU law, the Administrative Court referred the case to the CJEU, raising several preliminary questions regarding the interpretation of Article 33(2)(d) and Article 40 of the Recast APD.

The CJEU reiterated that its case law can constitute a new element within the meaning of Article 33(2) and Article 40 of Recast APD.[36] However, it is for the national court to determine whether the CJEU's ruling in C-238/19, invoked by A.A. in the domestic proceedings, is the 'new element' that significantly increases the likelihood that he qualifies for refugee status.[37]

The CJEU further clarified the scope of its judgment in case C-238/19, stating that it did not intend to prescribe an irrebuttable presumption or to replace the assessment of the competent

[29] Judgment in C-216/22, 2024, p. 14.
[30] Judgment in C-216/22, 2024, p. 15.
[31] Judgment in C-216/22, 2024, p. 16.
[32] Judgment in C-216/22, 2024, p. 16.
[33] Asylgesetz, 1992, BGBl. 1992 I, p. 1126.
[34] Verwaltungsverfahrensgesetz, 2003, BGBl. 2003 I, p. 102.
[35] Judgment in C-216/22, 2024, p. 19.
[36] Judgment in C-216/22, 2024, p. 48.
[37] Judgment in C-216/22, 2024, p. 52.

national authorities on this matter with its own.[38] Regarding the first two questions, the CJEU concluded that "any judgment of the Court, including a judgment which is limited to interpreting a provision of EU law already in force at the time that a decision on a previous application was adopted, constitutes a new element, within the meaning of those provisions, irrespective of the date on which it was delivered, if it significantly adds to the likelihood of the applicant qualifying as a beneficiary of international protection."[39]

Regarding the third question, which concerns the scope of the legal remedies available to A.A. against the contested decision, the CJEU concluded that Article 46(1)(a)(ii) of Recast APD allows—but does not require—member states to empower their courts, when annulling a decision rejecting a subsequent application as inadmissible, to decide on that application themselves without referring it back to the decision-making body, provided that the courts respect the guarantees set out in Chapter II of Recast APD.[40]

The CJEU noted that, by adopting the Recast APD, the EU legislator did not intend to introduce a common rule under which the decision-making body would lose its competence after an annulment of the decision on the application for international protection. Therefore, member states may continue to prescribe that the case file must be returned to the decision-making body after such an annulment for the issuance of a new decision.[41]

Lastly, the CJEU concluded that the Recast APD provides member states with a certain degree of discretion in implementing their national procedural systems, which aligns with the principle of national procedural autonomy.[42] However, when a court annuls an inadmissibility decision on a subsequent application, the first-instance administrative body must comply with the court's findings and no longer exercise discretion in granting or denying the requested protection for the reasons assessed by the court.[43]

5. Conclusion: Comment on the Case

Although the judgment in case C-216/22 was issued over a year ago (on 8 February 2024), it has received little commentary or analysis.[44] This commentary thus provides the first in-depth examination of the judgment and its impact within the context of asylum law.

[38] Judgment in C-216/22, 2024, p. 53.
[39] Judgment in C-216/22, 2024, p. 54.
[40] Judgment in C-216/22, 2024, p. 67.
[41] Judgment in C-216/22, 2024, par. 6 and C-556/17 Torubarov, 2019, paras. 65–66.
[42] Halberstam, Daniel. "Understanding National Remedies and the Principle of National Procedural Autonomy: A Constitutional Approach." *Cambridge Yearbook of European Legal Studies* 23 (2021): 128–58. https://doi.org/10.1017/cel.2021.12. pp.- 128-158.
[43] Judgment in C-216/22, 2024, p. 65.
[44] Peers, Steve. "Recent asylum case law of the CJEU: Distinction, integration or extension from 'mainstream' EU law?", 18 June 2024, EU Law Analysis Blog. Retrieved September 7, 2024, https://eulawanalysis.blogspot.com/2024/06/recent-asylum-case-law-of-cjeu.html.

The Grand Chamber of the CJEU issued a relatively brief and, for the most part, clear judgment. While it generally follows the opinion of AG Emiliou, particularly regarding the major points, it is noteworthy that the CJEU does not explicitly refer to his opinion anywhere.[45]

For example, both the CJEU and the AG noted a key fact: in the domestic proceedings, A.A. did not file a lawsuit against the administrative authority's original decision (namely, the Federal Office for Migration and Refugees decision from August 16, 2017), rendering the decision final. Since this involved an administrative decision and not a judicial one, the AG considered it to enjoy a lesser degree of protection under the principle of *res iudicata*, making it easier to overturn. The AG also strongly emphasised the fact that applicants are usually not represented by professional legal representatives—such as a lawyer or attorney—and that they come from third countries, often unfamiliar with EU law. He thus argued that it would neither be fair nor reasonable to assume that asylum applicants "forfeited their opportunity" to have their application reconsidered simply because they did not timely contest the decision made in the previous administrative proceedings, especially when that decision conflicted with EU law.[46] While the AG discussed this matter in detail in his opinion, the CJEU did not consider it relevant to its decision.[47]

The applicant, A.A., relied on two important prior CJEU rulings. First, on the judgment in the joined cases C-924/19 and C-925/19 PPU, in which the CJEU established that its judgments could, under certain circumstances, constitute a 'new element'. Second, on the judgment in C-238/19, in which the Court eased the burden of proof for asylum seekers from war-torn third countries. It could be argued that the CJEU did not introduce any particularly new principles in C-216/22 but rather clarified the scope of its earlier decisions in light of the facts presented by the German court. This might explain why this judgment has not been the subject of analysis or critical reviews, as noted in the introduction.

The CJEU's ruling in C-216/22 can be summarised as follows:

- Any CJEU judgment may constitute a 'new element' justifying a fresh, comprehensive review of an application for refugee status or international protection.
- This principle also applies to judgments (i.e., previous decisions of the CJEU) that are limited to interpreting provisions of EU law that were already in force at the time the decision on the previous application was made (as in the case at hand).
- For a CJEU judgment to be considered a new element justifying a fresh, comprehensive review of the application, it must significantly increase the likelihood that the applicant qualifies for refugee status or subsidiary protection.

[45] Note that the opinions of the Advocate General are not formally binding, but the Court generally refers to them in its judgments. As Hartley states, the opinion does not bind the Court, but the judges will consider it with great attention when making their decision; it shows the judges what a trained legal mind, of equal quality to theirs, has concluded regarding the case they are deciding. It can serve as a reference point or starting point from which they can begin their deliberation. Hartley, Trevor C. The Foundations of European Union Law: An Introduction to the Constitutional and Administrative Law of the European Union. Oxford University Press, 2014, p. 57; Petrašević, T. "Postupci pred Sudom EU." In Procesno-pravni aspekti prava EU, edited by Tunjica Petrašević and Igor Vuletić, 103–124, Faculty of Law, University of Osijek, 2016.

[46] Opinion of AG in C-216/22, 2023, par. 63.

[47] Opinion of AG in C-216/22, 2023, paras. 40–41, 43, 52–53.

- Member states may empower their courts, when annulling a decision rejecting a subsequent application as inadmissible, to decide on the application themselves and, if necessary, grant it. However, they are not required to do so. They may refer the case back to the first-instance body for further proceedings, with the understanding that this body will be bound by the court's decision and legal reasoning.

Finally, it is worth mentioning that the CJEU judgment in C-238/19, which A.A. relied upon, did not, as Kosińska points out, "open a gateway to Europe," but rather "a wicket to be used by non-opportunists who genuinely wish to escape the Syrian regime."[48] Kosińska suggests that this judgment could also be applied to refugees coming from other war-torn countries (e.g., Ukraine, Palestine, etc.). Given the *erga omnes* effect of previous decisions, national courts should be able to resolve cases more swiftly by relying on the so-called *acte éclairé*[49] doctrine, thus expediting the asylum procedure without needing to refer new preliminary questions to the CJEU in each individual case.[50]

Bibliography

Books, Articles

Broeberg, Morten, and Niels Fenger. Preliminary references to the European Court of Justice, Oxford, Oxford University Press, 2010.

Information Note on Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast) (2014)

Fernandes, I. T. "The interpretation of article 9 of Directive 2011/95/EU: Evasion of military service in Case C-238/19 [EZ v. Germany]." NOVA Refugee Clinic Blog (2021). Retrieved September 7, 2024, from https://novarefugeelegalclinic.novalaw.unl.pt/?blog_post=the-interpretation-of-article-9-of-directive-2011-95-eu-evasion-of-military-service-in-case-c-238-19-ez-v-germany

Fripp, Eric. "Draft evaders and refugee protection." RLI Blog (2022). Retrieved September 7, 2024, from https://rli.blogs.sas.ac.uk/2022/10/19/draft-evaders-and-refugee-protection/Fundamental Rights Agency (FRA). *Handbook on European law relating to asylum, borders and immigration* (edition 2020).

[48] Kosińska, A. M. "Did the Court of Justice open a gateway to Europe for refugees? Analysis of the judgment of the Court of Justice of the European Union in EZ v. Bundesrepublik Deutschland (C-238/19)." Studia Iuridica Lublinensia, (2022): 239-261. p. 257. (hereinafter: Kosinska, 2022).

[49] The *acte éclairé* doctrine means that a national court, which is otherwise obligated to refer a preliminary question, is not required to do so if there is an earlier decision of the CJEU on that issue (Broeberg & Fenger, 2010, p. 442)

[50] Kosinska, 2022, p. 258; Fernandes, 2021; Fripp, 2022; Fernandes, I. T. "The interpretation of article 9 of Directive 2011/95/EU: Evasion of military service in Case C-238/19 [EZ v. Germany]." NOVA Refugee Clinic Blog (2021). Retrieved September 7, 2024, from https://novarefugeelegalclinic.novalaw.unl.pt/?blog_post=the-interpretation-of-article-9-of-directive-2011-95-eu-evasion-of-military-service-in-case-c-238-19-ez-v-germany; Fripp, E. "Draft evaders and refugee protection." RLI Blog (2022). Retrieved September 7, 2024, from https://rli.blogs.sas.ac.uk/2022/10/19/draft-evaders-and-refugee-protection/.

Halberstam, Daniel. "Understanding National Remedies and the Principle of National Procedural Autonomy: A Constitutional Approach." *Cambridge Yearbook of European Legal Studies* 23 (2021): 128–58. https://doi.org/10.1017/cel.2021.12

Hartley, Trevor C. The Foundations of European Union Law: An Introduction to the Constitutional and Administrative Law of the European Union. Oxford University Press, 2014

Kosińska, A. M. "Did the Court of Justice open a gateway to Europe for refugees? Analysis of the judgment of the Court of Justice of the European Union in EZ v. Bundesrepublik Deutschland (C-238/19)." Studia Iuridica Lublinensia, (2022): 239-261

Peers, Steve. "Recent asylum case law of the CJEU: Distinction, integration or extension from 'mainstream' EU law?", 18 June 2024, EU Law Analysis Blog. Retrieved September 7, 2024, https://eulawanalysis.blogspot.com/2024/06/recent-asylum-case-law-of-cjeu.html

Petrašević, Tunjica. "Novi hitni prethodni postupak za područje slobode, sigurnosti i pravde." in Hrvatska i komparativna javna uprava, 10(2), 427–446, 2011.

Petrašević, Tunjica. "Ubrzani i hitni prethodni postupak pred Europskim sudom." In Prethodni postupak u pravu Europske unije – suradnja nacionalnih sudova s Europskim sudom, edited by Tamara Ćapeta, Iris Goldner Lang, Tamara Perišin, and Siniša Rodin, 103–124. Narodne novine, 2011

Petrašević, Tunjica. "*Prethodni postupak pred Sudom EU (Preliminary ruling procedure before the Court of Justice of the EU)"*. Faculty of Law Osijek, 2014

Fachinger, T., Hoffmeyer-Zlotnik, P., & Stiller, M. (2024, July 10). Country report: Differential treatment of specific nationalities in the procedure. *Asylum Information Database (AIDA)*. Retrieved September 7, 2024, from https://asylumineurope.org/reports/country/germany/asylum-procedure/differential-treatment-specific-nationalities-procedure/

Petrašević, Tunjica. (2016). Postupci pred Sudom EU. In T. Petrašević & I. Vuletić (Eds.), *Procesno-pravni aspekti prava EU* (pp. 103–124). Faculty of Law, University of Osijek.

EU Law

Directive 2011/95/EU of the European Parliament and of the Council. (2011, December 13). On standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast). Official Journal of the European Union, L 337, 9–26.

Directive 2013/32/EU of the European Parliament and of the Council. (2013, June 26). On common procedures for granting and withdrawing international protection (recast). *Official Journal of the European Union*, L 180, 60–95.

Case law

C-556/17 Alekszij Torubarov v. Bevándorlási és Menekültügyi Hivatal, EU:C:2019:626.

C-238/19 E.Z. v. Federal Republic of Germany, ECLI:EU:C:2020:945.

C-921/19 Staatssecretaris van Justitie en Veiligheid (New elements or findings), EU:C:2021:478, par. 50.

Joined Cases C-924/19 FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság, and C-925/19