Central European Moot Court Competition

Valletta, Malta 2012

MEMORANDUM FOR THE APPLICANT

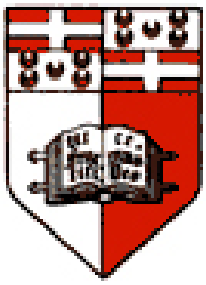
Syrian Immigrants Group

(Applicant)

v

State of Mulysa

(Defendants)



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Question 1:

Question 1 (a)

1. Applicant's claim revolves around whether, as a third country national, who is a father of a child and the divorced spouse of two Union citizens, he enjoys a derivative right of residence. Applicant submits that there is sufficient link with European Union law for citizenship rights to be invoked.

2. In the light of the position adopted in the ***Zambrano*** case[1], Article 20 TFEU,[2] "*precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union".*[3]

3. Within the context of the ECJ findings in the ***Zambrano*** *case*, a refusal to grant a right of residence to a third country national with a dependent minor child and former spouse in the Member State, where they are nationals and reside, has such an effect[4]; this notwithstanding that the EU citizens in question had yet to exercise their right of free movement within the EU. Applicant submits that a deep insight into this judgment denotes that it is only in instances where the principle of proportionality is respected that Article 20 and 21 TFEU preclude a Member State from refusing to grant such derivative right of residence.

4. It should further be submitted that applicant is raising the issue of whether Article 20 and 21 TFEU encompass a free-standing right to reside, which is independent from the right to move. Applicant contends that citizenship does not simply denote rights exclusive to physical movement, since there have been cases, such as ***Garcia Avello***[5] where the element of movement was neither easily discernible nor existent[6]. Indeed, applicant argues that while in actuality the right to reside is preceded by the right to move, Articles 20 and 21 TFEU seem to indicate that there is a distinction between the two rights, resulting in an independent right of residence.[7]

5. The applicant further raises the possibility as to whether it would be conceivable to rely on the EU fundamental right to family life being distinct from any other provision of EU law.

6. Here a further submission relates to whether EU fundamental rights can be relied upon independently, or whether they should be attached to another EU right. This is ancillary to the fact that applicant is claiming that he and his family run a real risk of suffering a breach of fundamental right to family life under EU law.[8]

7. This view is reflected both in the ***Carpenter*** case[9] and the ***Boultif*** case.[10] In the former case, the ECJ recognised the fundamental right to family life as part of the general principles of EU law; in the latter it expounded that "the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed in Article 8(1) of the ECHR."

8. The applicant submits a further area to be considered relating to derogation from Fundamental Principles of Community law. In the ***Schimdberger*** case it was held that the measure of discretion given to the national authorities must be exercised in such a manner as to ensure that a balance is kept between fundamental rights and Treaty obligations.[11]

Question 1 (b)

9. Article 8 ECHR offers protection to an alien migrant's family life on the basis of a real relationship between the migrant and his or her minor child. This was clearly expounded in ***Berrehab***, where the Court expanded on the provision, "right to respect for private and family life" and tried to explain what family life actually entails.[12] The Court here maintained that cohabitation is not a condition *sine qua non* of family life between parents and minor children. It went on to highlight that in view of Article 8 ECHR, the birth of a child of two formerly married persons constitutes an *ipso jure* part of that relationship. In effect this means that there is weaved between the child and his parents a tie tantamount to family life which subsists even if the parents no longer live together. [13]

10. Another vital point which should be taken into account is that applicant's expulsion from Mulysa would prevent him from maintaining his regular contacts with the child. As outlined in ***Berrehab***, this would not only be of a detriment

to the child in view of his tender age but would also constitute a breach of the general principle secured by Article 8 (1).[14]

11. Two other essential factors constituting family life are the exercise by the father of his right to access to the child and also the contributions afforded to education.[15] It cannot be contested that with regards to the facts at issue that these are not present given that applicant's financial contributions serve as the sole financial means available to his former spouse and offspring.

12. Applicant finally submits that Articles 7, on respect for private and family life, and Article 24 on the rights of the child within the Charter of Fundamental Rights of the European Union impose obligations on Member States. The Charter serves as a point of reference for the ECJ when interpreting cases which revolved around the right to family life.[16]

Question 2:

Question 2 (a)

1. In the ***McCarthy*** case, the ECJ stressed that Directive 2004/38/EC[17], *"aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member State that is conferred directly on Union citizens by the Treaty and that it aims in particular to strengthen that right"*.[18] The applicant here submits his discontent that in his case such right is not only not strengthened, but breached altogether.

2. In ***Diatta*** the ECtHR dealt with the situation of a couple who were married but later separated. The case concerned a Senegalese woman married to a French national who lived and worked in Germany. Eventually separation was the only option, followed by the intention to divorce. The authorities refused to renew her residence permit on the ground that she was no longer a family member of an EU national and did not live with her husband. The Court ruled that Article 10 of Regulation 1612/68[19] did not require members of a migrant's family to live permanently together. It reasoned that if cohabitation of spouses was a mandatory condition for a residence permit, the worker could cause his spouse to be expelled from the Member State at any moment, simply by throwing her out of the house.[20]

3. ***Diatta*** therefore suggests that separated couples must be allowed to remain in the host state, a decision compatible with the Court's approach in ***Commission* v *Germany***[21] that Regulation 1612/68 had to be interpreted in the light of the requirement of the respect for family life set out in Article 8 ECHR.

4. The applicant further submits that those residents who reside for more than three months but less than five years also enjoy a 'right of residence'. According to Article 7(1) of the Citizens' Right Directive, all Union citizens are endowed this right of residence on the territory of another Member State for more than three months if they are workers, self-employed, have sufficient resources and medical insurance, or they are students, also with sufficient resources and medical insurance. The same right also applies to family members accompanying or joining the Union citizen, whether they are nationals of a Member State or not.

5. The applicant maintains that another case lending itself to citation is that of ***Garcia Avello***[22]. The Court confirmed that the citizenship provisions applied to this case. It noted that since Mr Garcia Avello's children held the nationality of two Member States, they enjoyed the status of citizen of the Union. This in turn suggests that they enjoyed equal treatment with nationals of the Host State in respect of situations falling within the material scope of the Treaties, in particular those involving the freedom to move and reside in the territory of the Member States.[23]

6. Furthermore, as a third country national the appellant pleads that should he be devoid of his right of residence, there would ensue reverse discrimination against the nationals of Mulysa who had not exercised rights of free movement under EU law, and, in a parallel manner, they'd be prohibited from benefitting from the family reunification provisions.

Question 2 (b)

7. Article 27 (1) of the Citizens' Right Directive speaks of the possibility for Member States to *"'restrict' the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health."*

8. Applicant contends that steps taken on the basis of public policy and public security shall be limited only to the individual conduct of the person in question, where criminal convictions taking place at any earlier stage are not in themselves constitutive of sufficient grounds backing this up. The fundamental rights of the relevant Society must be put under a genuine, present, and sufficiently serious menace.

9. The applicant also poses the question relating to fundamental rights enshrined under the ECHR and recognised as general principles of EU law, provided that they appear as a leitmotif seeping through the entire matter, and hence ask whether both he and his son would run the peril of a breach of the fundamental right to family life.

10. Article 8(2) provides that: *"There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

11. The applicant accordingly puts forward that separation of a person from his family members is solely allowed when it is deemed to be exigent in a democratic society, and analogously propelled by a dire need, and most essentially, proportionate to the legitimate aim pursued. This point was heavily stressed in the ***Carpenter*** case.[24] The applicant, in view of his good faith, does not perceive the involuntary separation from his son as proportionate to the aim pursued, but as a breach of such fundamental rights applicable to both.

Question 3:

1. The objective of Article 15(3) TFEU is to afford a right to citizens of the European Union to access documents of the Union institutions, bodies, offices and agencies, in any medium whatsoever. General principles and limits to this right are governed by Regulation 1049/2001 which deals with access to documents.[25] Union citizens have a right to access documents of the Union institutions, bodies, offices, and agencies, whatever their medium. However, since this Regulation does not specifically include documents pertaining to Member States in particular, it seems that the circumstances at issue are not covered by it. Article 42 of the Charter of Fundamental Rights of the EU[26] speaks of right of access to documents. Yet, this also makes no mention of documents pertaining to Member States.

2. The applicant submits that the national court violated his right to freedom of expression and information guaranteed by the general principles of EU law as inspired by Article 10 of the ECHR – in particular his right to receive information of public interest.[27]

3. Applicant submits that the order affecting the access to or use of the documents in question amounts to a breach of his right to have access to information of public interest.[28]

4. The applicant argues that to receive and impart information is a precondition of freedom of expression, since one could not form or hold a well-founded opinion without knowing the relevant and accurate facts. Since he is being denied the right to reside in the Mulysan State, the denial of access to government policies and actions towards the particular category of migrants of which he forms part will greatly impact his capacity to competently argue his case before the Courts, thereby accomplishing his mission. The Court had thus thwarted his attempt in putting forward the best possible defence.[29]

5. This leads the applicant to submit that there has been a breach to the general principle of EU law under the right to a fair trial enshrined under Article 6 of the ECHR.[30] The right to natural justice, and in particular the right to a fair hearing, was invoked in ***Transocean Marine Paint Association v Commission***, where the Court opined that as a principle when the interests of an individual are evidently impinged by a decision of a public authority he must be allowed to assert his views.[31] This principle was echoed in ***Hoffman-La Roche & Co AG v Commission***, where it was deemed that the right to be heard is a fundamental principle of law and must be adhered to even in proceedings of an administrative nature. [32]

6. This right to a fair hearing hauls along with it the notion of *equality of arms*. This was clearly enunciated in the ***Solvay*** case, where the Court maintained that the principle of equality of arms presupposes that both the parties are to have equal knowledge of the files used in the proceedings.[33] In this case, the Commission had failed to inform Solvay of the existence of certain documents, and consequently the Court explained how this would give the Commission more power vis-à-vis the defendant company due to the fact that it had holistic knowledge of the file whereas the defendant had not.

7. The applicant also submits that the State has a duty to give reasons, which emanates from the right to a fair trial. This duty was asserted in ***Union Nationale des Entraineurs et Cadres Techniques Professionels du Football v Heylens***, wherein the ECJ held that the right of free movement of workers envisages that an action refusing to recognize the equivalence of a qualification issued in another Member State should give rise to legal redress. This was expounded in view of the necessity that the affected individual is to be always informed of the reasons upon which such an action is based.[34] The crux of this was further delineated in ***Al-Jubail Fertiliser Company v Council***, stating that the right to a fair hearing meant that institutions were under a duty to supply the applicant with all the information that would render the defence of their interests possible.[35]

8. Applicant submits that as a spokesman for FSG – a political group seeking to encourage the overthrow of the existing Syrian government - the group's activities warrant similar Convention protection to that afforded to the press.[36]

9. The State of Mulysa cannot allow arbitrary restrictions. Moreover, it cannot be argued that the information in question relates to personal data which cannot be accesses without the author's approval.[37]

10. Applicant here maintains that the Mulysan State has positive obligations under Article 10 of the Convention. Applicant observes that the information being requested is ready and available meaning that there is no need for further collection of information by the State. Therefore, the Court considers that the State had an obligation not to impede the flow of information sought by the applicant. The disclosure of public information on request in fact falls within the notion of the right "to receive", as understood by Article 10 (1). This provision protects those who seek to receive such information. To hold otherwise would mean that freedom of expression is no more than the absence of censorship, which would be incompatible with the above-mentioned positive obligations. [38]

11. The applicant contests the existence of a legitimate aim. The State's real aim is to prevent media criticism on the question at issue, meaning it does not serve to protect any legitimate public interest. Applicant in fact argues that Mulysan authorities were alarmed at the possibility of disclosure of such documents out of fear of starting a debate on the eve of the upcoming elections. Such restriction is therefore not necessary in a democratic society.[39]

12. The applicant further submits that the ECtHR in the ***Társaság a Szabadságjogokért v Hungary*** case remarked that it has consistently recognised that the public has a right to receive information of general interest. The Court here observed that press freedom and the vital role it maintains to impart information and ideas was enunciated in ***Observer and Guardian v the United Kingdom*** and ***Thorgeir Thorgeirson v Ireland***. It added that it maintains careful scrutiny when the measures taken by national authorities are capable of discouraging the participation of the press, one of society's "watchdogs", in public debate on matters of legitimate public concern.[40]

Question 4

1. Applicant would like to respectfully submit that he has wrongly been denied refugee status by the Mulysan government, and moreover that he does not fall within the exclusion clause, as claimed by the Mulysan government. It is applicant's firm submission that the legal interpretation of the Refugees' Directive applied by the Mulysan authorities in his case, is erroneous and has led to a conclusion which runs counter to both the letter and the meaning of the Law in this regard applicant therefore humbly petitions this Honourable Court to provide the proper interpretation of Article 12 (1) (b) in order to declare him eligible for refugee status.

2. It is submitted that in order for this provision to come into effect, two criteria must be satisfied. The first is that the person in question must have taken up residence in the member state concerned; and the second is that he must be

recognised by the authorities of that Member State as exercising rights and obligations attached to the possession of the nationality of that country. Both criteria must exist together as the provision laying them down is evidently cumulative and not alternative.

3. It is submitted with respect that in order for to be considered to have validly taken up residence in terms of this provision of Law, an applicant must have been living in the particular Member State for a long continuous period of time, and not simply for a short time. This consequently raises the necessary question of effective long-term residence. The notion of long-term residence was introduced in order to further ensure that third country nationals are integrated into the Host State and granted equal treatment and rights and obligations as the nationals of that state.[41]

4. In order for a third country national to qualify for long-term resident status, however, he must have resided 'legally and continuously' within the territory of that Member State for at least five years[42]. This qualification, on the one hand ensures that residence rights are acquired in *bona fides* and after a real and concrete association with the country concerned whilst on the other hand ensures that *bona fides* refugees are not exclude on the basis of the application of a mere presence or short or interrupted term residence within that country. Applicant thus respectfully submits, that he cannot be said to have validly taken up residence in Mulysa in terms of this provision of law as he has not been living there for five years. He claims that since he has only been living there for two years, it thus cannot be held that he has fully taken up residence there.

5. With regard to the requisite of effective recognition of such rights by the country concerned, it is humbly submitted, as a preliminary consideration, that in its actions the Mulysan authorities are effectively themselves acting in a manner which negates such recognition. Applicant maintains that it is one of the duties of a state to protect its nationals against being deported without a valid reason. In this present case, the Mulysan state is not recognising the applicant as having equal rights and obligations as other Mulysan nationals, as otherwise the authorities would have sought to protect the applicant against deportation and not act such a manner as to actually seek his actual deportation.

6. Applicant submits that the form of recognition afforded to him by the Mulysan authorities in the past was both conditional and limited and cannot in any valid manner be invoked or interpreted as constituting recognition in terms of Article 12 in question. The previous recognition of having the same rights and obligations as a Mulysan national, such as the right to work and the right to family life, was directly linked to and dependent on applicant's marital status as the husband of a Mulysan national and was consequently withdrawn upon the dissolution of the relative marriage. Today the state itself does not in fact give such recognition any longer. Applicant respectfully points out that that it is this same state itself that is claiming that 'following the dissolution of [his] marriage, [he] no longer has any right to stay in Mulysa'. This leads to the conclusion that the Mulysan state is seeking to strip applicant of his link or connection with Mulysa.

7. This cessation of the previously-held conditional recognition comes barely two years after Applicant's commencement of residence and thus it cannot, with respect, be validly argues that such a two-year period lived in terms of this particular type of recognition, validly fits within the letter and spirit of the Law under consideration.

8. It is for the above reasons that applicant is claiming that there was the wrong interpretation and application of Article 12 (1) (b).

9. Furthermore, applicant would like to submit that, not only does he fall outside the exclusion clause, but that he should be granted some form of refugee protection in terms of the Refugees' Directive. Due to the political turmoil in Syria, and the Arab Spring Uprising, applicant further submits that his asylum application should be assessed in terms of Chapter II of the Refugees' Directive, and that he further qualifies for international refugee protection, in terms of the requirements laid down in Chapter III and IV of the same directive.

Question 5:

1. The first exclusion envisaged under Article 12 of Directive 2004/83/EC[43] relates to situations where a third country national or a stateless person falls within the scope of Article 1D of the UN Convention relating to the Status of

Refugees[44]. The article provides that persons who are at present receiving protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees do not fall within the scope of the Convention.

2. The second sentence to Article 1D reads as follows: "When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Conventions."

3. Applicant here submits that such a UN agency is, "to provide humanitarian assistance, as far as practicable, on an emergency basis and as a temporary measure, to other persons in the area who are at present displaced and are in serious need of immediate assistance as a result of recent hostilities."[45]

4. The applicant does not contest that protection or assistance was forthcoming by a UN agency (UNSMU) as envisaged by the first sentence to Article 1D. However, the applicant submits that there exists a separate basis for recognition as a refugee under the second sentence to Article 1D, which is indeed applicable to their scenario.[46] In parallel to this, Article 12(1) (a) also envisages such basis for recognition for refugee status. The applicant here contends that they were constrained to leave UNSMU and seek refuge elsewhere as a result of the unsafe and unsanitary conditions existing within this agency. Therefore, the agency did not effectively guarantee protection or assistance to them. The risks being faced were the sole reason behind their departure.

5. The applicant here also makes reference to the Charter of Fundamental Rights, which became part of the primary law of the EU with the entry into force of the Lisbon Treaty.[47] Under Article 18 thereof, a provision guaranteeing the right to asylum states that: "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community".[48]

6. The applicant therefore submits that even in the event that the Mulysan State was to be allowed to revise the Refugee Act of 2011, enforceable rights under Article 12(1) (a) are nonetheless enforceable.

Question 6:

Question 6 (a)

1. Article 14(1) of the Refugees' Directive[49] provides that for a Member State to revoke, end or refuse to renew the refugee status of a third country national or a stateless person, such person must have ceased to be a refugee in accordance with Article 11 of the same Directive. Applicant submits that there exist no grounds under Article 11 on which such actions would be satisfied.

2. Applicant further submits that Article 14 (3) allows a Member State to revoke, end or refuse the refugee status of a third country national or a stateless person, if after he or she has been granted refugee status, it is established by the Member State concerned that he has either committed a serious non-political crime or acts contrary to the purposes and principles of the United Nations. In view of the ***Bundesrepublik Deutschland v B and D*** case[50], the applicant submits that revocation will only be justifiable should there be found serious reasons attesting to this prior to an individual's admission to the host Member State. Here again, in view of the circumstances at issue, there exist no evidence attesting to such commissions.

3. Neither are the circumstances envisaged under Article 14 (4) (a) and (b) attributable to the applicant.

4. Furthermore, ***Defrenne v Sabena***[51] brought to the fore the principle of legal certainty and its applicability in terms of the principle of legitimate expectations and the principle of non-retroactivity. Applicant submits that the principle of legitimate expectations presupposes, where a matter of public interest is lacking, that there should be no violations of the legitimate expectations of the parties involved.[52]

5. Taking into account that a legitimate expectation relates to a reasonable person's concerns with regard to his normal eventualities, the applicant contends that it was expected that the Syrian refugees would allowed to remain in the Mulysan State until the expiry of their one-year resident permit. The applicant deems that what emanated from **Germany v Council**[53] is also applicable to the case at issue, since a resultant loss was sustained due to a thwarting of a reasonable expectation on which they were relying.

Question 6(b) (i)

6. According to settled case law in particular ***R v Intervention Board, Exports Man (Sugar) Ltd*** in order to determine that a provision of Community law respects the principle of proportionality, it has to be assessed whether the means employed are appropriate and necessary to achieve the objective sought.[54] Subsequently, a pivotal point relevant to the principle of proportionality is establishing a direct link between the nature and scope of the measures taken and the target in view.[55]

7. The applicant submits that proportionality can be put at play here on the ground that the measures taken by the State, i.e. those of outright expulsion, go beyond what is necessary to seek the objective of aligning the Refugee Act with the minimum provisions found in the Refugees Directive.[56] There is no proper balance between the interests involved, thus giving rise to a disproportion between the means employed and the legitimate aim pursed.[57] Additionally, these measures taken are left objectively questionable as to whether in reality they seek to expel all the Syrian refugees from Mulysa, which action cannot be allowed unless there is such allowance under law, or else to truly adhere to the provisions within the Directive.

8. The principle of legal certainty also comes to the fore in this scenario, since the applicant was made to believe that the resident permit would not be revoked in subsequence to a legislative amendment. Applicant contends that as respected principle of Community law[58], legal certainty would be damaged by such a freedom of manoeuvre on the part of Member States.

9. The far-reaching consequences that such arbitrary revocation would entail also defeat another principle which emanates from legal certainty, namely protection of reasonable expectations. In ***Opel Austria GmbH v Council***[59], the ECJ defined the principle of legitimate expectations as the corollary of the principle of good faith in public international law.

10. The applicant thus reiterates that a measure as drastic as revocation of a resident permit to third country nationals who had been granted refugee status in accordance with the provisions of domestic law should be subject to the principle of legal certainty.

Question 6(b) (ii)

11. A fundamental tenet of the rule of law is that an individual should be able to plan his life in the secure knowledge of the legal consequences of his actions. Hence the application of retroactivity may prove damaging to the rights of the individual. To this regard, applicant submits that as held in ***Diversinte SA*** case[60] it is only in exceptional circumstances that retrospective application is permitted. Here the ECJ added that this allowance will be made in cases where it is necessary to achieve certain objectives ensuring that no breach of individual's legitimate expectations ensues.

12. The applicant, in accordance with what was suggested in ***Marleasing***[61], submits that in interpreting national law to conform to the objectives of a directive there must be a presumption held by national courts that the State's intention was that of complying with community law. Additionally, with reference to what the ECJ maintained in ***Adeneler***[62], this obligation towards compliance is limited by the general principles of EU law, in particular those of legal certainty and non-retroactivity. As in fact held in ***Kolpinghuis Nijmegen***[63], when referring to the content of a directive the national courts are restricted in their interpretation of relevant rules under national law by the general principles of Community law particularly legal certainty and non-retroactivity.

13. In the context of serious economic repercussions on employers in the event of retrospective application of the principle of equal pay, the ECJ in ***Defrenne v Sabena***[64] upheld the argumentation posed by the British and Irish

governments as it was explained that the employers in question believed that they were complying with the law. This case indeed shows that the applicability of the principle of legitimate expectations is viewed in line with the principle of non-retroactivity.

14. Advocate General Lenz in his Opinion to the ***Faccini Dori*** case,[65] referred to a possible departure from previous case law on the issue of enforcement of directives against all parties, with a view of maintaining a more uniform and effective application of Union law. Yet, he maintained that: "[i]n the interests of legal certainty such a ruling should however not be retrospective in its effects."

15. Retrospective application in the context of a judgment deeming veterinary science as vocational training was also not allowed by the ECJ. In ***Blaizot***[66] the Court was cognizant of the effects which such a decision could trigger on Belgian universities if it had to provide retrospective application. In fact it held that 'important considerations of legal certainty' call for a limitation to the effects of the judgment in such a manner as to apply only to new cases or those instituted prior to the handing of judgment.

16. On this reasoning, applicant submits that a clear breach of the individual's legitimate expectations and the principle of legal certainty would ensue had the new definition of 'refugee' to be applied retroactively.

Question 6(b) (iii)

17. Expulsion is only deemed justifiable should the beneficiaries of the right of residence become an unreasonable burden on the social assistance system of the host Member State.

18. Hence, it is not sufficient for them to be of a burden, but this should be further qualified as being "unreasonable".[67] This effectively means that expulsion is not the legitimate reaction to relieve the social assistance system. Additionally, the Directive enshrines that expulsion is never allowed to be meted against workers, except on grounds of public policy or public security. The scope for such measure should thus be set within the parameters of the principle of proportionality, having regard to the degree of integration of the persons concerned, the length of their residence in the host Member State and their family and economic situation. Accordingly, the higher the degree of integration, the greater the degree of protection afforded should be. Therefore, the applicants here submit that both household and employment denote such ingrain within the state.

19. Steps taken on the basis of public policy and public security shall be limited only to the individual conduct of the person in question, where criminal convictions taking place at any earlier stage are not in themselves constitutive of sufficient grounds backing this up. The fundamental rights of the relevant society must be put under a genuine, present, and sufficiently serious menace. The applicants submit that they certainly do not instil such threat, given that Abdul was not even present at the most crucial protest.

Question 7:

1. The Tampere European Council sought to establish a European asylum system, providing for common asylum procedures and a consistent status to be awarded to those granted asylum.[68] The conclusions of the Tampere Council are further reflected in the Refugees' Directive which further goes on to provide that *rules regarding refugee status should be complemented by measures on subsidiary forms of protection, offering an appropriate status to any person in need of such protection."*[69]

2. Article 38 lays down the obligation for Member States to bring into force laws and regulations within their national law, in order to comply with this directive.

3. The main objective of this directive is to establish uniform criteria in order to assess whether an individual is genuinely in need of international protection, and also to establish a minimum level of benefits. Furthermore, the Directive seeks to ensure that there are minimum standards to be applied across the Union, in relation to whether a third country national qualifies for refugee protection or international protection.[70] Notwithstanding these minimum standards, Article 3 grants the possibility for states to grant more favourable conditions when assessing the

applicant's qualification or otherwise to refugee protection; as the Mulysan state as done when implementing the Directive provisions or refugee status.

4. The provisions in the Directive must not be looked at in isolation; they must be interpreted in relation to the general scheme and purpose, as laid down in the Directive itself. This must be done whiles respecting principles laid down in the Geneva Convention, as well as other European Law.[71] The Directive 2004/85EC highly reflects the 1951 Geneva Convention and lays down a definition of refugee, as well as establishes instances when one could be granted or excluded from such protection. Furthermore, this directive goes a step further than the Geneva Convention, in that it establishes a new form of protection – that of subsidiary protection – and lays down the minimum standards for such form of protection.

5. As defined in the Directive, "*persons eligible for subsidiary protection means a third country national [...] who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin […] would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or owing to such risk, unwilling to avail himself or herself o the protection of that country".*[72]

6. The Directive provides a legal basis for subsidiary protection, which binds member states to grant such subsidiary protection to individuals who, although they do not qualify for refugee status, are still worthy for lesser degree of protection.

7. Applicant submits that an application for refugee status must be examined on an individual basis,[73] taking into account certain specific facts pertaining to the individuals' case. Applicant puts forward the general notion under refugee law that, it is only when an application for refugee status is rejected, that the authorities must go on to assess whether that individual would qualify for subsidiary protection. [74]

8. In this regard, applicant would like to maintain that since Mulysa has not directly implemented the provisions of subsidiary provision, in accordance with its obligations under this Directive, he should not be deprived of being awarded such protection, and that therefore the wider definition granted in their Refugee Act should be said to incorporate such protection.

9. Applicant submits that when analysing the definition of refugee status and subsidiary protection as laid down in article 2(c) and 2(e) respectively, there isn't a great margin of disparity between the two definitions. Applicant acknowledges that in order to be awarded refugee protection the bar is set higher than in the case of subsidiary protection, but nonetheless, if the parameters of refugee status are widened, then the definition could very easily, be said to encompass subsidiary protection.

10. Applicant makes reference to ***Germany v B and D***[75], where certain grounds for excluding refugees were introduced into national law which where, in substance, similar to those laid down in the Geneva Convention. The Court, in this respect held that since the grounds in the directive corresponded, in substance to the Convention, then by implication the grounds which were introduced in national law, although only similar in substance, were considered to be applicable and corresponding with the Directive.[76]

11. Applicant therefore submits that if the Mulysan national law contains, in substance, provisions equivalent to subsidiary forms of protection of the Directive, then even if they are not effectively termed as such, it can safely be concluded that prior to the amendment the particular national law did include in substance this subsidiary form of protection.

12. In cases where domestic law was enacted in order to abide by Directive provisions, it is justifiable to consider the provisions of such domestic law are to be interpreted in terms of the Directive.[77] Consequently, and in conjunction with the above arguments submitted, applicants further claim that the definition of refugee law should be interpreted in terms of the directive and also in light of the subsidiary protection provisions.

13. If the Mulysan authorities have given refugee status in terms of law, then it is legitimate to expect that any subsequent amendment would not be applied retrospectively in his regard and in such a way as to adversely affect his status or worse still, in such a way, as to actually disqualify him from retaining such status.

14. Applicants also submit and raise the plea of legitimate expectations, through which it is the more favourable condition laid down that binds the authorities of that state. Therefore, applicants are claiming that the lowering of legitimate expectation is to apply from one point onwards, and should not apply retroactively. Furthermore, applicants submit that once an individual has been granted a right, then the state does not have a right to revoke that right previously granted, in favour of something less favourable.

15. In light of this, applicants submit that the decision to grant them refugee status should be recognised by the authorities as tantamount to subsidiary protection, because if this were not the case, then applicants would be exposed to less favourable conditions (as they would be send back to a place where they would be suffering a real risk of serious harm).

Question 8:

1. Within the parameters of its decision in ***Francovich***, the ECJ maintained that a Member State may in certain circumstances be liable in damages for loss caused to an individual by the state's failure to implement a directive.[78] The applicant here submits, that while the Refugees' Directive had been implemented by the State of Mulysa, the provisions that it contains have been breached.

2. Broadening on the three pre-conditions for state liability, the Directive in question is surely one that grants rights to individuals, which rights can be clearly identified in relation to their content. Applicant contends that it is additionally also evident that the loss suffered from a deportation order is causally linked with the State's breach of the Directive's provisions. [79]

3. The "decisive test" for whether a breach is sufficiently serious is whether the institution in question has "manifestly and gravely exceeded the limits of its discretion". The factors at play here are various, including the clarity and precision of the rule breached, which in this case is transparently branched out in the law and where situations are clearly depicted.

4. Yet harsher, ***Dillenkofer v Germany*** made it a rule of the thumb that that the conditions under which a right to reparation arose depended on the nature of the breach. But in the same breath it indicated that the conditions applied in every case. Crucially, it made clear that the strictest of those conditions – that a breach be "sufficiently serious" – applied regardless of the degree of discretion enjoyed by the Member State.[80]

5. The sufficiently serious condition was developed further in ***Hedley Lomas***. The Court held that the ***Francovich*** conditions applied. This was significant since they had been developed in circumstances where the Member State had a wide legislative discretion. Here, however, *"the Member State…was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion"*. In such circumstances one might have expected the conditions for liability to be somewhat less strict than in ***Francovich***. But the Court met this concern – and in doing so confirmed the versatility of the conditions – by suggesting that, in these circumstances, the mere infringement of Community law may be sufficient to satisfy the "sufficiently serious" condition. This was not a discretion case.[81]

6. Building upon the criteria spanned out in ***Brasserie du Pêcheur***, the state has further no discretion due to both the aim and substance of the infringed obligation being "manifest".[82] This subsequently renders the mere infringement of the directive sufficient for the creation of liability The measure of discretion left by that rule to the national or Community authorities is also essential, and this is lacking in the case at stake. Also, as pointed out in ***R v Her Majesty's Treasury***[83], while the state may be allowed to choose in matters of form and method of implementation of directives, it enjoys no discretion to act in breach of Community law.

7. Finally, applicant contends that when viewing the question of whether the infringement was intentional or voluntary, the action seems to be xenophobic, also stating it loud and clear that unless the applicant leaves voluntarily within a prescribed time limit, he is to face deportation.

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[23] Case C–148/02 *Carlos Garcia Avello* v. *Etat Belge* [2003] ECR I–11613, noted by T. Ackermann, (2007) 44 *CMLRev.*141, Bundle part 2 p 127

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[28] Ibid., page 196, paragraph 3

[29] Ibid., page 199, paragraph 22

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[47] *MSS v Belgium and Greece* (ECtHR 2011), Bundle Page 208, paragraph 61

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[72] Article 2(3) of the Refugees' Directive

[73] Article 4 (3) of the Refugees' Directive

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Central European Moot Court Competition

Valletta, Malta 2012

MEMORANDUM FOR THE RESPONDENT

Syrian Immigrants Group

(Applicant)

v

State of Mulysa

(Defendants)

Faculty of Laws, University of Malta

Pauline Lanzon – Veronica Perici Calascione – Marsette Xerri

Question 1:

Question 1 (a)

1. The respondent believes in establishing a balance in the interpretation of Article 21 TFEU, in order to be able to deduce with certainty who should enjoy the benefits it grants. It is also being emphasised that by stretching the limits of entitlement foreseen by this article could possibly result in loss of its scope.

2. The respondent makes reference to the 'genuine enjoyment' test set up in the ***Zambrano*** case[1], which was subsequently marked down in the ***Dereci*** case[2]. Indeed, the ECJ made it clear that for the test to be satisfied, the EU citizen must be in a position in which he not only has to leave the Member State of his nationality, but also the territory of the Union in its entirety.[3]

3. A further limitation to the test finds ground in the ECJ statement propounded in ***Dereci*** that: "*the mere fact that it might appear desirable to a national of a MS, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a MS to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such right is not granted*."[4]

4. It should be further submitted that the Court in ***Dereci*** seems to apply the 'genuine enjoyment' test in a uniform manner when it comes to different familial relationships. This contrasts the position adopted in ***Zambrano***[5], where a filial relationship returned a positive outcome to this test, and that of ***McCarthy***[6] which seemed to have inferred that a matrimonial relationship fails at this.

5. Returning to ***Zambrano***, it is evident that it solely applies to specific circumstances where the implementation of a national measure would hinder the genuine enjoyment of the rights envisaged by Article 20 and 21 TFEU. Respondent here maintains that applicant's child and former spouse, both EU citizens, do not run the risk of having to leave the territory of the Union.

Question 1 (b)

6. Moving onto the notion of the right to respect for private and family life, enshrined under Article 8 of the ECHR[7], in the light of the facts of the case, respondent contends that interference by the State is justified when taking into account applicant's behaviour towards his family members. Thus, respondent submits that there has been no breach of the general principle of EU law, as inspired by the aforementioned article.

7. Indeed, a third-country national faced with expulsion, yet claiming rights of contact and weekly access with his child as a ground for non-expulsion, should be able to show that such interest and the interest of the minor child are sufficiently important to outweigh the State's interest.[8] As a result of domestic violence concerns, the Court in the divorce proceedings between applicant and his spouse granted sole custody to the mother. It is very debatable whether weekly access under the supervision of local social services, again due to domestic violence concerns, could constitute a relationship amounting to family life within the meaning of Article 8 of the Convention.

8. Respondent further submits that if the decision for deportation would be put into effect this does not in itself suggest a halt in the filial relation as there always stands the possibility of maintaining contact following an agreement with the applicant's former spouse. The same argument was enunciated in ***Berrehab***.[9] Nevertheless, applicant's behavior within his family relations and the consequent position adopted before the national courts of Mulysa are left objectively questionable as to whether in reality he seeks to maintain contact with the minor or has indeed an ulterior motive.

Question 2:

Question 2 (a)

1. In the ***McCarthy*** case, the ECJ stresses that Directive 2004/38/EC[10], *"aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member State that is conferred directly on Union citizens by the Treaty and that it aims in particular to strengthen that right*".[11]

2. In the circumstances at issue, the applicant's child and former spouse (both EU citizens) have never availed themselves of their right of free movement and have always resided in Mulysa. Thus, they fall outside the definition of 'beneficiary'[12] for the purposes of Article 3(1) of the Directive, meaning it is not applicable to them.[13]

3. In view of the aforesaid, given that the definition is not applicable to the circumstances of the EU citizens in issue, the applicant is also not covered by such concept. This stems from the fact that the rights accorded by the directive are acquired through their status as members of the beneficiary's family.[14]

4. With regard to the applicability of the Treaty provisions dealing with citizenship of the Union, the ECJ in ***Dereci*** stresses the importance of establishing a link between the Treaty rules governing freedom of movement and existing EU legislation. Respondent submits that if such link is lacking, the matter would seem to be regulated by national law.[15]

5. The respondent consequently submits that applicant's situation is one that is purely internal to Mulysan law therefore side-lining other EU law provisions, including those relating to citizenship of the Union. This appears to be supported by the ECJ findings in the ***Dereci*** case.[16]

Question 2 (b)

6. As a matter of fact, Article 27 (1) speaks of the possibility for Member States to *"'restrict' the freedom of movement and residence of Union citizens and **their family members**, irrespective of nationality, on grounds of public policy, public security or public health."* The second sentence provides that such grounds are not to be invoked for economic ends. Here respondent confirms that apart from applicant having no legal right to reside within the Mulysan State, there exists no economic bases upon which any further motivation could have been built.

7. Yet, in view of the submissions pertaining to the aforementioned question, respondent contends that Article 27 of the Citizens' Right Directive[17] is not applicable to the circumstances at issue.

8. Nevertheless, the respondent observes that in the light of the general principle of EU law as inspired by Article 8 of the ECHR, and the exclusionary sub-paragraph therein,[18] the circumstances of the case clearly denote a legitimate aim in interfering with the exercise of the right which the applicant is seeking to protect.

9. Indeed, Article 8(2) provides that: *"There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is* ***necessary in a democratic society*** *in the interests of* ***national security***, ***public safety*** *or the economic well-being of the country,* ***for the prevention of disorder or crime****, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

10. As enunciated in ***Berrehab***, the Convention does not prohibit Contracting States from regulating the entry and protraction of stay of aliens. Moreover, the Court here leaves it to the discretion of the Contracting States to assess whether interference is deemed "necessary in a democratic society".[19] Throwing light on the word "necessary" this should denote not only a pressing social need but also an interference that is proportionate to the legitimate aim pursued.

11. The respondent contends that the proportionality test entailed in Article 8(2) of the ECHR, as derogation from the right guaranteed by Article 8(1), demands that a justification based on abuse of rights must produce clear evidence of applicant's bad faith. This is supported by the ECJ own line of reasoning, particularly in the ***Carpenter*** case[20]. In addition to this, respondent submits that the key element behind a MS measure based on the principle of proportionality is the requirement to establish a link between the nature and scope of such measure and the aim thereof.[21]

12. Whereas, in ***Berrehab***, the Government did not claim to have any complaint against the behaviour of Mr Berrehab, in the case at hand, the respondent strongly believes that applicant is posing a threat or danger to public order or public safety of the Mulysan State as a result of his capacity as an FSG spokesman and activist, wherein he has called upon Mulysa-based Syrians to actively involve themselves with a view to freeing Syria, stressing that they should do this "by all means necessary, including armed force if required." Rather than condemning a previous violent protest he served as an active catalyst to spur them.

Question 3:

1. The objective of Article 15(3) TFEU is to afford a right to citizens of the European Union to access documents of the Union institutions, bodies, offices and agencies, in any medium whatsoever. General principles and limits to this right are governed by Regulation 1049/2001 which deals with access to documents.[22] Union citizens have a right to access documents of the Union institutions, bodies, offices, and agencies, whatever their medium. However, since this Regulation does not specifically include documents pertaining to Member States in particular, it seems that the circumstances at issue are not covered by it. Article 42 of the Charter of Fundamental Rights of the EU[23] speaks of right of access to documents. Yet, this also makes no mention of documents pertaining to Member States.

2. The respondent submits that the restriction met ECHR requirements as laid down in Article 10(2)[24], meaning that it was prescribed by law, it was applied in order to **protect the public interest** and it was **necessary in a democratic society**.[25]

3. In this scenario, respondent submits that the documents at issue do not solely relate to the applicant.[26] Access to data of a public nature could be restricted on the ground that it contained information the preservation of which is essential to protect public interest concerns.[27]

4. Respondent also submits that States have a certain margin of appreciation in determining whether or not a restriction on the rights protected by Article 10 is necessary.[28]

5. Respondent finally argues on the limits to the right to a fair hearing. Indeed, the Court of First Instance in ***Descom v Council*** starkly states that the Commission is not required to provide a written record of every stage of the investigation detailing information which was still subject to verification. In this case, prior notification to the defendant company was deemed sufficient, without any further need for a written record to be provided by the Commission. *[29]*

Question 4:

1. It is to be respectfully clarified right at the outset, that the respondent has refused applicant's request for refugee status on the basis that he falls within the Article 12 (1) (b) – in the sense that he had been recognised by the Mulysan authorities as having rights possessed by other Mulysan nationals.

2. The respondent submits in this regard that it should be clearly established that this official recognition had taken place, by operation of Law, immediately upon applicant's marriage to a Mulysan national. Consequent to this, following such recognition, Mr. Abdul was exercising such rights and obligations which are equivalent to those of a person who possessed Mulysan nationality, and in this regard therefore cannot possibly now be recognised as a refugee and should not be deemed a beneficiary of refugee status rights.

3. One of the aims of the Tampere European Council of 1999 was that third country nationals would be integrated into the Host State and would be granted equal treatment with nationals of that Member State. The legislative intent behind this provision was that when such third country nationals enter into a Member State and reside there, they would be eligible to the same rights and responsibilities as EU nationals.[30]

4. Respondent is fully aware of its international obligations under European law to grant equal treatment both to Mulysan nationals and also to TCN's. Respondent humbly submits that in applicant's case, it has fully honoured its obligations and it is precisely in consequence of it having honoured such obligations that applicant effectively established his primary residence in Mulysa, and like other nationals, he exercised his right to work and also his right to family life.

5. It is respectfully submitted in this regard that the question of residence or otherwise in terms of Article 12 of the Directive should not in itself pose a problem of interpretation. Respondent submits that the very fact that it, as a state authority, acknowledged and granted applicant those precise same rights and obligations which are attached to the possession of the nationality of Mulysan or rights and obligations equivalent to those, could only have arisen from the fact that respondent at some point formally recognised applicant as having formally and validly taken up residence in Mulysa. Without this residence having been established and recognised by respondent, applicant would never have

validly been in a position to exercise and enjoy residence rights – something which he effectively and undeniably did.

6. One of the essential criteria for this exclusion clause to be brought into effect is that the applicant must have taken up residence in the country in question. This implies that he must have been residing in the country for a long continuous period, and not simply for a short stay.

7. In this regard, respondent would like to submit that the applicant has been residing in Mulysa since he first entered the country in 2009, and he has not left the country since. Respondent thus submits that, since applicant has been living in the country for the past two years, and did not show any intention of leaving Mulysa, then it can be inferred that he can be considered as having taken up residence there. This would make him consequently unable to be considered for refugee status.

8. On a final note, respondent respectfully submits that applicant may not validly bring up the argument that his residence rights may have been put in jeopardy through the dissolution of his marriage. This dissolution is a fact to which respondent is entirely extraneous and had no direct or indirect participation in. Respondent honoured all its legal obligations towards applicant in this regard by conferring all the rights upon him in terms of local and also of European Union laws.

Question 5:

1. Title V of Part Three TFEU (formerly Title IV of Part Three EC) established the legal bases required to achieve the Tampere objectives, setting a timetable within which measures were to be adopted.[31] Article 78, delineates the approach which the EU is to develop on asylum, subsidiary protection and temporary protection, thereby aiming at a common policy.[32] While the Treaty provides the framework of Community policy-making, it is Directives which provide the key to develop its scope by being implemented at national level through national legal procedures.[33]

2. Article 3 of the Refugees' Directive[34] establishes that Member States are allowed to introduce or retain more favourable standards for determining who qualifies as a refugee in so far as these standards are compatible with the Directive. This principle was re-affirmed in ***Bundesrepublik Deutschland v B and D***[35].

3. Respondent submits that case law of the ECJ provides a remedy to Union citizens to rely on the provisions of a directive which was left unimplemented by the Member State concerned.[36] However, applicant cannot argue that the Refugees' Directive was left unimplemented under Mulysan law with a resultant thwarting of their legitimate expectations complying with the Directive's rights.[37]

4. In line with Article 288 TFEU on the adoption of legal acts of the Union[38] and Article 189 to the Treaty Establishing the European Community[39], respondent submits that the implemented Refugee Act 2011 attains the aims set out in the Directive in that the definition of those excluded from refugee status mirrors the exclusions set out in Article 12 of the Directive.

5. As a matter of fact, respondent submits that the national law complies with the main objective found under Recital 6 of the Directive[40], in particular that it ensures a minimum level of benefits to be available for these persons in Member States.

6. Additionally, Recital 8 of the Directive[41] allows Member States to introduce or maintain more favourable provisions for third country nationals or stateless persons who request international protection from a Member State. Respondent indeed contends that this was initially the position adopted since the definition of 'refugee' was given a wider scope than that envisaged by the Directive. Nevertheless, there is no provision envisaged under the Directive which limits a Member State from revising national law to be more in line with the particular EU instrument.

7. Drawing on the principle of proportionality, respondent submits that as outlined in ***United Kingdom v Council*** although the principle of proportionality enjoys a wide discretion in the field of policy choice, violation of the same principle is very infrequent in those instances where wide-ranging legislative choices are impugned.[42] Therefore, the respondent argues that there is no violation of the principle of proportionality in acceding to the exclusionary provisions under the Refugees' Directive. Given that the legality of a measure should only be deemed manifestly inappropriate when it goes beyond what is necessary, and provided that the action taken (expulsion) was the only feasible one for the State, the legitimate aim was definitely not surpassed.[43]

Question 6:

Question 6(a)

1. Respondent primarily submits that it considers the applicant to have ceased to be a refugee in terms of Article 14 (2) of the Refugees' Directive[44]. This is in juxtaposition with Article 12(1)(a) which provides that a third country national or a stateless person is excluded from being a refugee since he is afforded protection or assistance by a United Nations organ or agency other than the United Nations High Commissioner for Refugees. Indeed the applicant was afforded protection by the UNSMU, which was voluntarily terminated upon relocation in Mulysa.

2. Article 12(1) (a) emulates Article 1D of the Convention relating to the Status of Refugees[45], with the latter providing as follows: *"[…] When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention."*

3. The 2009 UNHCR statement[46] provides that 'ceased for any reason' encompasses situations where an individual has travelled outside the zone of a UN agency, having been previously registered therein. Moreover, Article 12 of Joint Position (31)[47] states: *"Any person who deliberately removes himself from the protection and assistance referred to in Article 1D of the Geneva Convention is no longer automatically covered by that Convention. In such cases, refugee status is in principle to be determined in accordance with Article 1A."*

4. The respondent contends, in accordance with Advocate General Sharpston's opinion in ***Bolbol***[48], that while all genuine refugees should be able to receive protection or assistance, it is a given that the extent to which a State is able to accommodate such refugees is not infinite. For this reason, Article 1D of the Convention is not to be read as allowing every displaced third country national, who could have or is currently being given assistance by a UN agency, to voluntarily leave such agency and seek to obtain refugee status in another State.

5. A further interpretation of Article 1D by AG Sharpston envisages that *ipso facto* entitlement to the benefits of the Convention rests on the reason for cessation of protection or assistance.[49] With respect to this notion, respondent submits that persons who voluntarily renounce to the protection or assistance of a UN agency cannot claim to be *ipso facto* entitled to the benefits of the Convention.[50] In

fact, AG Sharpston explains further that while such third country national could attempt to obtain refugee status under Article 1A of the Convention, he is precluded from seeking automatic refugee status elsewhere if he is unable to benefit from the protection or assistance of a UN agency as a result of his own action.[51]

Question 6(b) (i)

6. In view of the above arguments, respondent submits that it should be allowed to revoke the one year resident permit given that it was granted in conjunction with applicant's refugee status. Since they no longer satisfy the conditions upon which the grant of residence permit depends, as they have voluntarily renounced to the protection or assistance of the UN agency in Turkey, there are no grounds for retaining the resident permit.

7. Failure to revoke such permit could result in an injustice to the detriment of the State and its citizens. Respondent submits that applicant's expulsion is necessary in the interests of public order, and that the disputed decision has been taken for legitimate purposes, including the prevention of disorder and the protection of the rights and freedoms of others.[52]

8. Respondent further submits that given that it complies with the provisions of Community law under the relevant directive, it should not be constrained in allowing third-country nationals to keep on residing within the territory of the Member State if they fall outside the definition of 'refugee'. The two are not independent from one another since the lack of refugee status inevitably means termination of residence, consequently deportation. As contended further above, a remedial action could be for applicant to attempt to justify a claim for refugee status under Article 1A of the Convention.

Question 6(b) (ii)

9. Respondent contends that retrospective application is only permitted in exceptional circumstances where the Member State deems it necessary in order to achieve particular objectives. Such an action must respect the individual's legitimate expectations.[53]

10. Respondent makes reference to ECJ case law on the position of retroactivity. In ***ArtieteSpA***[54] and ***Meridionale Industria Salumi Sri***[55] it was held that in a 'normal' case a ruling by the ECJ was retroactive. As held in ***Barber***[56], it is only when the Court is introducing a new principle, or in a scenario where the judgment may give rise to serious effects as regards the past, that the Court would proceed to restrict the effects of its rulings.

11. Notwithstanding a clear commitment to uphold the principle of legal certainty, the ECJ did not limit retrospective application only to situations where the effects of a judgment could be deemed less serious. Indeed, in ***Francovich***[57] the Court did not limit the scope of a judgment on State liability, and proceeded to apply its effects retroactively, thus targeting also past defaults by Member States. This albeit an alert on the part of Advocate General Mischo, in his Opinion to the case, where he noted that the effects *ratione temporis* of the judgment are to be limited in view of the prevailing uncertainty on the issue of State liability and the financial consequences which would ensue in respect of prior defaults.[58]

12. Respondent submits since the definition of 'refugee' as provided by the amended Refugee Act is in line with the provisions of the Refugees' Directive, there is no introduction of any new principle and therefore it should be allowed to apply the provision retrospectively. Respondent thus contends that it is within the remit of the rule of law.

Question 6(b) (iii)

13. Respondent submits that access to employment is commensurate with the notion of maintenance of national security and public order. Yet the fact that applicant could be gainfully employed should not be viewed as a guarantee in respect of non-revocation of refugee status. Article 17 of the Convention relating to the Status of Refugees[59] allows Contracting States to impose restrictive measures on aliens if they have not fulfilled at least one of the following: (a) has resided in the country for three years; (b) his/her spouse is a national of the country; (c) has one or more children who are nationals of the country. Given that none of the Syrian 'refugees' comply with these criteria, respondent submits that the State would be allowed to make the relevant restrictions; thereby further showing that employment in itself should not subsist to favour retention of the refugee status.

14. While in ***Zambrano***[60], the ECJ precluded a Member State from refusing to grant a work permit to a third country national having minor children being European Union citizens, such scenario cannot be applicable to the circumstances at issue. In fact, while the Court deemed it expedient not to deprive the Zambrano children of the genuine enjoyment of the substance of the rights attaching to the status of citizen of the Union, no such threat exists in relation to the applicant. This is because none enjoy the status of a European Union citizen.

Question 7:

1. The Refugees' Directive was introduced as a reflection of what was concluded in the Tampere European Council. The principle rationale behind the Refugees' Directive, is that it establishes a set of minimum standards which have to be followed by the Member States, in relation to the conditions that third country nationals or stateless persons must satisfy in order to benefit from international protection.[61]

2. Notwithstanding that the Directive lays down these minimum standards, which are to be applicable and respected throughout all Member States, the Directive nonetheless grants the States a positive discretion when implementing the provisions. This discretion lies in the fact that Member States can possibly enact and introduce more favourable provisions or standards upon which they will grant international protection. This positive discretion is reflected in Recital (8) as well as Article 3. In cases where States opt to maintain more favourable standards, in cases such as ***Germany v B and D***[62], the Court has held that these standards must nonetheless be compatible with the said directive, and States must thus seek to ensure that the minimum standards are maintained and respected throughout.[63]

3. In this regard, respondent submits that Member States have discretion when it comes to implementing provisions of the Directive. Respondent claims that in relation to who qualifies for refugee protection, the State has gone over these minimum standards, as a more generous definition of refugee is provided in Mulysan law.

4. Therefore, respondent submits that although there is express provision dealing with subsidiary protection, in granting a wider definition of refugee the minimum standards laid down in the Directive were still abided with. It is further maintained that since the minimum standards were respected, then a breach cannot ensue.

5. Notwithstanding the above, respondent also claims that one cannot expand the wide definition of refugee to incorporate the notion of subsidiary protection. Respondent here would like to refer to the drafting and text of the Refugees' Directive itself. In the Directive, both refugee protection and

subsidiary protection are dealt with separately and independently from each other. Each form of protection is dealt with in a separate Chapter within the Directive, and each have their own requirements which must be satisfied in order for a person to qualify for such form of protection. Respondent refers to the different headings, and points out that while Chapter II provides for assessments of applications, Chapter III deals with conditions for establishing whether an individual could qualify as a refugee, and Chapter V deals with the conditions that must be satisfied in order to qualify for subsidiary protection.[64]

6. Respondent submits that, in light of this, Member States have a right to deal with the forms of protection separately from each other, and thus the definition of one should not be considered to compromise the meaning of the other. Respondent refers to ***R v British Coal Corporation, ex parte Vardy,*** where the English High Court held that it is not possible for one to interpret a provision in national law, in a way as to give it a meaning as is required by the EC Directive[65], thus one cannot interpret the Mulysan provision on refugee status in such a way as to give it a meaning of subsidiary protection, as laid down in the Refugees' Directive.

7. Respondent further submits that since the definition, in his humble opinion, should not be considered to include subsidiary protection, the fact that Mulysa granted them refugee protection is not tantamount to the authorities recognising that the person qualifies for subsidiary protection. In this case, since Mulysa revoked the refugee status, and since this definition did not include subsidiary protection, then applicants will not be entitled to protection which would otherwise be granted to them, if they were granted subsidiary protection.

8. In this regard, respondent brings to the fore the notion of legitimate expectation and vested rights. Respondent claims that a Member State is free to use the discretion granted within the Directive in any manner, as long as action is within the limits and the minimum criteria laid down.

9. Although Mulysa amended the definition of refugee, it was so done within the parameters established in the Directive, and the minimum standards laid down were maintained.

10. Respondent therefore submits that, if the Member State decide to repeal any additional benefits or more favourable standards that it would have granted, whilst at the same time retaining respect of the minimum standards, then the State will still be within legal parameters to do this, and the former interpretation in relation to those additional benefits will not be able to be used.

11. In conclusion to the above, respondent is thus claiming that the more generous definition that was formerly enacted under national legislation is not tantamount to their implementation of subsidiary protection.

Question 8:

1. Respondent submits that as was very well explained in the ***Hedley Lomas*** decision, the main reason governing the limited liability in ***Francovich*** does not lie in the fact that Member States' discretion when implementing Community Law should not be encumbered, but in the foundation that rules of Community law are often not clear. [66]

2. Respondent mentions the mere reference in Recital 8 of the Refugees' Directive[67] as to the introduction and maintenance of favourable measures to refugees. Such reference can in turn be construed as meaning that while respecting the minimum standards enshrined by the Directive, various steps seeking to further protect the nation can be taken. Even more cornering is the fact that this precludes a state from being in a position to make any legislative choices.

3. Holding a State liable for mere infringements of these rules would not be any different from weaving a principle of strict liability. This would not only convert itself into a political danger, but it would also go counter to the principle of legal certainty. Running on similar lines, the ***DenkavitInternational BV v Bundesamt*** outlined that a deficiency in both clarity and precision, coupled up with lack of comprehensive guidelines as to the relevant interpretation cannot lead to a sufficiently serious reason triggering liability.[68]

4. Furthermore, respondent contends that as highlighted in ***R v HM Treasury, ex parte British Telecommunications,*** the Court held that whether this gave rise to financial liability on the part of the state nonetheless depended on the three conditions laid down in ***Francovich***.[69] It was thus established that these conditions applied not only where a national legislature acted in a field where there was little, if any, Community legislation but also where it misinterpreted a Directive whilst transposing it into domestic law. While the approach was understandable as a matter of policy, it is hard to see it as a case where the Member State had a wide margin of discretion in implementing this particular provision. So a mere infringement of Community law did not in this situation engage the liability of the UK.

5. In this case the "sufficiently serious" condition was decisive. In determining whether that the condition was satisfied, the factors to be considered included the clarity and precision of the provision breached. Since the Directive was imprecisely worded, the UK's interpretation was not manifestly contrary to its wording or aims. The breach of Community law was therefore not sufficiently serious to require the UK to compensate.

References

[1] Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi* [2011], Bundle page 135, paragraph 42

[2] Case C-256/11, *Dereci and others v Bundesministerium für Inneres* [2011], Bundle pages 180-181, paragraphs 40 and 60

[3] Ibid., Bundle page 182, paragraph 66

[4] Ibid., paragraph 68

[5] Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi* [2011], Bundle page 135, paragraph 42 and 43

[6] Case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department* [2011], Bundle page 156, paragraph 56

[7] The European Convention of Human Rights and Fundamental Freedoms (1950), (hereinafter ECHR) Bundle page 41

[8] *Berrehab v The Netherlands* (ECtHR 1988), Bundle page 191, paragraph 16

[9] Ibid., Bundle page 190, paragraph 11

[10] Council Directive EC 2004/38 of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, (hereinafter Citizens' Right Directive)

[11] Case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department* [2011], Bundle page 154, paragraph 28

[12] Citizens' Right Directive, Bundle page 54

[13] Case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department* [2011], Bundle page 154, paragraph 39

[14] Ibid., Bundle page 155, paragraph 42

[15] Case C-256/11, *Dereci and others v Bundesministerium für Inneres* [2011], Bundle page 181, paragraph 60

[16] Ibid., Bundle page 182, paragraph 61

[17] Citizens' Right Directive, Bundle page 60

[18] ECHR, Bundle page 41; Article 8(2)

[19] *Berrehab v The Netherlands* (ECtHR 1988), Bundle page 193, paragraph 28

[20] Josephine Steiner and Lorna Woods, *EU Law* (10th edn, Oxford University Press, USA 2009) Chapter 6 citing Case C-60/00, *Mary Carpenter v Secretary for the Home Department* [2002], Supplementary Background Reading page 66

[21] Stephen Weatherill, *Cases and Materials on EU Law* (8th edn, Oxford University Press, USA 2007) Proportionality Chapter, Supplementary Background Reading page 23

[22] Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms*, (3rd edn, Oxford University Press, USA 2010) Chapter 12, Supplementary Background Reading page 147

[23] Charter of Fundamental Rights of the European Union, Bundle page 39

[24] ECHR, Bundle page 41;

[25] *Társaság a Szabadságjogokért v Hungary* (ECtHR 2009),Bundle page 199, paragraph 21

[26] Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms*, (3rd edn, Oxford University Press, USA 2010) Chapter 12, Supplementary Background Reading page 148

[27] *Társaság a Szabadságjogokért v Hungary* (ECtHR 2009),Bundle page 198, paragraph 20

[28] Ibid., paragraph 18

[29] Josephine Steiner and Lorna Woods, *EU Law* (10th edn, Oxford University Press, USA 2009) Chapter 6 citing Case T-171/94, *Descom Scales Manufacturing Co. Ltd v Council of the European Union* [1994], Supplementary Background Reading page 59

[30] Ibid., Supplementary Background Reading page 164

[31] Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms*, (3rd edn, Oxford University Press, USA 2010) Chapter 14, Supplementary Background Reading page 167

[32] Treaty on the Functioning of the European Union, (hereinafter TFEU), Article 78, Bundle page 29

[33] Stephen Weatherill, *Cases and Materials on EU Law* (8th edn, Oxford University Press, USA 2007), The Direct Effect of Directives Chapter, Supplementary Background Reading page 1

[34] Council Directive EC 2004/83 of 29 April 2004 on minimum standards for the qualification and status of third country national or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, (hereinafter Refugees' Directive), Bundle page 64

[35] Joined cases C-57/09 and C-101/09, *Bundesrepublik Deutschland v B and D* [2010], Bundle page 148, paragraph 114

[36] Stephen Weatherill, *Cases and Materials on EU Law* (8th edn, Oxford University Press, USA 2007), The Direct Effect of Directives Chapter citing Case C-148/78, *Pubblico Ministero v Tullio Ratti* [1979], Supplementary Background Reading page 2

[37] Ibid., citing: F. Mancini 'The Making of a Constitution for Europe' (1989) 26 CML Rev 595, Supplementary Background Reading page 3

[38] TFEU, Bundle Page 33

[39] Stephen Weatherill, *Cases and Materials on EU Law* (8th edn, Oxford University Press, USA 2007), The Direct Effect of Directives Chapter, Supplementary Background Reading page 6

[40] Bundle page 64

[41] Ibid.

[42] Stephen Weatherill, *Cases and Materials on EU Law* (8th edn, Oxford University Press, USA 2007) Proportionality Chapter citing Case C-84/94, *United Kingdom v Council* [1996], Supplementary Background Reading page 23

[43] Ibid., Supplementary Background Reading page 24

[44] Bundle page 70

[45] Case C-31/09, *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal* [2010], Advocate-General Opinion (Sharpston), Bundle page 109, paragraph 26

[46] This statements relates to the interpretation of Article 1D of the 1951 Convention even though it does not have binding force; Case C-31/09, *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal* [2010], Advocate-General Opinion (Sharpston), Bundle page 108, paragraph 16

[47] Joint Position of 4 March 1996 on the harmonised application of the definition of the term ‘refugee’ in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees, Case C-31/09, *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal* [2010], Advocate-General Opinion (Sharpston), Bundle page 109, paragraph 22

[48] Ibid., Bundle page 112, paragraph 55

[49] Ibid., Bundle page 115, paragraph 90(c)

[50] Ibid., paragraph 83

[51] Ibid., Bundle page 116, paragraph 90(e)

[52] *Berrehab v The Netherlands* (ECtHR 1988), Bundle page 193, paragraph 25

[53] Josephine Steiner and Lorna Woods, *EU Law* (10th edn, Oxford University Press, USA 2009) Chapter 6 citing Joined Case C-260/91 and C-261/91, *Diversinte SA and Iberlacta SA v Administración Principal de Aduanas e Impuestos Especiales de la Junquera* [1993], Supplementary Background Reading Page 57

[54] Ibid., citing Case C-811/79, *Amministrazione delle finanza dello Stato v Ariete SpA*, [1980] Supplementary Background Reading Pg 58

[55] Ibid., citing Joined Cases 66, 127 and 128/79, *Amministrazione delle Finanza dello Stato v Srl Meridionale Industria Salumi and others*, [1981] Supplementary Background Reading page 58

[56] Ibid., citing Case C262/88, *Barber v Guardian Royal Exchange Assurance Group* [1990], Supplementary Background Reading page 58

[57] Josephine Steiner and Lorna Woods, *EU Law* (10th edn, Oxford University Press, USA 2009) Chapter 10 citing Joined Cases C-6/90 and C9-90, *Andrea Francovich and Danila Bonifaci and others v Italy* [1991], (hereinafter *Francovich*), Supplementary Background Reading Page 96

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[59] United Nations Convention relating to the Status of Refugees [1951], Bundle page 81

[60] Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi* [2011], Bundle page 135, paragraphs 42 and 43

[61] Joined Cases C-57/09 and C-101/09, *Germany v B and D* [2010], Bundle page 138, paragraph 17

[62] Ibid., Bundle page 136

[63] Ibid., Bundle page 148, paragraph 114,

[64] Joined Cases C-411/10 and C-493/10, *N.S v Secretary of State for the Home Department* [2011], Bundle page 162, paragraph 29

[65] Josephine Steiner and Lorna Woods, *EU Law* (10th edn, Oxford University Press, USA 2009) Chapter 5 citing case, *R v British Coal Corporation, ex parte Vardy* ([1993] ICR 720), Supplementary Background Reading page 42

[66] Josephine Steiner and Lorna Woods, *EU Law* (10th edn, Oxford University Press, USA 2009) Chapter 9 citing Case C-1 12/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Austria* [2003], Supplementary Background Reading page 75

[67] Bundle page 64

[68] Josephine Steiner and Lorna Woods, *EU Law* (10th edn, Oxford University Press, USA 2009) Chapter 9 citing Joined Cases C-283, 291,292/94, *DenkavitInternationalBV v Bundesamt fur Finanzen* [1996], Supplementary Background Reading page 73

[69] Josephine Steiner and Lorna Woods, *EU Law* (10th edn, Oxford University Press, USA 2009) Chapter 9 citing CaseC-392/93, *R v Her Majesty's Treasury, ex parte British Telecommunications pic* [1996], Supplementary Background Reading page 73