

ARTICLE

# The Common European Asylum System: Balancing Mutual Trust Against Fundamental Rights Protection

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## Abstract

The Common European Asylum System constitutes one of the principal areas in which the fundamental rights of individuals are essentially placed in competition with the core principle of mutual confidence and the need to preserve the effectiveness of EU law. That competitive relationship becomes particularly evident when applicants for international protection rely on alleged violations of their fundamental rights in order to contest their transfer to the Member State that is normally responsible for examining their asylum request according to the criteria of the Dublin III Regulation. The balancing process that needs to be carried out in this respect and the measure of the monitoring obligation that EU law imposes on the receiving Member State regarding the protection of the fundamental rights of asylum seekers are well exemplified by the preliminary ruling in *Jawo*. That case provides additional clarification regarding the circumstances in which the protection of fundamental rights may introduce exceptions to the principle of mutual trust. At the same time, it illustrates the inherent tensions that exist between the protection of fundamental rights and the application of the principle of mutual confidence.

**Keywords:** EU Law; Common European Asylum System; Regulation EU 604/2013; principle of mutual trust; applicants for international protection; determination of the responsible Member State; grounds for no transfer; Charter of Fundamental Rights of the European Union; absolute and relative fundamental rights; prohibition of inhuman or degrading treatment; expected living conditions of beneficiaries of international protection; extreme material poverty; obligation of national treatment; right to asylum

## A. Introduction

The right to asylum is a fundamental right, expressly recognized by the Charter of Fundamental Rights of the EU.<sup>1</sup> The Treaty provides in this respect for the establishment of a Common European Asylum System (CEAS) based on the observance of the various international instruments on the protection of fundamental rights, setting the minimum standards and the procedures for the grant of appropriate status to third country nationals requiring international protection.<sup>2</sup> That system implements the common asylum policy of the EU, which purports to

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<sup>1</sup>Charter of Fundamental Rights of the European Union art. 18, 2010 O.J. (C 83) 389 [hereinafter Charter].

<sup>2</sup>Consolidated Version of the Treaty on the Functioning of the European Union art. 78, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

guarantee high standards to persons in need of international protection in accordance with the principle of solidarity and fair sharing of responsibility between the Member States.<sup>3</sup>

Central to the effective operation of that system is the determination of the Member State that is responsible to examine the asylum request and to ascertain the need to provide international protection to the applicant. Aiming at the establishment of a clear and workable method to allocate that responsibility so as to guarantee effective access to the procedures for granting international protection, and not to compromise the objective of rapid processing of asylum applications, the Dublin III Regulation provides a list of hierarchical criteria that intend to ensure that only a single Member State will examine each individual application.<sup>4</sup> While specific considerations apply for various categories of applicants and in particular for minors and persons with family members in a given Member State, the application of those criteria imposes in most of the cases the responsibility for the examination of the claim on the Member State that constitutes the point of first entry of the applicant in the EU territory.<sup>5</sup> If it proves impossible to specify the Member State normally responsible on the basis of those criteria, the first Member State in which the application for international protection has been lodged is considered responsible for the examination of the asylum request.<sup>6</sup>

In many cases, applicants for international protection object to their transfer to the responsible Member State on grounds of alleged violations of their fundamental rights. However, the ability of the competent authorities of the requesting Member State to examine such claims in the context of the CEAS is considerably circumscribed by the principle of mutual trust.<sup>7</sup> The Court of Justice of the European Union (Court) has forcefully underlined the importance of that principle and the ensuing principle of mutual recognition for the institutional balance and the autonomy of EU law, noting that they allow an area without internal frontiers to be created and maintained. The competent national authorities are therefore required, in principle, to consider that all the other Member States respect the provisions of EU law, and in particular the fundamental rights recognized by the Charter.<sup>8</sup> When implementing EU law, a Member State may not require a higher level of national protection of fundamental rights from another Member State than that provided by EU law. Furthermore, it is only in exceptional circumstances that it may be allowed to check whether that other Member State has actually observed, in a specific case, the fundamental rights guaranteed by the EU.<sup>9</sup> As a result, the application of mutual trust in the area of the CEAS means, in practice, that the requesting Member State is obliged in principle to consider that the Member State responsible will fully respect the fundamental rights of applicants for international protection.

The inherent tensions that exist between the protection of fundamental rights of individuals and the operation of the principle of mutual trust are brought back to the fore by the preliminary

<sup>3</sup>TFEU art. 80.

<sup>4</sup>Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person, 2013 OJ (L 180) 31 (hereinafter Dublin III).

<sup>5</sup>Dublin III art. 13(1).

<sup>6</sup>Dublin III art. 3(2).

<sup>7</sup>On the judicial development and application of this principle, see particularly Sacha Prechal, *Mutual Trust Before the Court of Justice of the European Union*, 2 EUR. PAPERS 75 (2017). See also Emioni Xanthopoulou, *Mutual Trust and Rights in EU Criminal and Asylum Law: Three Faces of Evolution and the Uncharged Territory Beyond Blind Trust*, 55 COMMON MKT. L. REV. 489 (2018). On the relationship between the application of the principle of mutual confidence and the protection of fundamental rights, see Eduardo Gill-Pedro & Xavier Groussot, *The Duty of Mutual Trust in EU Law and the Duty to Secure Human Rights*, 35 NORDIC J. HUM. RTS. 258 (2017).

<sup>8</sup>See ECJ, Case C-216/18 PPU, Minister for Justice & Equal. v. LM, ECLI:EU:C:2018:586 (July 25, 2018), paras. 35–37, <http://curia.europa.eu/juris/liste.jsf?num=C-216/18>.

<sup>9</sup>See ECJ, Opinion 2/13, Accession of the European Union to the ECHR, ECLI:EU:C:2014:2454 (Dec. 18, 2014), para. 192, <http://curia.europa.eu/juris/liste.jsf?num=C-2/13>.

ruling in *Jawo*.<sup>10</sup> On the one hand, the Court extends the application of the Charter to the expected living conditions of asylum seekers after the grant of international protection in the Member State responsible and introduces therefore a new ground for non-transfer and an additional limitation to the principle of mutual confidence stemming from the observance of the absolute right to respect for human dignity. On the other hand, it adopts at the same time a very restrictive test regarding the establishment of living conditions that amount to degrading treatment by requiring the existence of a real risk of exposure to a situation of extreme material poverty. It also seems to pay little attention to the inherent vulnerability of beneficiaries of international protection and appears to act on the premise that it suffices in principle that the Member State responsible treats those persons under the same conditions as its own nationals, in order to conclude that an asylum seeker will not be exposed to a serious risk of degrading treatment on account of his or her expected living conditions as a beneficiary of international protection in that latter Member State. The importance that the Court continues to place on the principle of mutual trust in the area of the CEAS becomes even more evident if the above pronouncements are examined in the light of the preliminary ruling in *Ibrahim*.<sup>11</sup> Read together, these two cases confirm that it is not any violation of the obligations imposed by the CEAS that may affect the balance of responsibilities between the Member States introduced by the EU legislature. That is the case even when that violation can possibly be interpreted as an infringement of the right to asylum. It is further revealed that the prominent role given by the Court to the principle of mutual confidence also leads to a very restrictive reading of the circumstances that may give rise to a violation of an absolute fundamental right.

All of the above will now be examined in turn, after providing some necessary information about the legal and factual background of *Jawo*. Following that, the practical impact that the preliminary ruling has on the chances of successfully challenging on grounds of fundamental rights the transfer of an applicant for international protection to the Member State normally responsible to examine the asylum request will be explained. At a more general level, the analysis will also extend to the implications that this case seems to have concerning the balancing of the effectiveness of EU law with the principle of mutual confidence against the fundamental rights of individuals.

## B. The *Jawo* Case

The legal proceedings in *Jawo* concerned a third country national who had reached Italy by sea and had lodged an initial application for asylum there. That person then travelled on to Germany, where he submitted another asylum application. The competent German authorities rejected that application as inadmissible on the basis that Italy had become the Member State responsible for examining the asylum request according to the Dublin III criteria and ordered the return of the applicant to Italy. That transfer failed because the person concerned was not present at the accommodation center on the day that he was supposed to be transferred. Considering that the asylum seeker had absconded, the German authorities informed their Italian counterparts that the transfer would take place at a later date within the extended time limit provided by Dublin III in cases of abscondment.

Appealing against his removal to Italy, the applicant argued that Germany had become the Member State responsible for examining his asylum application because the six-month time limit prescribed by Dublin III for his transfer to Italy had already expired and, as a result, the Italian asylum authorities had been automatically relieved of their relevant obligations.<sup>12</sup> He maintained in this respect that he had not absconded and that consequently the German authorities were not entitled to extend that time limit up to a maximum of eighteen months, as provided by Dublin III

<sup>10</sup>ECJ, Case C-163/17, *Abubacarr Jawo v. Bundesrepublik Deutschland*, ECLI:EU:C:2019:218 (Mar. 19, 2019), <http://curia.europa.eu/juris/liste.jsf?num=C-163/17>.

<sup>11</sup>ECJ, Joined Cases 297, 318, & 319, 438/17, *Bashar Ibrahim & Others v. Bundesrepublik Deutschland*, ECLI:EU:C:2019:219 (Mar. 19, 2019), <http://curia.europa.eu/juris/liste.jsf?num=C-297/17>.

<sup>12</sup>Dublin III art. 29.

in cases of abscondment. He stated that the reason that he could not be found in his accommodation was because he was visiting a friend in another town and asserted that nobody had informed him that he needed to report his absence. He further argued that his transfer to Italy would be contrary to the requirements of Dublin III because there exist serious systemic flaws in the asylum procedure and in the reception conditions for applicants of international protection in that Member State that result in a risk of degrading treatment.

Considering that the outcome of the case depends on the interpretation given to the relevant provisions of Dublin III, the national court stayed the proceedings and referred preliminary questions on the notion of abscondment and on the scope of the obligations imposed on the requesting Member State in case of alleged violations of fundamental rights in the Member State normally responsible to examine the asylum application. The referring court wanted to know in this respect whether an asylum seeker is absconding only where he purposefully evades the reach of the national authorities in order to prevent his transfer. It further asked whether the lawfulness of a transfer should be ascertained by reference to the expected living conditions that the applicant would be subject to after the grant of international protection in the Member State normally responsible for examining the asylum request. It also sought guidance on the criteria according to which the living conditions of a person recognized as a beneficiary of international protection have to be assessed under the provisions of EU law.

### C. Protection of Fundamental Rights as a Limit to the Principle of Mutual Trust

Central to the reasoning of the Court is the attempt to strike a balance between the need to ensure the effective functioning of the CEAS and the aspiration to protect the legal interests of asylum seekers and beneficiaries of international protection. Very characteristic in this respect is the approach that the ruling adopts on the interpretation of the notion of absconding. The Court accepts that the ordinary meaning of abscondment implies the intent of the person concerned to evade transfer to the responsible Member State.<sup>13</sup> It immediately adds, though, that in some circumstances the existence of such an intention must be presumed so as not to imperil the objective of rapid processing of applications for international protection by enabling asylum seekers that do not want to be removed to the Member State responsible to elude the authorities of the requesting Member State until such time as the responsibility for the examination of their application is finally transferred to that latter Member State. This construction effectively reverses the burden of proof in favor of the national authorities of the transferring Member State. However, that presumption of abscondment applies only if the person concerned has been duly informed of his relevant obligations.<sup>14</sup> That person also retains the possibility of rebutting this presumption by providing evidence that there are valid reasons explaining his failure to inform the competent authorities about his absence and that he had no intention to evade transfer.<sup>15</sup>

That balancing exercise between effectiveness and individual protection becomes much more interesting if one looks at the main question addressed by the preliminary ruling, concerning the existence of an obligation on the part of the requesting Member State to take into account the expected living conditions of asylum seekers after their recognition as beneficiaries of international protection. By accepting the existence of that obligation, the Court effectively extends the joint responsibility of the requesting Member State for the protection of the fundamental rights of applicants for international protection also to the stage that follows the completion of the asylum procedure, imposing, therefore, an additional limitation to the principle of mutual confidence (Section I). Furthermore, the preliminary ruling seems to suggest that the gravity of the alleged infringement is a crucial element and that the real risk of any particularly serious

<sup>13</sup> *Jawo*, Case C-163/17 at paras. 53–56.

<sup>14</sup> *Id.* at paras. 57–63.

<sup>15</sup> *Id.* at paras. 64–65.

violation of a fundamental right may introduce exceptions to the application of the principle of mutual trust regardless of the absolute nature of that right (Section II). At the same time, though, the very restrictive requirements set by the Court regarding the establishment of degrading living conditions and its reluctance to go beyond the principle of national treatment concerning the measure of protection that asylum seekers are entitled to receive in the Member State responsible in case their application is accepted considerably circumscribe the practical effect of the preliminary ruling and illustrate once again the uneasiness of the legal symbiosis of fundamental rights protection and the principle of mutual confidence under the common roof of EU law (Section III).

### *I. The Extension of the Monitoring Obligation Imposed on the Requesting Member State*

Certainly that was not the first time that the Court was called upon to rule on the obligations imposed by the Charter concerning the determination of the Member State responsible for examining an application for international protection. The first such occasion was given in the seminal *N.S.* ruling.<sup>16</sup> In that case, the Court concluded that EU law precludes the application of a conclusive presumption that the Member State responsible observes the fundamental rights of the EU. It also stressed that the competent national authorities may not transfer an applicant for international protection to the Member State normally responsible, when they cannot be unaware that there exist systemic flaws in the asylum procedure and in the reception conditions of asylum seekers in that Member State that amount to substantial grounds for believing that the asylum seeker there would face a real risk of suffering degrading treatment contrary to the requirements of the Charter.<sup>17</sup> Apart from its apparent importance concerning the explicit recognition of possible exceptions to the blind application of the principle of mutual trust, the ruling also made the existence of systemic flaws in the asylum system of the Member State responsible an issue not only of national law, but also of EU law. It further imposed on the requesting Member State a monitoring obligation aimed to guarantee that the reception conditions and the asylum procedure in the Member State responsible are not vitiated by systemic flaws giving rise to a substantial risk of degrading treatment of applicants for international protection.<sup>18</sup>

Later on, that principle was codified explicitly in the provisions of the amended Dublin III Regulation.<sup>19</sup> However, Dublin III also stresses in its recitals that Member States are bound in its application by the various instruments of international law on the protection of fundamental rights, and states that its provisions respect the fundamental rights and observe the principles recognized by the Charter.<sup>20</sup> Similar references can also be found in the recitals of all the other legal measures constituting the CEAS.<sup>21</sup> The question therefore arises whether the need to protect

<sup>16</sup>ECJ, Joined Cases 411 & 493/10, *N. S. v. Sec'y of State for the Home Dep't*, ECLI:EU:C:2011:865 (Dec. 21, 2011), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=117187&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8289193>. That ruling gave rise to an abundance of academic literature. See Grainne Mellon, *The Charter of Fundamental Rights and the Dublin Convention: An Analysis of N.S. v. Secretary of State for the Home Department*, 18 EUR. PUB. L. 655 (2012); Joanna Buckley, *N.S. v. Secretary of State for the Home Department*, 2012 EUR. HUM. RTS. L. REV. 208 (2012); Sophie Lieven, *Case Report on C-411/10, N.S. and C-493/10, M.E. and Others*, 14 EUR. J. MIGRATION & L. 223 (2012); Cathryn Costello, *Dublin-Case NS/ME: Finally an End to Blind Trust Across the EU?*, 2 ASIEL & MIGRANTENRECHT 83 (2012).

<sup>17</sup>The ruling relied in this respect on the relevant case law of *M.S.S. v. Belg. & Greece*, App. No. 30696/09, (Jan. 21, 2011), <http://hudoc.echr.coe.int/eng?i=001-103050>.

<sup>18</sup>The imposition of that monitoring obligation has been described as a form of horizontal Solange. See Iris Canor, *My Brother's Keeper? Horizontal Solange: "An Ever Closer Distrust Among the Peoples of Europe,"* 50 COMMON MKT. L. REV. 383 (2013).

<sup>19</sup>Dublin III art. 3(2).

<sup>20</sup>Dublin III recs. 32, 39.

<sup>21</sup>Directive 2013/33/EU, of the European Parliament and of the Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection, 2013 O.J. (L 180) 96, recs. 10, 35 [hereinafter Reception Conditions Directive]; Directive 2011/95/EU, of the European Parliament and of the Council of 13 December 2011 on Standards for

the fundamental rights of asylum seekers imposes additional exceptions to the application of the principle of mutual trust, going beyond those resulting from the legislative implementation of the *N.S.* case law.

Some indications in this respect were provided by the preliminary ruling in *C.K.*<sup>22</sup> The Court there accepted that the individual circumstances of the asylum seeker should be taken into account and that transfer can take place only in conditions that preclude the existence of a serious risk of degrading treatment. It is true that this conclusion was reached in relation to risks arising from the transfer itself, which could not be attributed to the Member State responsible. That was because the case involved an applicant suffering from serious medical problems that could potentially lead to very severe and permanent consequences in the event that she was transferred, regardless of the quality of the reception and care that she would then get in the receiving Member State. The language used by the Court, however, and in particular its reference to the increased measure of protection that the amended regulation intends to provide to the fundamental rights of asylum seekers compared to its predecessor, suggests that the requesting Member State is obliged to perform an individualized examination of the concerned person's situation in order to rule out the existence in the receiving Member State of any serious risk amounting to a violation of the prohibition of degrading treatment.<sup>23</sup> That obligation exists regardless of the source of the risk or the existence of systemic problems in the Member State responsible. For example, one could think of applicants for international protection suffering from severe illnesses that require specialized medical assistance that is not available in the receiving Member State.<sup>24</sup> The transfer of those persons would undoubtedly violate their fundamental rights, even if the general health care system of the Member State responsible is considered satisfactory.<sup>25</sup> It is indeed apparent that the particular vulnerability and the exceptional circumstances of the applicant are relevant factors that should always be taken into consideration by the competent national authorities.<sup>26</sup>

However, all cases decided thus far concerned the situation before the grant of international protection to the applicant. In comparison, the preliminary reference in *Jawo* concerned the impact that the expected living conditions of beneficiaries of international protection in the Member State normally responsible could potentially have on the transfer of an asylum seeker to that latter Member State. However, Dublin III refers to the beneficiaries of international protection only in their capacity as family members of the applicant.<sup>27</sup> Other than that, there is absolutely no indication that the EU legislature intended them to exercise any influence over the application of the responsibility criteria prescribed by that regulation. There were, therefore, several objections that could have been raised against the recognition of the obligation to examine the living conditions that an asylum seeker is likely to be subject to if granted international protection by the Member State responsible.

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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, 2011 O.J. (L 337) 9, recs. 16, 17 [hereinafter Qualification Directive]; 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, 2013 O.J. (L 180) 60, recs. 15, 60 [hereinafter Asylum Procedures Directive].

<sup>22</sup>ECJ, Case C-578/16 PPU, *C. K. & Others v. Republika Slovenija*, ECLI:EU:C:2017:127 (Feb. 16, 2017), <http://curia.europa.eu/juris/liste.jsf?num=C-578/16>. For more on this preliminary ruling see Šeila Imamovic & Elise Muir, *The Dublin III System: More Derogations to the Duty to Transfer Individual Asylum Seekers?*, 2 EUR. PAPERS 719 (2017).

<sup>23</sup>This interpretation brings the preliminary ruling closer to the relevant case law of the ECtHR in *Tarakhel v. Switzerland*, App. No. 29217/12, (Nov. 4, 2014), <http://hudoc.echr.coe.int/eng?i=001-148070>.

<sup>24</sup>See, e.g., *Paposhvili v. Belgium*, App. No. 41738/10, (Dec. 13, 2016), <http://hudoc.echr.coe.int/eng?i=001-169662>.

<sup>25</sup>See by analogy the preliminary ruling in ECJ, Case C-52/13, *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v. Moussa Abdida*, ECLI:EU:C:2014:2453 (Mar. 13, 2014), paras. 46–48, <http://curia.europa.eu/juris/liste.jsf?num=C-52/13>.

<sup>26</sup>See *Jawo*, Case C-163/17, at para. 95.

<sup>27</sup>Dublin III art. 9.

An obvious argument is that the risk mentioned by the referring court is too remote to be taken into account before the transfer of the asylum seeker. At that stage, the applicant has not been recognized yet as a beneficiary of international protection and there is absolutely no certainty that his application will be accepted. Therefore, it could seem rather premature to examine before the transfer a potential risk that may never arise.<sup>28</sup>

There is also the concern that Dublin III does not govern the outcome of the asylum request and the situation that follows the grant of international protection to the applicant. Because it is not the transfer itself that exposes the person concerned to the risk of degrading treatment, it could therefore be argued that the question asked by the referring court escapes the scope of application of the Charter and that it is exclusively the Member State responsible that can be considered accountable for the living conditions of that person after the examination of his request.<sup>29</sup> Furthermore, the EU has adopted specific legislation regarding the obligations of its Member States towards the beneficiaries of international protection. That legislation requires only national treatment for those persons, instead of introducing uniform minimum standards applicable in all Member States.<sup>30</sup> It could therefore be maintained that the living conditions of the beneficiaries of international protection can be assessed only in the light of those requirements and that it is not permissible to additionally examine in this regard the question of a possible breach of the prohibition of degrading treatment under the Charter.<sup>31</sup>

The Court ruled though that the question asked by the referring national court concerned a situation that gave rise to the application of the Charter.<sup>32</sup> The preliminary ruling stressed in this respect that the transfer of an applicant for international protection to the Member State responsible pursuant to the criteria prescribed by the regulation constitutes an element of the CEAS and implements EU law, falling therefore within the scope of application of the Charter.<sup>33</sup> It then relied on the general and absolute nature of the prohibition of inhuman and degrading treatment to conclude that it is immaterial whether the applicant is exposed to a substantial risk of suffering such a treatment after the grant of international protection, given that the CEAS and the principle of mutual trust that underlies it are based on the premise that the operation of that system will not result—at any stage and in any form—in such a serious risk.<sup>34</sup>

Those statements merit closer examination. The Charter specifically states that its provisions are addressed to the Member States in circumstances only where they are implementing EU law.<sup>35</sup> Certainly it is not always easy to ascertain whether a Member State implements in a specific case the provisions of EU law.<sup>36</sup> There are even occasions where the relevant case law of the Court has given rise to constitutional reactions at the national level, on the rationale that it purports to extend the EU standard of protection of fundamental rights to cases that are only incidentally

<sup>28</sup>Also see the submissions in *Jawo* of the Italian and the United Kingdom Governments.

<sup>29</sup>Also see the submissions in *Jawo* of the German, United Kingdom, and Netherlands Governments.

<sup>30</sup>Qualification Directive arts. 26–30.

<sup>31</sup>See the submissions in *Jawo* of the Commission and the German Government.

<sup>32</sup>*Jawo*, Case C-163/17 at para. 79.

<sup>33</sup>*Id.* at paras. 76–79.

<sup>34</sup>*Id.* at paras. 86–90.

<sup>35</sup>Charter art. 51(1).

<sup>36</sup>See, e.g., ECJ, Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, ECLI:EU:C:2013:105 (May 7, 2013), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=123724&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8299698>. For more on that preliminary ruling, see Filippo Fontanelli, *Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog*, 9 EUR. CONST. L. REV. 315 (2013); Emily Hancox, *The Meaning of “Implementing” EU Law Under Article 51(1) of the Charter: Åkerberg Fransson*, 50 COMMON MKT. L. REV. 1411 (2013); Bas Van Bockel & Peter Wattel, *New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after Åkerberg Fransson*, 38 EUR. L. REV. 866 (2013).

linked to the application of EU law.<sup>37</sup> The implication of the reasoning employed by the Court in *Jawo* seems to be that the Charter applies even in situations that may arise as potential consequences of the implementation of the provisions of EU law by a Member State, in that case of the obligation imposed on the competent national authorities to apply the Dublin III criteria in order to transfer the applicant for international protection to the Member State responsible to examine the request. It is not important that this situation may never actually occur. Rather, it suffices that it is conceivable at the time the competent national authority is called upon to examine the case. It is also immaterial that the existence of that situation presupposes some kind of action by another Member State, such as the acceptance by the Member State responsible for the asylum request.

Such an interpretation of the preliminary ruling could have very far-reaching consequences regarding the scope of application of the Charter, as it could bring it into play in situations that merely constitute indirect outcomes of the requisite national action that gives rise to the application of EU law. In most of those cases, however, such an application of the Charter would amount to an unacceptable extension of the EU standard of protection of fundamental rights. Consider, for instance, the execution of a European arrest warrant. By surrendering the requested person to the issuing Member State, the national executing authorities are clearly implementing the relevant requirements of EU law.<sup>38</sup> It could not nevertheless be maintained that this alone suffices to make the Charter automatically applicable also to the circumstances and the living conditions that the person concerned is likely to experience in the issuing Member State after he has served his sentence. These considerations are therefore not relevant concerning the obligation to surrender the requested person to the issuing Member State.

Apparently, then, the relevant statements of the Court should be read in a more restrictive manner that confines them to the particular context of the CEAS. Indeed, that system comprises rules that protect the persons concerned both before and after their recognition as beneficiaries of international protection. It is certainly true that the nature and content of that protection is not the same, given that the relevant measures provide minimum substantive standards concerning applicants for international protection, but offer only national treatment after the grant of the requested international protection.<sup>39</sup> That being said, the fact remains that the application of EU law also extends to the stage that follows the transfer of the applicant to the responsible Member State and the successful examination of the asylum request. That specificity makes it possible to consider that all stages leading to the grant of international protection to the applicant constitute a single unity, although each one of them may be governed by its own rules and procedures.<sup>40</sup> Consequently, those individual stages follow on from each other and are intrinsically linked in the sense that the processing of applications for international protection and the possible grant of that protection clearly result from the specification of the responsible Member State according to the criteria prescribed by the regulation.<sup>41</sup> In these circumstances, it seems reasonable to introduce uniform standards regarding the protection of fundamental rights in all stages of the procedure that may eventually lead to the recognition of the applicant as a beneficiary of international protection under the provisions of EU law.

In any event, the practical consequence of the preliminary ruling is to considerably extend the monitoring obligation imposed on the transferring Member State concerning the observance of fundamental rights in the context of the CEAS. Its national authorities are now required to

<sup>37</sup>See particularly in this respect the judgment of the German Constitutional Court in Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Case No. 1 BvR 1215/07, (Apr. 24, 2013), [http://www.bverfg.de/e/rs20130424\\_1bvr121507en.html](http://www.bverfg.de/e/rs20130424_1bvr121507en.html). For more on this case see the Editorial Comments, *Ultra Vires: Has the Bundesverfassungsgericht Shown its Teeth?*, 50 COMMON MKT. L. REV. 925 (2013).

<sup>38</sup>Council Framework Decision 2009/299/JHA of 26 February 2009, 2009 O.J. (L 81) 24.

<sup>39</sup>Reception Conditions Directive and Qualification Directive, respectively.

<sup>40</sup>*Jawo*, Case C-163/17 at paras. 88–90.

<sup>41</sup>See in this respect the Opinion of Advocate General Wathelet in *Jawo*, Case C-163/17 at paras. 107–08.

guarantee not only that the applicant will not suffer any degrading treatment because of his or her transfer to the responsible Member State—pending the examination there of his or her asylum request—but also that his or her expected living conditions in that same Member State as a potential beneficiary of international protection will adhere to the relevant requirements of the Charter. That effectively amounts to the introduction of an additional ground for nontransfer and imposes a new exception to the operation of the principle of mutual trust going beyond the legislative codification of the *N.S.* case law.

## II. *The Fundamental Rights that May Impose Limits on the Principle of Mutual Trust*

In order to ascertain the actual extent of the limitations that the EU concept of fundamental rights practically imposes on the operation of the principle of mutual confidence, it is necessary to examine two additional issues. The first relates to the categories of fundamental rights that can set aside the application of that principle. The second concerns the requirements that the Court seems to introduce in order to conclude in a particular case that a given national conduct constitutes a fundamental rights violation capable of setting aside the principle of mutual trust. These are crucial issues that go beyond the area of EU asylum law and relate more generally to the magnitude of exceptions that the principle of mutual confidence may be subject to because of the need to give priority to the protection of the fundamental rights of individuals over the effectiveness of EU law.

Regarding the first of those questions, all asylum cases examined thus far under the preliminary reference procedure concerned alleged violations of the prohibition of degrading treatment.<sup>42</sup> The preliminary rulings have placed emphasis in this respect on the general and absolute nature of that prohibition, stressing particularly its fundamental importance and the fact that it is closely linked to respect for human dignity.<sup>43</sup> The question that arises then is whether the transfer of the applicant may also be precluded on the basis of other fundamental rights considerations, going beyond the prohibition of degrading treatment.

The CEAS is not the only area in which the Court has given prominence to the prohibition of degrading treatment in order to impose limits on the application of legislative rules based on the principle of mutual confidence. In fact, the first emphatic reference to the absolute nature of that prohibition was made in the area of judicial cooperation in criminal matters concerning, in particular, the execution of European arrest warrants.<sup>44</sup> The Court relied on the relevant provision of the Charter in order to introduce an exception to the automaticity of the surrender procedure of requested persons.<sup>45</sup> It imposed, to this end, the obligation on the national executing authorities to ascertain that the person concerned will not be exposed to a serious risk of degrading treatment because of the general prison conditions of the issuing Member State. When those authorities conclude that such a risk exists, they are required to postpone the surrender of the person concerned until such time as they are given precise and sufficient guarantees in relation to the specific individual that allow them to rule out in practice the existence of that risk.<sup>46</sup>

<sup>42</sup>Charter art. 4.

<sup>43</sup>*C. K. & Others*, Case C-578/16 PPU at para. 59; *Jawo*, Case C-163/170 at paras. 78, 87; *Bashar Ibrahim*, Joined Cases 297, 318, 319, & 438/17 at para. 87.

<sup>44</sup>Council Framework Decision 2009/299/JHA of Feb. 26, 2009, 2009 O.J. (L 81) 24.

<sup>45</sup>That case law was later on extended to extradition procedures. See ECJ, Case C-182/15, *Aleksei Petruhin v. Latvijas Republikas Ģenerālprokuratūra*, ECLI:EU:C:2016:630 (Sept. 6, 2016), paras. 51–60, <http://curia.europa.eu/juris/liste.jsf?num=C-182/15>.

<sup>46</sup>ECJ, Joined Cases 404 & 609/15 PPU, *Pál Aranyosi & Robert Căldăraru*, ECLI:EU:C:2016:198 (Apr. 5, 2016), <http://curia.europa.eu/juris/liste.jsf?num=C-404/15>. For more on this case, see Georgios Anagnostaras, *Mutual Confidence is not Blind Trust! Fundamental Rights Protection and the Execution of the European Arrest Warrant*, 53 COMMON MKT. L. REV. 1675 (2017). See Mathias Hong, *Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in the Dialogue of Courts: Solange-III and Aranyosi*, 12 EUR. CONST. L. REV. 549 (2016).

It could therefore be argued that the Court has created a subcategory of fundamental rights that are always considered superior to the objectives pursued by the principle of mutual confidence because of their absolute nature. According to one interpretation, it is only those rights that can introduce an exception to the mutual trust between the Member States and to the automatic application of the principle of mutual recognition. That reading of the relevant case law is not incontestable, however. On the contrary, a more likely interpretation of all the preliminary rulings concerning alleged violations of the prohibition of degrading treatment is that the Court placed specific importance on the absolute nature of the fundamental right involved in those cases in order to underline the particular seriousness of the fundamental rights concerns arising in the proceedings. According to this construction, it is the gravity of the violation rather than the nature of the fundamental right at issue that may affect the obligations of the Member States under the principle of mutual trust. Certainly, the infringement of an absolute fundamental right must always be regarded as particularly serious. Nevertheless, there may also be particularly grave violations of relative fundamental rights.

The latter interpretation also finds support in the legislative structure of the CEAS. As explained previously, all legislative measures adopted in the context of the CEAS specifically state in their recitals that their provisions respect the fundamental rights and observe the principles recognized by the Charter. Those recitals also make explicit reference to a number of fundamental rights that must be observed in the application of Dublin III.<sup>47</sup> Most of the fundamental rights contained in that list are not absolute in nature. Consequently, there is no indication that the EU legislature intended to introduce a strict hierarchy of fundamental rights and to exclude completely the introduction of exceptions to the application of the principle of mutual confidence on the basis of relative fundamental rights. This conclusion is reinforced by the reasoning employed by the court in *Jawo*. The preliminary ruling stresses in this respect that the provisions of Dublin III must be interpreted and applied in a manner consistent with the fundamental rights guaranteed by the Charter.<sup>48</sup> It is only then that the Court concentrates on the specific circumstances of the case and refers to the absolute nature of the particular fundamental right involved in the legal proceedings.

The notion that even relative fundamental rights may introduce exceptions to the principle of mutual trust is confirmed by the preliminary ruling in *Celmer*.<sup>49</sup> That case concerned the surrender of a requested person to Poland on the basis of a European arrest warrant issued by a Polish court. Uncertain if the current state of the justice system in Poland ensured the right to a fair trial before an independent tribunal, the executing national court made a preliminary reference asking about the circumstances in which it could refrain from surrendering the requested person on account of a risk of violation of that fundamental right.<sup>50</sup>

The right to a fair trial is not absolute in nature, but its exercise may be subject to certain limitations that are provided for by law and respect its essence.<sup>51</sup> The Court examined, in this respect, whether the existence of a real risk of breach of that right could introduce an exception to the principle of mutual recognition that governs the execution of European arrest warrants. It pointed out that the requirement of judicial independence forms part of the very essence of the fundamental right to a fair trial. It also stressed the cardinal importance of that right, as a

<sup>47</sup>Reference is made to Articles 1 (human dignity), 4 (prohibition of inhuman and degrading treatment), 7 (respect for private and family life), 18 (right to asylum), 24 (rights of the child), and 47 (right to an effective remedy and to a fair trial).

<sup>48</sup>*Jawo*, Case C-163/170 at para. 78.

<sup>49</sup>*Minister for Justice & Equal.*, Case C-216/18 PPU. For more on this case see Matthias Wendel, *Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice After LM*, 15 EUR. CONST. L. REV. 17 (2019). See also Michal Krajewski, *Who is Afraid of the European Council? The Court of Justice's Cautious Approach to the Independence of Domestic Judges: ECJ 25 July 2018, Case C-216/18 PPU, The Minister for Justice and Equality v LM*, 14 EUR. CONST. L. REV. 792 (2018).

<sup>50</sup>As protected by Charter art. 47(2).

<sup>51</sup>Charter art. 52(1).

guarantee that all rights conferred by EU law on individuals will be protected and that the values common to the Member States, and in particular the value of the rule of law, will be safeguarded.<sup>52</sup> The ruling underlined that the very existence of effective judicial review is integral to the rule of law and that, accordingly, every Member State is obliged to ensure that all its courts and tribunals meet the requirements of effective judicial protection and independence.<sup>53</sup> The Court concluded that the existence of a real risk that the surrender of the requested person will lead to an infringement of his or her fundamental right to an independent tribunal—and consequently of the very essence of the fundamental right to a fair trial—is capable of permitting the executing judicial authority to create an exception from executing a European arrest warrant.<sup>54</sup>

It appears, therefore, that the protection of the essence of the relative fundamental rights poses an additional limitation on the application of the principle of mutual confidence. It is certainly true that there currently exists considerable obscurity around the concept of “essence,” its exact content, and its practical function.<sup>55</sup> It is rather incontestable, however, that the “essence” relates to the inviolable core of the fundamental right that must be protected against any external interference regardless of its source. Consequently, the measure of protection afforded to the essence of a relative fundamental right is exactly the same as the one recognized for rights that are considered as absolute in nature. It is nevertheless suggested that an infringement of the essence of a fundamental right exists only if the interference is of such an intensity and extent that it calls into question the very existence of the right and makes its exercise practically impossible.<sup>56</sup> It seems thus that resorting to the concept of essence is reserved exclusively for cases of exceptionally grave fundamental rights interferences that are clearly considered unjustifiable in all circumstances.<sup>57</sup> Other less serious violations of fundamental rights are not capable of affecting the essence of those rights.

That interpretation of the concept of essence and of its effect on the principle of mutual confidence seems to be confirmed by case law. Consider, for example, the preliminary ruling in *N.S.*<sup>58</sup> In that case, the Court stressed that all legal instruments constituting the CEAS expressly provide that they seek to observe the fundamental rights and principles recognized by the Charter. It could not be concluded, however, that every single infringement of a fundamental right by the Member State responsible can affect the obligations of the other Member States under the provisions of EU law. This could nullify the principle of mutual confidence by adding another exclusionary criterion, according to which even minor infringements committed by the Member States could exempt them from their obligations under the CEAS.<sup>59</sup> The ruling therefore seems to suggest that only exceptionally serious violations of fundamental rights can impose limitations on the application of the principle of mutual trust. Arguably, such infringements can only concern absolute fundamental rights and the essence of relative fundamental rights.

Additional indications in this respect are provided by *Celmer*. The Advocate General of the case proposed an assessment based on the gravity of the infringement of fundamental rights that are not absolute in nature. He argued that exceptions to the principle of mutual recognition on the basis of a real risk of violating the right to a fair trial can be accepted only in cases where a particularly serious breach of that fundamental right exists. He concluded that there must be a real

<sup>52</sup>*Minister for Justice & Equal.*, Case C-216/18 PPU at para. 48.

<sup>53</sup>*Id.* at paras. 49–55.

<sup>54</sup>*Id.* at para. 59.

<sup>55</sup>See P. Takis Tridimas & Giulia Gentile, *The Essence of Rights: An Unreliable Boundary?*, 20 GERMAN L.J. 794 (2019).

<sup>56</sup>See Maja Brkan, *The Essence of Fundamental Rights to Privacy and Data Protection: Finding the Way Through the Maze of the CJEU's Constitutional Reasoning*, 20 GERMAN L.J. 864, 882–83 (2019); Mark Dawson, Orla Lynskey & Elsa Muir, *What is the Added Value of the Concept of the “Essence” of EU Fundamental Rights?*, 20 GERMAN L.J. 763, 768–69 (2019); Koen Lenaerts, *Limits on Limitations: The Essence of Fundamental Rights*, 20 GERMAN L.J. 779, 784–85 (2019).

<sup>57</sup>Maja Brkan, *The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core*, 14 EUR. CONST. L. REV. 332, 364, 368 (2018).

<sup>58</sup>*N. S. & M.E.*, Joined Cases 411 & 493/10.

<sup>59</sup>*Id.* at paras. 82–85.

risk of breach not of the right to a fair trial as such, but rather of the essence of that right, in order for the executing authority to be required to postpone the surrender of the requested person.<sup>60</sup> Read in the light of the Advocate General's conclusions, the preliminary ruling in *Celmer* seems to confirm that it is not just any violation of a fundamental right that can exercise an influence over the balance of responsibilities imposed on the Member States by the provisions of EU law. Unless the observance of an absolute fundamental right is at stake, it is only the risk of an exceptionally serious violation affecting the essence of the fundamental right concerned that may introduce limitations to the principle of mutual trust. This is vividly illustrated by the recent preliminary ruling in *Ibrahim*.<sup>61</sup>

*Ibrahim* involved a number of stateless persons that had been granted subsidiary protection in Bulgaria pursuant to the provisions of the CEAS.<sup>62</sup> Those persons then travelled on to Germany and lodged new applications for asylum. The German authorities rejected those applications as inadmissible on the basis that the persons concerned had already been offered subsidiary protection in another Member State and ordered the removal of the applicants to Bulgaria.<sup>63</sup> The applicants appealed that rejection and the national court considered it necessary to refer a number of preliminary questions, asking *inter alia* whether a Member State is precluded from relying on the relevant ground for inadmissibility provided for by EU law in case the asylum procedure in the Member State that granted the subsidiary protection is vitiated by systemic flaws. According to the referring court, those flaws arose from the predictable and systematic refusal of the Bulgarian authorities to grant refugee status to applicants for international protection and to examine subsequent applications of persons already granted subsidiary protection notwithstanding that there may be new evidence that increases the probability of the applicant satisfying the conditions required to be recognized as a refugee.

The Advocate General of the case stressed that the right to asylum is a fundamental right explicitly recognized by the Charter, and pointed out that subsidiary protection status is in principle less than refugee status, particularly concerning the right of residence and the right to social welfare. He underlined then that because of the application of the principle of mutual trust, Member States are permitted to presume that the other Member States grant the superior refugee status to applicants for international protection, provided that the latter meet the relevant requirements. He considered, though, that the person concerned must be allowed to prove the existence of systemic flaws, consisting *inter alia* of a general practice of granting subsidiary protection status rather than refugee status. The Advocate General concluded that the right to asylum precludes the rejection of an asylum application as inadmissible on the ground that the applicant has been granted subsidiary protection in another Member State, if the asylum procedure in that latter Member State is vitiated by systemic flaws.<sup>64</sup>

Although the Court ruled that the systematic refusal of a Member State to grant the superior refugee status to eligible applicants constitutes a violation of the fundamental right to asylum, it concluded that the other Member States are entitled by the principle of mutual trust to rely on the provisions of the secondary EU legislation and to reject as inadmissible any further asylum application submitted to them by a beneficiary of subsidiary protection. In such circumstances, it is for the Member State that granted the subsidiary protection to resume the procedure for obtaining refugee status.<sup>65</sup> Arguably, then, this particular violation of the right to asylum is not considered serious enough to impose on the national authorities of the other Member States the responsibility to monitor the observance by the Member State concerned of its fundamental rights obligations

<sup>60</sup>Opinion of Advocate General Tanchev, *Minister for Justice & Equal.*, Case C-216/18 PPU at paras. 69–77.

<sup>61</sup>*Bashar Ibrahim*, Joined Cases 297, 318, 319, & 438/17.

<sup>62</sup>Qualification Directive arts. 15–19.

<sup>63</sup>Asylum Procedures Directive art. 33(2)(a).

<sup>64</sup>Opinion of Advocate General Wathelet, *Bashar Ibrahim*, Joined Cases 297, 318, 319, & 438/17 at paras 108–20.

<sup>65</sup>*Bashar Ibrahim*, Joined Cases C-297, 318, 319, & 438/17 at paras. 95–100.

towards applicants for international protection. Although the Court provides no explanation in this respect, one possible interpretation of its preliminary ruling could be that beneficiaries of subsidiary protection are provided effective protection under EU law and are therefore not exposed to the same risks as the other categories of asylum seekers.<sup>66</sup> Following this, there is no overriding need to upset the operation of the principle of mutual confidence and it is only the Member State responsible for the breach that must remedy the problem and adhere to the requirements set by the CEAS. In other words, the violation involved in *Ibrahim* was not of such gravity as to affect the essence of the right to asylum so as to make its exercise practically impossible.

### III. The Restrictive Interpretation of the Absolute Prohibition of Degrading Treatment

It appears therefore that the gravity of the infringement comes into play once a violation of a non-absolute fundamental right has been established, in order to ascertain whether that particular breach can introduce an exception to the application of the principle of mutual trust. That already limits considerably the chances of successfully rebutting the operation of that principle, because the concept of essence seems to be reserved only for exceptionally serious infringements of fundamental rights. *Jawo* attests, however, that severity may be relevant concerning the establishment of a violation of the absolute prohibition of degrading treatment. That brings this Article to the last issue raised by the referring national court regarding the criteria under EU law that must guide the assessment of the living conditions of the beneficiaries of international protection. This is indeed a very important issue, not least because it is also connected to the standard of the reception conditions of applicants for international protection required by EU law.<sup>67</sup> The conclusions reached by the preliminary ruling further testify that the importance that the Court continues to place on the principle of mutual confidence in the area of fundamental rights protection is likely to lead to interpretations that practically exercise a limiting effect even on absolute fundamental rights.

The Court ruled in this respect that the systemic flaws affecting the living conditions of those receiving international protection must attain such a particularly high level of severity so as to place the person concerned in an involuntary situation of extreme material poverty which does not allow him or her to meet his or her most basic needs, and that undermines his or her physical and mental health, putting him or her in a state of degradation incompatible with human dignity. Anything falling under that threshold cannot be considered a violation of the prohibition of degrading treatment, even if it is characterized by considerable insecurity and significant degradation of the living conditions of that person.<sup>68</sup> The Court makes an apparent attempt to base these conclusions on the relevant case law of the European Court of Human Rights (ECtHR). It starts by stressing that the meaning and scope of the prohibition of degrading treatment under the Charter corresponds to that of the relevant provision of the European Convention on Human Rights (ECHR).<sup>69</sup> Based on that premise, the preliminary ruling makes then specific reference to the seminal judgment of the ECtHR in *M.S.S.* and appears to rely on its conclusions.<sup>70</sup>

It is not entirely clear, however, that the ECtHR has introduced the criterion of extreme material poverty as an absolute requirement for establishing the existence of living conditions that violate the prohibition of degrading treatment. It is indeed correct that the case law of that Court has stressed on numerous occasions that a minimum level of severity is required for a given ill treatment to fall under the relevant prohibition. That same case law has also made it clear though that the assessment of that minimum is relative and requires an examination of all circumstances

<sup>66</sup>That argument seems to be implicit in the submissions of the French and the Polish Governments in the proceedings.

<sup>67</sup>*N. S. & M.E.*, Joined Cases 411 & 493/10.

<sup>68</sup>*Jawo*, Case C-163/170 at paras. 91–93.

<sup>69</sup>European Convention on Human Rights art. 3 (1950).

<sup>70</sup>*M.S.S.*, App. No. 30696/09. For more on this case, see Paul Gragl, *The Shortcomings of Dublin II: Strasbourg's M.S.S. Judgment and its Implications for the European Union's Legal Order*, 2012 EUR. Y.B. ON HUM. RTS. 123.

of the case, including those relating to the victim of the ill treatment.<sup>71</sup> Applying those criteria to the question of the living conditions of asylum seekers, the *M.S.S.* judgment confirmed that the exposure of the person concerned to a situation of extreme material poverty because of the official indifference of the national authorities constitutes a violation of the prohibition of degrading treatment.<sup>72</sup> That is not to say, however, that other national practices which place the concerned persons in a state of significant insecurity in their living conditions can never fall under that prohibition in the absence of such extreme material poverty.

The *Tarakhel* case appears to confirm this.<sup>73</sup> That case concerned the removal to Italy of an entire family of third country nationals, on the basis of the provisions of the CEAS. The overall situation of the reception arrangements in that Member State could not be compared in any respect to that involved in the *M.S.S.* proceedings, and there was no allegation that the persons concerned would be exposed to a situation of extreme material poverty. The ECtHR nevertheless concluded that the assessment of the reception conditions in the responsible Member State should also take into account the specifics of the case: Namely, the age of the children and the need to keep the family together. *Tarakhel* seems, therefore, to suggest that the criteria for the examination of the living conditions of the persons concerned should never be absolute, but must rather allow an overall assessment based on the circumstances of the case.

It could, of course, be argued that *Jawo* also provides for such an individualized examination to the extent that it allows the person concerned to rely on exceptional circumstances that are unique to him or her in order to prove that his or her recognition as beneficiary of international protection in the responsible Member State would give rise to a real risk of degrading treatment.<sup>74</sup> Yet the preliminary ruling states that the purpose of such a reliance is to establish the existence of a situation of extreme material poverty because of the particular vulnerability of the person concerned. It is not intended to introduce an exception to that requirement based on the specificities of the case. As a result, that statement cannot be interpreted as an indication that the Court accepts that the extreme material poverty criterion is not applicable in all cases involving the assessment of the living conditions in the receiving Member State.

Arguably, then, the Court has adopted a very restrictive interpretation of the notion of degrading living conditions on this matter that is not completely in line with the definition given under the ECHR. This may potentially pose problems for the reception of that case law by the national courts, especially in those Member States that traditionally provide very robust constitutional standards of fundamental rights protection. Certainly, the Court has stressed that Member States are not allowed to require a higher standard of national protection of fundamental rights from another Member State than that provided by EU law.<sup>75</sup> It is equally true, however, that certain constitutional courts have expressed forceful objections against the unconditional lowering of their level of fundamental rights protection in the areas involving the implementation of EU law. That is particularly the case regarding fundamental rights that are closely connected to the respect for human dignity, such as the one prohibiting any form of inhuman and degrading treatment.<sup>76</sup>

<sup>71</sup>See *Bouyid v. Belgium*, App. No. 23380/09, para. 86 (Sept. 28, 2015), <http://hudoc.echr.coe.int/eng?i=001-157670>.

<sup>72</sup>*M.S.S.*, App. No. 30696/09 at paras. 252–64.

<sup>73</sup>*Tarakhel*, App. No. 29217/12.

<sup>74</sup>*Jawo*, Case C-163/170 at para. 95.

<sup>75</sup>*Accession of the European Union to the ECHR*, Opinion 2/13 at para. 192. For more on this case, see Bruno De Witte & Šejla Imamović, *Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order Against a Foreign Human Rights Court*, 40 EUR. L. REV. 683 (2015); Piet Eeckhout, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky*, 38 FORDHAM INT'L L.J. 955 (2015); Benedikt H. Pirker & Stefan Reitemeyer, *Between Discursive and Exclusive Autonomy – Opinion 2/13, the Protection of Fundamental Rights and the Autonomy of EU Law*, 17 Y.B. FOR EUR. LEG. STUD. 168 (2015). See also Editorial Comments, 52 COMMON MKT. LEG. REV. 1 (2015); Special Section, 16 GERMAN L.J. 105–222 (2015).

<sup>76</sup>See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Case No. 2 BvR 2735/14, (Jan. 26, 2016), [http://www.bverfg.de/e/rs20151215\\_2bvr273514en.html](http://www.bverfg.de/e/rs20151215_2bvr273514en.html). For more on this case, see Georgios Anagnostaras, *Solange III? Fundamental Rights Protection Under National Identity Review*, 42 EUR. L. REV. 234 (2017); Tobias Reinbacher & Mattias

Furthermore, it appears extremely challenging to prove that asylum seekers run a real risk of exposure to a situation of extreme material poverty on account of their expected living conditions as beneficiaries of international protection in the Member State responsible. That is partly because EU law has not subjected beneficiaries of international protection to uniform minimum standards of protection.<sup>77</sup> On the contrary, Member States are only required, as a general rule, to treat them under the same conditions as their own nationals in relation to a number of social benefits.<sup>78</sup> That seems to imply that the requesting Member State may rely in principle on the fact that the responsible Member State formally respects its obligations under that principle of national treatment, in order to conclude that the person concerned will not be exposed to a real risk of extreme material poverty in case he or she is recognized as a beneficiary of international protection in that latter Member State.

However, asylum seekers constitute a particularly underprivileged and vulnerable population group in need of special protection.<sup>79</sup> Apparently, that need continues to exist for some time, even after the grant of the international protection. Consequently, it is not self-evident that reliance on the principle of national treatment will always suffice to guarantee to beneficiaries of international protection living conditions that live up to the requirements of the Charter. That point was specifically brought up by the referring national court in *Jawo*. That court underlined that, in order to be able to effectively assert their rights under the principle of national treatment, the beneficiaries of international protection must be brought first to a situation comparable to that of the nationals of the receiving Member State. The preliminary reference particularly stressed the obligation of that latter Member State to ensure effective access to integration programs intended to facilitate the incorporation of the beneficiaries of international protection into the society.<sup>80</sup> The court also placed specific emphasis on the reported inadequacies of the social system of the responsible Member State that could not be offset by support in family structures, as in the case of the nationals of that same Member State, given that such a form of support is normally not available to beneficiaries of international protection. Seen in this perspective, the preliminary reference essentially invited the Court to clarify whether the requirements of the Charter could lead to the imposition of minimum standards of protection concerning the beneficiaries of international protection, notwithstanding the explicit introduction of the principle of national treatment in secondary EU law.

The preliminary ruling seems to exclude such a possibility. It specifically states that the mere fact that beneficiaries of international protection are not able to rely on support in family structures in order to counterbalance the alleged inadequacies of the social system of the Member State responsible is not sufficient to conclude that the person concerned will be exposed to a situation of extreme material poverty in that latter Member State.<sup>81</sup> Arguably, that statement is indicative of the Court's reluctance to overlook the clear and unambiguous intention of the EU legislature to guarantee only national treatment to beneficiaries of international protection and not to introduce any minimum substantive standards similar to those recognized for applicants of international protection. This conclusion is reinforced by the preliminary ruling in *Ibrahim*. In that case, the Court underlined that the fact that beneficiaries of subsidiary protection receive in the Member State that granted that protection a subsistence allowance that is markedly inferior to that in other Member States may not in principle lead to the finding that the persons concerned

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Wendel, *The Bundesverfassungsgericht's European Arrest Warrant II Decision*, 23 MAASTRICHT J. EUR. & COMP. L. 702 (2016); Hong, *supra* note 46.

<sup>77</sup>According to the provisions of Procedures Directive.

<sup>78</sup>Qualification Directive arts. 26–30.

<sup>79</sup>That has been emphatically stressed on several occasions in the case law of the ECtHR. See *M.S.S.*, App. No. 30696/09 at para. 251.

<sup>80</sup>Qualification Directive art. 34.

<sup>81</sup>*Jawo*, Case C-163/170 at para. 94.

are exposed to a real risk of suffering degrading treatment, so long as the principle of national treatment is observed.<sup>82</sup>

However, the concerns expressed by the referring national court about the inherent vulnerability of beneficiaries of international protection are certainly valid. The preliminary ruling attempts to address these concerns by allowing the persons involved to rely on exceptional circumstances unique to them in order to establish the existence of a real risk of extreme material poverty.<sup>83</sup> The Court seems to suggest that it may be possible for an asylum seeker to object to his or her transfer to the responsible Member State on the basis that the national treatment that he or she would be subject to in that latter Member State as a beneficiary of international protection could still expose him or her to a situation of extreme material poverty because of his or her particular vulnerability.<sup>84</sup> It is submitted that this also implies that it is solely a small subcategory of particularly vulnerable applicants for international protection that may rely on such exceptional and unique circumstances, on account of factors such as the age and the special needs of the person concerned.

Rather predictably, the preliminary ruling also concludes that the existence of shortcomings in the implementation by the responsible Member State of programs to integrate the beneficiaries of international protection may not support the conclusion that the person concerned would be exposed to a real risk of suffering degrading treatment as a beneficiary of international protection in that latter Member State.<sup>85</sup> That finding confirms that is not any single infringement of the common European asylum rules that may prevent the transfer of an asylum seeker to the Member State normally responsible.<sup>86</sup> Apparently, the same applies to isolated violations of the principle of national treatment.<sup>87</sup> Arguably, then, the combined effect of the introduction of the extreme material poverty criterion and the application of the principle of national treatment it is that it will usually suffice to establish that the Member State responsible treats the beneficiaries of international protection under the same conditions as its own nationals in order to rule out that an asylum seeker will be exposed to a real risk of degrading treatment on account of his or her expected living conditions as a beneficiary of international protection in that latter Member State. If that interpretation of the preliminary ruling is indeed correct, it may very well mean that it is only manifest and generalized violations of the principle of national treatment by the Member State responsible that can give rise to concerns under the provisions of the Charter about the expected living conditions of beneficiaries of international protection in that Member State. For the time being, it appears that the Court is prepared to go beyond that principle of national treatment only in cases of particularly vulnerable applicants for international protection.

Looking more closely at the practical effects that the preliminary ruling entails for the application of the principle of mutual confidence, it is possible to make two very interesting observations. The first concerns specifically the operation of that principle in the CEAS. Instead of improving the chances of successfully challenging on grounds of fundamental rights the transfer of an asylum seeker to the Member State normally responsible because of the extension of the monitoring obligation imposed on the requesting Member State also to the stage that follows the recognition of the applicant as a beneficiary of international protection, it seems likely that the ruling may actually lead to the relaxation of the applicable transfer criteria. That is because the introduction of the material poverty requirement also has an impact on the interpretation of the minimum standard of the living conditions that the responsible Member State is obliged under the Charter to make available to applicants for international protection, pending the examination of their asylum request. That makes it extremely challenging for an asylum seeker to rebut the

<sup>82</sup>*Bashar Ibrahim*, Joined Cases 297, 318, 319, & 438/17 at para. 93.

<sup>83</sup>*Jawo*, Case C-163/170 at para. 95.

<sup>84</sup>See also *Bashar Ibrahim*, Joined Cases 297, 318, 319, & 438/17 at para. 93.

<sup>85</sup>*Jawo*, Case C-163/170 at para. 96.

<sup>86</sup>*N. S. & M.E.*, Joined Cases 411 & 493/10 at paras. 84–85.

<sup>87</sup>See also *Bashar Ibrahim*, Joined Cases 297, 318, 319, & 438/17, at para. 92.

presumption of adequate fundamental rights protection that the principle of mutual confidence entails, placing an important limitation on the practical application of the *N.S.* case law.

The second observation is of a more general nature and concerns the balancing of the effectiveness of EU law and the principle of mutual confidence against the fundamental rights of individuals. A common criticism against the Court is that it is carrying out its fundamental rights review taking into account perspectives that are alien to the nature of those rights and that intend to facilitate the attainment of the objectives pursued by the EU legislature. Even in cases where the Court is called upon to balance two competing fundamental rights, its reasoning often gives rise to the suspicion that it is inclined to add to the scale the requirements of the EU legal order.<sup>88</sup> In the same vein, the application of the principle of mutual trust in the area of fundamental rights protection suggests in essence that the level of protection of those rights must be adapted to the particularities of EU law and to the specific interests pursued by its provisions.<sup>89</sup> It is certainly true that the judicial recognition of absolute prohibitions stemming from the fundamental right to respect for human dignity automatically exempts an entire category of fundamental rights from any kind of balancing exercise. At the same time, though, the Court introduced requirements that could be interpreted as concealed attempts to prioritize mutual trust over individual protection even regarding supposedly absolute rights.

*Jawo* is very instructive in this respect. While the Court confirms the absolute nature of the prohibition of degrading treatment, it interprets its scope in a very restrictive manner that seems to misconstrue the relevant case law of the ECtHR. That poses serious obstacles to the successful reliance on that prohibition not because it is outbalanced by the application of the principle of mutual confidence, but rather because it is very onerous to establish in the first place the existence of a real risk of its violation in order to set aside the operation of that principle. Therefore, the absolute nature of that prohibition is compromised by its circumscribed reading and one could reasonably suspect that this may be motivated by the pivotal role that is still reserved for the principle of mutual trust in the area of fundamental rights protection. As a result, the continuous reliance on that principle may effectively lead to very contestable judicial interpretations that place additional implicit limits on the effective protection of individuals even in circumstances where the fundamental right at stake is absolute in nature.

#### D. Concluding Observations

The currently applicable mechanism for establishing the Member State that is normally responsible for examining an application for international protection has proved to be manifestly unworkable and unable to meet its promised objective of ensuring quick and effective access to asylum procedures based on the respect of fundamental rights of asylum seekers.<sup>90</sup> Based on the country of first entry rule rather than the principle of solidarity and fair sharing of responsibility, that system overburdens, in practice, a limited number of individual Member States that constitute, because of their geographical position, the traditional points of irregular entry into the territory of the EU. These increased inflows place extreme pressure on the reception infrastructures of those Member States and result in the degradation of their asylum systems, giving rise to

<sup>88</sup>See, e.g., ECJ, Case C-283/11, *Sky Österreich GmbH v. Österreichischer Rundfunk*, ECLI:EU:C:2013:28 (Jan. 22, 2013), <http://curia.europa.eu/juris/liste.jsf?num=C-283/11>. One possible interpretation of the ruling is that the court balanced the freedom to conduct a business not only against the right to receive information and the pluralism of the media, but also against the emergence of a single information area and the completion of the internal market in the audiovisual media services sector. See Georgios Anagnostaras, *Balancing Conflicting Fundamental Rights: The Sky Österreich Paradigm*, 39 *EUR. L. REV.* 111, 122 (2014).

<sup>89</sup>See ECJ, Case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, ECLI:EU:C:2013:107 (Feb. 26, 2013), paras. 62–63, <http://curia.europa.eu/juris/liste.jsf?num=C-399/11>.

<sup>90</sup>See *Communication from the Commission to the European Parliament and the Council Towards A Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, COM (2016) 197 final (Apr. 6, 2016).

serious concerns about their ability to respect the fundamental rights of applicants for international protection. Asylum seekers rely then on these serious fundamental rights considerations in order to challenge their removal to the Member State normally responsible and to require the examination of their application by a Member State that offers respectable living conditions. Engaged in that vicious cycle, the Court has attempted in its preliminary rulings to effectively square the circle by balancing the application of the core principle of mutual confidence against the requirements of fundamental rights protection without encouraging secondary migration and penalizing those Member States that respect their obligations under the CEAS.

*Jawo* underlines the complicated issues that such a balancing process entails. The preliminary ruling extends the monitoring obligation that the *N.S.* case had already imposed on the national authorities of the requesting Member States, requiring them to guarantee not only that the applicant will not suffer any degrading treatment because of his or her transfer to the Member State responsible and pending the examination there of his or her asylum request, but also that his or her expected living conditions in that same Member State as a potential beneficiary of international protection will adhere to the relevant requirements of the Charter. At first reading, that new exception to the principle of mutual trust seems capable of having very far reaching consequences. The Court adopts at the same time, however, a very restrictive interpretation of the notion of degrading living conditions that requires the establishment of a real risk of exposure to a situation of extreme material poverty. It also appears reluctant to go beyond the principle of national treatment, particularly concerning the measure of protection that asylum seekers are entitled to receive in the responsible Member State in case their application is accepted. Practically, then, the new ground for non-transfer introduced by the Court may prove useful to applicants for international protection only when they belong to particularly vulnerable groups of asylum seekers. Otherwise, its importance may be limited only to situations where the responsible Member State blatantly and systematically violates the obligations that it incurs towards beneficiaries of international protection under the principle of national treatment.

Seen in this perspective, a paradox of the preliminary ruling is that it could actually lead to the relaxation of the criteria for the transfer of asylum seekers to the Member State responsible because of the apparent relevance of the extreme material poverty requirement to the question of the reception conditions of applicants for international protection required by EU law. At a more general level, the ruling also seems to suggest that the importance that the principle of mutual confidence continues to play in the area of fundamental rights protection may lead to judicial interpretations that make it very challenging in practice to establish the existence of a real risk of infringement, even of absolute fundamental rights. Whether that is indeed the case remains to be seen.