Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 27 February 2020[1]

**Case C-897/19 PPU**

**I.N.,**
**in the presence of:**
**The Russian Federation**

(Reference for a preliminary ruling from the Vrhovni sud (Supreme Court, Croatia))

(EEA Agreement and freedom to receive services — Mutual Trust and the Common European Asylum System — Dublin III Regulation and Schengen Associated States — Extradition request by a third state to an EU Member State with respect to an EFTA national — Grant of asylum before acquisition of nationality by that EFTA state to EEA national subject to extradition request due to risk of exposure to inhuman and degrading treatment and unfair criminal proceedings in the event of *refoulement* to requesting third state — Arrest and detention by an EU Member State with a view to extradition of the EEA national for prosecution for the same crimes considered in asylum proceedings in the EFTA state — Discrimination on the basis of nationality with respect to extradition — International Agreement between Iceland, Norway and the EU on surrender procedures and judicial cooperation in criminal matters — Whether requested Member State obliged to inform the EEA state of the third state extradition request — Whether EU Member State required to return EEA national to their home state rather than comply with third state extradition request — *Petruhhin* ruling of the Court — Risk of impunity — Articles 4, 19 and 47 of the Charter of Fundamental Rights)

1. I.N. is a national of the Russian Federation ('Russia'), and became a national of the Republic of Iceland ('Iceland') on 19 June 2019, after having been granted asylum as a refugee in that country on 8 June 2015. On 30 June 2019 he was arrested by Croatian authorities while on holiday, crossing by bus with his family the frontier between that Member State and Slovenia, and remains incarcerated. The arrest took place under an international wanted persons notice issued on 20 May 2015 by Interpol's Bureau in Moscow.

2. Russia seeks I.N.'s extradition from Croatia on corruption charges and is supported by the Public Prosecutor of Croatia, representing Russia (the 'Public Prosecutor'). The Croatian constitution precludes extradition of its own nationals, but not non-nationals like I.N., when, as is the case with Russia, there is no extradition treaty. It is argued by the Public Prosecutor that, in the circumstances of the main proceedings, this situation is not precluded by EU law.

3. Iceland requests safe passage of I.N. to Iceland, in a context in which the proceedings for which his prosecution is sought in Russia appear to have formed the basis of the grant of asylum prior to I.N.'s acquisition of Icelandic nationality.

1 Original language: English.

4. In support of the safe passage request, I.N. and Iceland seek to rely on European Union law, but predominantly EEA law.[2] At the same time, Iceland relies on Articles 18 and 21 TFEU, which were held by the Court in *Petruhhin*,[3] to preclude discrimination on the basis of nationality with respect to extradition of EU citizens who have exercised free movement rights to third states, but subject to caveats that are important and relevant to the main proceedings.

5. This is the essence of the request for preliminary ruling from the Vrhovni sud, Hrvatska (Supreme Court, Croatia, 'the referring court'). It presents the Court with an opportunity to rule on the intersections between EEA and EU law, and the consequences following from the participation of third states like Iceland in the Schengen acquis as Schengen Associated States,[4] and in particular Iceland's association with 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[5] ('Dublin III Regulation'). The participation of both Iceland[6] and Croatia in the Dublin Regulation is of particular relevance to the main proceedings, as is the Common European Asylum System[7] more broadly.

6. In addition to this, consideration is required of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway[8] ('Surrender Procedure Agreement'), and in the background lie a range of Council of Europe instruments affecting extradition,[9] and the Geneva Convention Relating to the Status of Refugees.[10] Due consideration must also be afforded to the preclusion under EU law of extradition to conditions of inhuman and degrading treatment or

2 Article 216(2) TFEU provides that Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States. See for example judgment of 30 April 1974, *Haegeman* (181/73, EU:C:1974:41, paragraph 5).

3 Judgment of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630).

4 See the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen acquis, (OJ 1999 L 176, p. 36) ('Schengen Association Agreement').

5 (OJ 2013 L 180, p. 31) repealing at Article 48, Council Regulation (EC) No 343/2003 of 18 February 2003 (Dublin II).

6 Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the state responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway (OJ 2001 L 93, p. 40).

7 The core primary and legislative rules of the Common European Asylum System are as follows; Articles 67, 78, and 80 TFEU and Article 18 of the Charter; the Dublin III Regulation; Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice ('Eurodac Regulation') (OJ 2013 L 180, p. 1); Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) ('Qualifications Directive') (OJ 2011 L 337, p. 9); Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) ('the Procedures Directive') (OJ 2013 L 180 p. 60); 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, ('the Reception Directive') (OJ 2013 L 180, p. 96); Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office (OJ 2010 L 132, p. 11); Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ 2001 L 212, p. 12).

8 (OJ 2006 L 292, p. 2). This Agreement is incorporated into EU law by Council Decision of 27 November 2014 on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway (OJ 2014 L 343, p. 1) ('Surrender Procedure Agreement').

9 European Convention on Extradition (ETS No 024). The European Convention on Mutual Assistance in Criminal Matters (ETS No 030) which entered into force on 12 June 1962. Russia has ratified both of these agreements, and the second additional protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No 182) entered into force with respect to Russia on 1 January 2020. Under the auspices of the Council of Europe, there is also a European Convention on the Transfer of Sentenced Persons (ETS No 112).

10 Signed at Geneva on 28 July 1951 and which entered into force on 22 April 1954 (United Nations Treaty Series, vol. 189, p. 150, No 2545 (1954)), as supplemented by the Protocol relating to the Status of Refugees, concluded in New York on 31 January 1967, which entered into force on 4 October 1967 (together, 'the Geneva Convention').

punishment, which applies with respect to both extradition to third states [11] and internally across the EU in the context of the European Arrest Warrant [12] (as reflected, respectively in Articles 19 and 4 of the Charter), and extradition in the presence of alleged systemic deficiencies in the receiving judicial system, thereby imperilling fair trial (Article 47 of the Charter). [13]

7. In answer to the first question referred, I have reached the conclusion that the Croatian authorities are bound, under principles elaborated in *Petruhhin*, to inform the Icelandic authorities of Russia's extradition request with respect to I.N., and continue to be bound to forward to Iceland any material in their possession that might assist the authorities in Iceland to decide whether to prosecute I.N. in Iceland and seek his return.

8. Further, due to the obligation of mutual trust in the quality and lawfulness of the laws of participating states which underpins the Common European Asylum System, and particularly the Dublin III Regulation, the Croatian authorities, including the courts, are precluded from acting inconsistently with a decision granting asylum of a Schengen Associated State, like Iceland, to the Common European Asylum System. Such inconsistency would arise if Croatia (i) refrained from communicating to Iceland an extradition request concerning the same or similar criminal charges pursuant to which Iceland afforded I.N. asylum, since Iceland made a determination that it was the Member State responsible under the Dublin III Regulation; [14] (ii) any of its authorities, including the courts, decided on I.N.'s. risk of exposure to inhuman or degrading treatment or a flagrant denial of justice in Russia, as at the date of the Croatian proceedings, inconsistently with Iceland's prior grant of asylum to I.N. in 2015.

9. In answering the second question, given that Iceland is yet to make an extradition request, at present there is no obligation on Croatia to actively surrender I.N. to Iceland under the Surrender Procedure Agreement. [15] It will be for the Croatian courts to determine whether, in all the circumstances, any arrest warrant ultimately issued by Iceland, in combination with the Surrender Procedure Agreement, offers protection against impunity equivalent to extradition, without freeing those court's from their obligation to act consistently with Iceland's grant of asylum in 2015.

## I. Legal Framework

### *A. European Union Law*

10. Article 18 of the TFEU, first paragraph, states:

'Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

11. Article 2(1) of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, [16] states:

'Internal borders may be crossed at any point without any checks on persons being carried out.'

11 Order of 6 September 2017, *Peter Schotthöfer & Florian Steiner* (C-473/15, EU:C:2017:633, paragraph 24 and the case-law cited).

12 See, for example, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)* (C-220/18 PPU, EU:C:2018:589).

13 Judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586).

14 See footnote 5 above.

15 See footnote 8 above.

16 (*OJ 2000 L 239, p. 19, 'Convention Implementing the Schengen Agreement'*).

12. Article 2 of Protocol (No 19) on the Schengen *acquis* integrated into the framework of the European Union [17] states:

'The Schengen *acquis* shall apply to the Member States referred to in Article 1, without prejudice to Article 3 of the Act of Accession of 16 April 2003 or to Article 4 of the Act of Accession of 25 April 2005. The Council will substitute itself for the Executive Committee established by the Schengen agreements.'

13. The first paragraph of Article 6 of Protocol (No 19) on the Schengen *acquis* integrated into the framework of the European Union [18] states:

'The Republic of Iceland and the Kingdom of Norway shall be associated with the implementation of the Schengen *acquis* and its further development. Appropriate procedures shall be agreed to that effect in an Agreement to be concluded with those States by the Council, acting by the unanimity of its Members mentioned in Article 1. Such Agreement shall include provisions on the contribution of Iceland and Norway to any financial consequences resulting from the implementation of this Protocol.'

14. Article 1 of the Schengen Association Agreement [19] states:

'The Republic of Iceland and the Kingdom of Norway hereinafter referred to as "Iceland" and "Norway" respectively shall be associated with the activities of the European Community and the European Union in the fields covered by the provisions referred to in Annexes A and B to this Agreement and their further development.

This Agreement creates reciprocal rights and obligations in accordance with the procedures set out herein.'

15. Article 4(1) and (2), first sentence of the Act of Accession of the Republic of Croatia [20] state:

'1. The provisions of the Schengen *acquis* as referred to in the Protocol on the Schengen *acquis* integrated into the framework of the European Union (hereinafter referred to as the 'Schengen Protocol'), annexed to the TEU and the TFEU, and the acts building upon it or otherwise related to it, listed in Annex II, as well as any further such acts adopted before the date of accession, shall be binding on, and applicable in, Croatia from the date of accession.

2. Those provisions of the Schengen *acquis* as integrated into the framework of the European Union and the acts building upon it or otherwise related to it not referred to in paragraph 1, while binding on Croatia from the date of accession, shall only apply in Croatia pursuant to a Council decision to that effect, after verification, in accordance with the applicable Schengen evaluation procedures, that the necessary conditions for the application of all parts of the relevant *acquis* have been met in Croatia, including the effective application of all Schengen rules in accordance with the agreed common standards and with fundamental principles.' [21]

17 (OJ 2012 C 326, p. 1).

18 *Ibid.*

19 See footnote 4 above.

20 See Decision of the Council of the European Union of 5 December 2011 on the admission of the Republic of Croatia to the European Union, and the Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community appended thereto (OJ 2012 L 112, p. 6).

21 Annex II commences with The Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders dated 14 June 1985 (OJ 2000 L 239, p. 13) ('Schengen Agreement of 14 June 1985').

### *B. EEA Law*

16. Article 4 of the Agreement on the European Economic Area [22] ('EEA Agreement') states:

'Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

17. Article 36(1) of the EEA Agreement states:

'Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.'

### *C. Member State law*

18. Article 9 of the Constitution of the Republic of Croatia ('Narodne novine' No 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14) states:

'A national of the Republic of Croatia may not be forcibly expelled from the Republic of Croatia, deprived of his or her nationality, or extradited to another State, except in implementation of a decision on extradition or surrender made in accordance with an international treaty or the *acquis communautaire*.'

19. Article 12(1) points 1, 3 and 4 of the Zakon o međunarodnoj pravnoj pomoći u kaznenim stvarima (Law on international mutual legal assistance in criminal matters, 'Narodne novine' 178/04;'the ZOMPO') states that a request for extradition can be dismissed if (1) the request concerns an act considered to be a political offence or an act linked to such an offence; … (3) acceptance of the request could undermine the sovereignty, security, legal order or other vital interests of the Republic of Croatia; and (4) it can be reasonably assumed that the person referred to in the request for extradition would face, were he or she to be extradited, prosecution or punishment on account of his or her race, religion, nationality, membership of a particular social group, or political opinion, or that his or her situation would be made more difficult on one of those grounds.

20. Article 55 of the ZOMPO states:

'(1) Where the competent court rules that the legal conditions for extradition are not met, it shall adopt an order dismissing the extradition request and forward that order without delay to the Vrhovni sud (Supreme Court) of the Republic of Croatia, which, after hearing the competent Public Prosecutor, shall confirm, set aside or amend the order.'

## II. The facts in the main proceedings and the question referred for a preliminary ruling

21. As mentioned above, on 20 May 2015, Interpol's Bureau in Moscow issued an international wanted persons notice for I.N. for arrest on account of criminal proceedings for corruption, and more specifically a form of corruption known as passive corruption (Article 290(5) of the Criminal Code of the Russian Federation). I.N. is suspected of having received, in his capacity as director of the Division for Licences and Certificates of the Russian Ministry of Emergency Situations in the Republic of

22 (OJ 1994 L 1, p. 3).

Karelia, after prior agreement with other officials of the Ministry and in abuse of his official functions, a kickback amounting to 833 000 Russian rouble (RUB) (circa EUR 11 700) from a representative of an undertaking, and of having in return issued licences to that person relating to the assembly, technical support and repair of fire-prevention equipment in buildings and construction sites.

22. On 30 June 2019, at a Croatian border crossing point, I.N. was arrested on the basis of the aforementioned international wanted persons notice. At the border, I.N. presented an Icelandic travel document for refugees (No …), valid from 25 February 2019 to 25 February 2021.

23. On 1 July 2019, I.N. was brought before an investigating judge of the Županijski sud ('County Court of Zagreb', Croatia). On 1 July 2019 the County Court of Zagreb ordered that I.N. be detained pending extradition, in accordance with Article 47 of the ZOMPO. I.N. remains in detention, his appeals having been unsuccessful.

24. On 1 August 2019, the Administration for consular affairs, visa services and foreign nationals at the Ministry of Foreign and European Affairs of the Republic of Croatia forwarded to the County Court of Zagreb a note from an Embassy of Iceland, in which it is stated that I.N. has Icelandic nationality and permanent residence in Iceland. The note states that I.N. acquired Icelandic nationality on 19 June 2019. Before acquiring that nationality, he held a travel document for refugees (No … ). The note also states that the Icelandic Government asks that I.N. be guaranteed safe passage to Iceland with a minimum of delay.

25. On 6 August 2019, the County Court of Zagreb received a request from the Public Prosecutor's Office of the Russian Federation seeking the extradition of I.N. to the Russian Federation, in accordance with the provisions of the European Convention on Extradition.[23] The extradition was requested on account of criminal proceedings for nine offences of passive corruption, referred to in Article 290(3) of the Criminal Code of the Russian Federation, and five offences of passive corruption, referred to in Article 290(5)(a) of the Criminal Code of the Russian Federation. Documents were also submitted in support of the extradition request, in accordance with the provisions of the European Convention on Extradition, there being no extradition agreement between Croatia and Russia.

26. The request stated that the Public Prosecutor's Office of the Russian Federation guarantees that the purpose of the extradition request is not to prosecute the person concerned for political reasons, on account of his race, religion, nationality or opinions, that I.N. would have every opportunity to exercise his right of defence with the assistance of a lawyer, and that he would not be subjected to torture, cruel or inhuman treatment, or punishment undermining human dignity.

27. On 5 September 2019, the chamber of the County Court of Zagreb hearing the case held that the legal conditions for the extradition of the foreign national I.N. for the purpose of criminal proceedings, laid down in Articles 33, 34 and 37 of the ZOMPO, were met.

28. On 30 September 2019, I.N. lodged an appeal to the referring court. According to the order for reference, I.N. stated that there is a concrete, serious and reasonably foreseeable risk that, if he were extradited, he would be subjected to torture and inhuman and degrading treatment. In the appeal, he stated, inter alia that his status as refugee had been recognised in Iceland precisely on account of the specific criminal proceedings in Russia, that he held a valid Icelandic travel document for refugees, and that the County Court of Zagreb had de facto put an end to the international protection granted to him in Iceland. He further contended that the Zagreb County Court had misconstrued the ruling of the Court in *Petruhhin*.[24]

23 See footnote 9 above.

24 Judgment of 6 September 2019 (C-182/15, EU:C:2016:630).

29. Under the case-law of the referring court, an extradition request must be dismissed where there is a real risk that, were the person concerned to be extradited, he or she would be subjected to torture or inhuman punishment or treatment. The order for reference states that those aspects will be examined in the appeal proceedings.

30. Nevertheless, the referring court has doubts as to whether, prior to the adoption of a decision on the extradition request on the basis of the provisions of EU law, Iceland, which granted nationality to I.N., must be informed of the extradition request, so that that State can, if it so wishes, request the surrender of its national in order to conduct proceedings aimed at preventing the risk of impunity.

31. Given that there are doubts as to the application of EU law, the referring court stayed the proceedings on 26 November 2019, and referred the following questions to the Court of Justice for a preliminary ruling:

'1. Must Article 18 TFEU be interpreted as meaning that a Member State of the European Union which gives a ruling on the extradition to a third State of a national of a State that is not a Member State of the European Union but is a Member State of the Schengen area is required to inform that Member State of the Schengen area which granted nationality to that person of the extradition request?

2. If the answer to the preceding question is in the affirmative and the Member State of the Schengen area has requested the surrender of that person in order to conduct the proceedings in respect of which extradition is requested, must that person be surrendered to that State, in accordance with the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway?'

32. The order for reference was received at the Court of Justice on 5 December 2019, and the decision was taken to deal with it under the urgent preliminary-ruling procedure.

33. Written observations were filed at the Court by I.N., the Public Prosecutor, the Republic of Croatia and the European Commission. I.N. and the Commission participated at the hearing which took place at the Court on 31 January 2020, as did the Greek Republic, the Republic of Ireland, the Republic of Iceland, the Kingdom of Norway, and the EFTA Surveillance Authority ('ESA').

## III. Summary of Written and Oral Observations

34. I.N. states that the Icelandic authorities found he had testified against his superiors in the public administration to the competent Russian authorities with respect to their corrupt activities, but because of the links of his superiors with senior officials in the public administration, he was prosecuted rather than them.

35. I.N. alleges the prosecution is illegal and unclear, and that Croatia is acting in breach of Article 6 ECHR. I.N. says his status as a refugee is still relevant, and it should have been taken into account. I.N. also points out he is precluded from applying for asylum under Croatian law because it has already been granted, and there is 2018 case-law of the Constitutional Court of Croatia obliging the Croatian courts to take account of grants of international protection under Dublin III.[25]

25 See footnote 5 above.

36. The notion of equal treatment with respect to the four freedoms is central to relations between EEA and EU Member States (see fifteenth recital to the EEA Agreement and Article 4 EEA), as is uniform interpretation of the EEA Agreement and EU legislation. The goal is homogeneity between the two systems (Article 105 EEA).

37. I.N. adds that jurisprudence of the Court under Article 18 TFEU applies by analogy, because Article 4 EEA reproduces it in substance. Thus, a person who finds themselves in a situation falling within the scope of application of the EEA must be treated the same way, whatever their nationality,[26] and the main proceedings fall within the scope of application of Article 36 EEA which reproduces in substance Article 56 TFEU on free movement of services. If EEA nationals could not invoke protection against extradition under *Petruhhin*,[27] they would use the services of tourism operators offering journeys across Europe less often.

38. I.N. adds that free circulation of non-economically active people in the EEA who are not covered by one of the four freedoms sometimes falls within the EEA Agreement, because Directive 2004/38/EC of the European Parliament and of the Council 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[28] was integrated into EEA law by Decision of the EEA Joint Committee No 158/2007 of 7 December 2007 amending Annex V (Free movement of workers) and Annex VIII (Right of establishment) to the EEA Agreement.[29] In *Gunnarsson*[30] and *Jabbi*,[31] the EFTA Court interpreted Directive 2004/38 broadly to compensate for the absence of a provision of EEA law corresponding to Article 21 TFEU on citizenship.

39. I.N. argues that avoidance of impunity is a legitimate objective justifying a limitation on fundamental freedoms, but the same objective can be achieved by less restrictive means than extradition,[32] and I.N. refers to the Surrender Procedure Agreement between the EU, Iceland and Norway,[33] which, by its content, corresponds almost completely with Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.[34] I.N. points to the similarity of the definition of the European Arrest Warrant in Article 1 of Decision 2002/584/JHA and in Article 2(5) of the Surrender Procedure Agreement.[35]

40. According to the Public Prosecutor, because Iceland is not a Member State of the European Union, I.N. enjoyed at the date of his arrest rights arising under the EEA agreement but not those arising from the TFEU with respect to nationals of EU Member States. The right to free movement under the EEA is narrower than the rights afforded by Article 21 TFEU and EEA free movement rights do not extend to extradition. In consequence, the principle of non-discrimination in Article 4 of the EEA does not apply to the main proceedings.[36]

26 I.N. refers to the judgment of 2 February 1989, *Cowan* (186/87, EU:C:1989:47, paragraph 10).

27 The judgment of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630).

28 … amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).

29 (OJ 2008 L 124, p. 20).

30 Judgment of the EFTA Court of 24 November 2014, *Iceland v Gunnarsson*, Case E-27/13, EFTA Ct. Rep.

31 Judgment of the EFTA Court of 26 July 2016, *Jabbi v Norwegian Government*, Case E-28/15, EFTA Ct. Rep.

32 I.N. refers to the judgments of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630), and of 13 November 2018, *Raugevicius* (C-247/17, EU:C:2018:898).

33 See footnote 8 above.

34 (OJ 2002 L 190, p. 1). ('EAW Framework Decision').

35 See footnote 8 above.

36 With respect to free movement rights of Article 21 TFEU and derogations, the Public Prosecutor refers to the judgments of 12 May 2011, *Runevič-Vardyn and Wardyn* (C-391/09, EU:C:2011:291); of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630); and of 13 November 2018, *Raugevicius* (C-247/17, EU:C:218:898).

41. Further, there is no practice in Croatian extradition proceedings in which the accused is returned to their state of nationality rather than sent to the state requesting extradition. This is not a less restrictive measure in the *Petruhhin* sense, because it extends the period of detention pending extradition. It is thus unnecessary to inform Iceland of the extradition proceedings, of which they are aware in any case.

42. At the hearing, Ireland asked the Court to reconsider *Petruhhin* by applying the approach employed by Advocate General Bot in that ruling,[37] to the effect that non-nationals and nationals are not in comparable situations when it comes to rules excluding extradition to third countries; prosecution of nationals in home Member States follows to avoid impunity. In terms of re-visiting the findings in *Petruhhin*, Ireland refers in particular to paragraphs 47, 48, and 49.

43. At the hearing, Greece argued that the *Petruhhin* principles should be applied. I.N. has exercised his free movement rights, and cannot be discriminated against on the basis of nationality, although Greece does not exclude that extradition to a third country can pursue a legitimate purpose, such as avoiding impunity. It was important for the referring court to evaluate why I.N. had been granted refugee status. Greece referred to Articles 3, 4, 28, and 36 EEA.[38]

44. At the hearing, the ESA emphasized that the EEA was a *sui generis* legal order based on mutual trust and cooperation and characterised by the closeness of shared fundamental values of the EU and EFTA states.[39] The Article 3 EEA good faith clause was equivalent to Article 4 TEU. The system is characterised by a dynamic alignment of substantive provisions, and the EFTA States are on an equal footing with EU Member States when it comes to the Commission's legislative proposals (Article 99(1) EEA); a continuous consultation process ensues (Article 99(3) EEA). Relevant acts of the EU are added to the EEA Agreement, and become *acquis* if not adapted (Article 102 EEA). Homogeneity is secured by Articles 6 and 105 EEA. The case-law of the EFTA Court and this Court strengthens this dynamic alignment, and the differences between the two do not extend to its foundations and values.

45. Thus, ESA argued that Croatia has restricted I.N.'s free movement rights and *Petruhhin* applies with equal force to EEA nationals. Application of Article 4 EEA, combined with the appropriate EEA provision on free movement, achieves the same result.

46. ESA also relied on the order of 6 September 2017, *Peter Schotthöfer & Florian Steiner*.[40] EU citizens and EEA nationals moving freely are to be protected against extradition to third states entailing exposure to inhuman and degrading treatment as specified in Article 19 of the Charter.

47. ESA describes the *Schotthöfer* ruling as representing an absolute principle, and that Croatia should trust the assessment made by Iceland with respect to the consequences of extradition. There should be a presumption that the grounds for granting asylum are sound.[41] Those grounds have not disappeared through the grant of Icelandic citizenship to I.N. ESA notes that Article 15 of the Qualification Directive[42] is referred to in Icelandic law. ESA argues that Article 21 TFEU cannot reduce free movement rights otherwise available under EEA law, and that no distinction is made in the free movement *acquis* on whether a restriction is grounded in civil law, criminal law, or public law.

48. At the hearing Iceland elaborated on I.N's travels. He took a flight with his wife and two children from Iceland to Vienna and then a bus destined for Zagreb and a holiday planned on Croatian beaches.

37 (C-182/15, EU:C:2016:330).

38 Greece also referred to other rulings such as judgment of 5 July 2007, *Commission* v *Belgium* (C-522/04, EU:C:2007:405).

39 Reliance in this regard was placed on the first two recitals of the EEA Agreement.

40 (C-473/15, EU:C:2017:633).

41 Here the ESA refers to the judgment of 21 December 2011, *N.S. and Others* (C-411/10 and C-493/10, EU:C:2011:865, paragraph 83).

42 See footnote 7 above.

49. Iceland contends that the ruling in *Petruhhin* applies to the main proceedings because Article 36 EEA on services is equivalent to Article 56 TFEU and it was established in the ruling of the Court in *Cowan*[43] (C-186/87) that tourism services are services, and Directive 2004/38 is incorporated into EEA law. Reliance is also placed on the ruling of the EFTA Court in *Wahl v Icelandic State*,[44] and Iceland argued that Article 4 EEA is equivalent to Article 18 TFEU.

50. According to Iceland, Croatia was bound to provide Iceland with the information necessary to decide if Iceland was to prosecute I.N. and then surrender I.N. pursuant to the Surrender Procedure Agreement.[45]

51. The grant of international protection by the Icelandic Directorate for Immigration on 8 June 2015 was made on the basis of testimony that was deemed to be detailed, free of any contradiction, clear, consistent, credible and realistic. It was also based on the general state of human rights in Russia at the time as provided in NGO, national, and international reports, widespread corruption in administration and the judiciary and abnormally low success rates of criminal appeals (1%). Iceland was aware of the red notice out against I.N. with respect to the crime he was alleged to have committed when he was given international protection. Iceland has not responded to requests from Russia about I.N.'s whereabouts. Since 2015, international protection has been granted to twelve Russian nationals out of forty-seven applications. Four of those granted were to I.N. and his family.

52. Iceland further contended at the hearing that observance of the Charter is also required in the context of the EEA,[46] and that I.N. was to be protected against systemic problems in the Russian judiciary.[47]

53. After questioning on what was meant by a request for 'safe passage', Iceland added that on 24 July 2019 the Icelandic Embassy in Berlin received a *note verbale* that I.N. had been arrested the previous month. The Ambassador replied to the note under the Vienna Convention on Consular Relations[48] that it is the wish of the Government that proceedings are carried out expeditiously and safe passage is granted as soon as possible. The Surrender Procedure Agreement was not applicable at that time.[49]

54. Iceland stated it might have jurisdiction to try I.N. under Article 6 of the Icelandic Criminal Code, but this is a matter for the decision of the independent public prosecutor. I.N. cannot be extradited from Iceland under the Icelandic Extradition Act as a national.

55. At the hearing, Norway argued that there was no provision in the EEA Agreement equivalent to Article 21 TFEU. The pertinent EEA provisions were Articles 4, 28, and 36, but it was for the referring court alone to decide which, if any, of the freedoms applied, and there could be no presumption that I.N. was a recipient of services and this too was a question for a Croatian Court to decide. Nor can Directive 2004/38 be relevant. It does not regulate extradition requests. Criminal matter falls outside of the EEA Agreement.

43 Judgment of 2 February 1989 (C-186/87, EU:C:1989:47).

44 Judgment of 22 July 2013, E-15/12, EFTA Ct. Rep.

45 See footnote 8 above.

46 Iceland relied on the judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105).

47 As precluded by Article 47 of the Charter. Judgment of 25 July 2018, *Minister for Justice and Equality* (C-216/18 PPU, EU:C:2018:586).

48 United Nations, *Treaty Series*, vol. 596, p. 261.

49 See footnote 8 above. The Surrender Procedure Agreement entered into force on 1 November 2019.

56. Norway points out that the Supreme Court of Norway has asked the EFTA Court to overrule its decision in *Jabbi*,[50] in which it was held that Directive 2004/38 could be interpreted as affording rights that are the same as those afforded by Article 21 TFEU, in the pending ruling in *Campbell*.[51] Norway takes the view that *Jabbi* is inconsistent with Article 6 EEA, and invites the Court to rule that rights based solely on Article 21 TFEU fall outside of the scope of the EEA Agreement due to the lack of a corresponding provision.

57. With regard to question 1, Norway argued that the Surrender Procedure Agreement between Iceland and Norway is a regular international treaty that forms no part of EEA law, and it cannot be interpreted in the same way as the EAW Framework Decision.[52] The context and objective is different even if the wording is similar. *Petruhhin* emphasized context and purpose.

58. It was held in *Petruhhin* that unequal treatment could be justified by prevention of impunity and the measures had to be suitable to achieve that aim. What is required is identification of a means that is less restrictive of the free movement but which is as equally effective as extradition in preventing impunity.[53]

59. According to Norway, the EAW Framework Decision allows the national court to give such priority but the Surrender Procedure Agreement does not, having a different objective and context, and no mutual trust objective equivalent to the EAW Framework Decision,[54] or the objective stated in Article 3(2) TEU (cf. *Petruhhin*). *Petruhhin* also referred to Article 1(2) of the EAW Framework Decision in according it priority, and there is no similar provision in the Surrender Procedure Agreement, its preamble referring only to 'mutual confidence'. Article 3 EEA requires EEA contracting states to facilitate cooperation but lacks the additional requirements of Article 4 TEU. Article 19(1) of the Surrender Procedure Agreement, requires assessment of all pertinent circumstances and particularly those in Article 1 of the Agreement.

60. As for question 2, fundamental rights form part of EEA law,[55] and Article 19 of the Charter precludes expulsion to conditions of inhuman and degrading treatment or punishment.[56] For Norway the referring court is bound to assess the evidence of real risk of exposure to inhuman and degrading treatment upon extradition to Russia,[57] and is bound to take account of the decision of Icelandic authorities to afford refugee status, and the evidence relied on in that decision.

61. Croatia states that Articles 28 and 36 of the EEA correspond to Articles 45 and 56 TFEU,[58] while noting that Article 21 TFEU includes people going to other Member States for reasons that are not related to an economic activity. Article 21 TFEU concerns EEA nationals because Directive 2004/38 is not confined to economic activities.

62. Because I.N. has exercised his free movement rights, his situation falls within the scope of application of the treaties in the sense of Article 18 TFEU and the prohibition on discrimination on the basis of nationality,[59] which corresponds to Article 4 EEA.

50 Judgment of 26 July 2016, *Jabbi v The Norwegian Government*, E-28/15, EFTA Ct. Rep.

51 *Campbell v Norwegian Government*, E-4/19 (pending).

52 See footnote 34 above. Norway argued that the Surrender Procedure Agreement was rather governed by the Vienna Convention on the Law of Treaties (1969) UNTS vol. 1155, p. 331.

53 Norway refers to paragraphs 37 and 40 of the judgment of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630).

54 See footnote 34 above.

55 Norway referred to the judgment of the EFTA Court of 19 April 2016, *Holship Norge AS v Norsk Transportarbeiderforbund*, E-14/15, EFTA Ct. Rep., paragraph 123.

56 Judgment of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630, paragraph 62).

57 Ibid. paragraphs 58 and 62.

58 Croatia refers to the judgments of 11 September 2007, *Commission* v *Germany* (C-318/05, EU:C:2007:495, paragraph 32 and the case-law cited), and of 21 December 2016, *Commission* v *Portugal* (C-503/14, EU:C:2016:979, paragraphs 35 and 70).

59 Croatia refers to the judgment of 2 February 1989, *Cowan* (186/87, EU:C:1989:47, paragraphs 17 to 19).

63. Croatia argues that in the light of the ruling in *Petruhhin*,[60] in order to avoid impunity and apply measures that are the least restrictive of free movement, all measures of mutual assistance and cooperation existing in penal law should be applied. To this end, Croatia refers to the scope of the provisions of the Schengen *acquis* under Article 6 of Protocol No 19 on the Schengen *acquis*, integrated into the framework of EU law, applying to Iceland and Norway.

64. Croatia refers to the *Convention Implementing the Schengen Agreement*.[61] The fundamental objective of this agreement resides in the installation of a space of liberty, security, and justice, guaranteeing the free movement of persons, for citizens of the EU as much as foreigners who find themselves in the territory of the EU.

65. The *Convention Implementing the Schengen Agreement* envisages the putting in place of fundamental provisions on mutual assistance in penal matters (Title III on police and security, chapter 2) on which the development of mutual judicial assistance in criminal matters currently rests. The Schengen *acquis* also includes the Schengen Information System.[62]

66. In consequence, Croatia argues that information exchange with the Member State of which the person concerned is a national should be given priority, with a view to giving that Member State the possibility of prosecuting the person, to the extent to which they are competent, for acts committed outside of national territory; and issuing an arrest warrant in conformity with the Surrender Procedure Agreement.

67. Finally, Croatia argues that the principle of *non-refoulement* and non-exposure to inhuman and degrading treatment is the fundamental principle of international refugee law. If I.N. applied for asylum in Croatia, this would be refused under Article 43(1) of the Croatian law on international protection, because international protection has been accorded by a Member State of the EEA.

68. Croatia points out that Iceland applies the Dublin Regulation III[63] and is involved in Eurodac.[64] Thus, Croatia argues, it can be accepted that Iceland respects the rules of the EU on asylum and international protection. In 2014 Iceland concluded an agreement with the European Asylum Support Office[65] on the modalities of its participation.[66]

69. Therefore, contends Croatia, even though there is currently no system across the EEA for mutual recognition of asylum decisions, the legal framework is defined by the Common European Asylum System, and the conditions for asylum across each country are uniform.

60 Judgment of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630).

61 See footnote 16 above.

62 This consists of three regulations. Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals, (*OJ 2018 L 312, p. 1)*; Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006 (*OJ 2018 L 312, p. 14)*; Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU (OJ 2018 L 312, p. 56).

63 See footnote 6 above.

64 See footnote 7 above.

65 See footnote 7 above.

66 Croatia refers to Council Decision 2014/194/EU. of 11 February 2014 on the signing, on behalf of the Union, of the Arrangement between the European Union and the Republic of Iceland on the modalities of its participation in the European Asylum Support Office, OJ 2014 L 106, p. 2.

70. Unlike Croatia, the Commission takes the position that Iceland's status as a party to the EEA Agreement is more pertinent than its membership of the Schengen area to the resolution of the dispute. The Commission says that certain provisions of the EEA Agreement lead to the same result as occurred in *Petruhhin*. At the hearing the Commission acknowledged that there were pieces of the *Petruhhin* puzzle that were missing in the main proceedings, such as the fact that I.N. is not an EU citizen, but that these pieces could be made up for by other provisions of the EEA Agreement.

71. The Commission recalls that, pursuant to Article 1 of the EEA Agreement, its objective is to 'promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogenous' European Economic Area.

72. The Commission acknowledges the Joint Declaration by the Contracting Parties to Decision of the EEA Joint Committee No 158/2007 incorporating Directive 2004/38/EC of the European Parliament and of the Council into the EEA Agreement [67] integrating Directive 2004/38 into EEA law states. It states inter alia, that the concept of EU citizenship has no equivalent in EEA law, and that the EEA Agreement does not provide a basis for the political rights of EEA nationals.

73. However, all the rights and liberties of Directive 2004/38 are integrated into EEA law. Subject to conditions, EEA nationals have a right to circulate in the EEA and stay for up to three months in a contracting state of the EEA, subject to conditions, free from discrimination, even if they are not economically active. [68] The Commission says that it is for the referring court to decide whether the situation of I.N. falls within the material scope of Articles 28 or 36 EEA, and Directive 2004/38, pointing out that I.N. may have taken advantage of his right to receive services as a tourist. [69] The Commission says that, in any event, I.N. falls within the scope of application of the EEA Agreement by virtue of the fact that he left Iceland for Croatia. Therefore he is entitled to protection against discrimination (Articles 4 EEA and 18 TFEU).

74. According to the Commission, the ruling of the Court in *Petruhhin* was essentially grounded not on the abstract notion of citizenship, but on free movement rights and Article 18 TFEU. The Commission further contends that in the ruling in *Pisciotti*, [70] the point of departure for activating the procedure in *Petruhhin* was the existence of discrimination under Article 18 TFEU, corresponding to Article 4 EEA.

75. The Commission contends that it is useful to compare the judgment of the Court in *O. and B.* [71] with that of the EFTA Court in *Jabbi*. [72] In *O. and B.* the Court inferred from Article 21 TFEU a right to remain, derived for a national of a third State who is a family member of a citizen of the EU in the Member State of origin of the latter. In *Jabbi*, the EFTA Court came to the same conclusion by applying Directive 2004/38 to EEA nationals who are not economically active, even though the Court in *O. and B.* refused to apply Directive 2004/38 in that way.

67 See footnote 30 above.

68 The Commission refers to Articles 4 to 7 of Directive 2004/38, and paragraphs 78 and 79 of the judgment of the EFTA Court of 22 July 2013, *Wahl*, E-15/12, EFTA Ct. Rep.

69 Here the Commission refers to the judgments of 2 February 1989, *Cowan* (186/87, EU:C:1989:47, paragraphs 14 to 17), and of 25 April 2012, *Granville*, E-13/11, EFTA Ct. Rep., paragraph 37.

70 Judgment of 10 April 2018 (C-191/16, EU:C:2018:222).

71 Judgment of 12 March 2014 (C-456/12, EU:C:2014:135).

72 Judgment of the EFTA Court of 26 July 2016, *Jabbi v Norwegian Government*, E-28/15, EFTA Ct. rep., paragraphs 66 to 77. The Commission also refers to the judgment of the EFTA Court of 24 November 2014, *Iceland v Gunnarsson*, E-27/13, paragraphs 79 to 82.

76. The Commission notes the EEA Agreement acknowledges the 'privileged relationship between the European Community, its Member States and the [EFTA] Member States' based on 'proximity, long standing common values',[73] founded on 'common rules',[74] and with the objective of the contracting parties being to 'arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced' in the EEA 'and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms.'[75] Articles 105 and 106 EEA establish uniform interpretation.[76]

77. Therefore, the Commission concludes that the principles in *Petruhhin* should be followed, arguing that the authorities in Iceland have at their disposal an instrument that is equivalent to the European Arrest Warrant,[77] namely the Surrender Procedure Agreement. The Commission concludes that the Croatian authorities must inform Iceland of the receipt of the extradition request from Russia, allowing them to request the return of this person, in so far as Iceland is able to pursue criminal proceedings with respect to their national under the Surrender Procedure Agreement. Croatia is to give priority to this request.[78] Once received, Croatia is bound to send I.N. to Iceland.

## IV. Analysis

### *A. Identifying the key elements of the dispute in a multi-layered legal system*

78. As a starting point, it is helpful to underscore that there are seven legal systems in play in the main proceedings. Three national legal systems, those of Iceland, Croatia, and Russia, and three transnational ones, the European Union, the Council of Europe and the European Economic Area, along with the universal legal instruments of the system of public international law, such as the Geneva Convention on the status of refugees.[79] These systems overlap in a series of concentric circles, with none having hegemony over the other, save in the exceptional circumstance of any one of them, but not Russia or Iceland, encroaching on the primacy, unity, and effectiveness of EU law.[80]

79. However, no such issue arises directly in the main proceedings. Thus, the supranational legal order, as characterised by the EU, as an additional constitutional order, is not hierarchically higher or lower than the referring court,[81] or any of the other overlapping legal orders. They operate as synergies influencing each other.[82]

80. In short, by ordering these legal systems — the multiple legal orders forming the legal framework in this case — each one of the systems are inter-hierarchical but do not form any intra-hierarchical entity.

73 Second recital to the EEA Agreement.

74 Fourth recital.

75 Fifteenth recital.

76 Judgment of the EFTA Court of 26 July 1017, *Jabbi v Norwegian Government*, E-28/15, EFTA Ct. rep., paragraphs 68 and 70.

77 See footnote 34 above.

78 Here the Commission refers to judgments of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630, paragraph 49), and of 10 April 2018, *Pisciotti* (C-191/16, EU:C:2018:222).

79 See footnote 10 above.

80 See the judgment of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, particularly paragraphs 58 and 59). See more recently judgment of 29 July 2019, *Spiegel Online* (C-516/17, EU:C:2019:625, paragraph 21).

81 Pernice, I., 'Multilevel Constitutionalism and the Crisis of Democracy in Europe' 11 (2015), *European Constitutional Law Review*, p. 541, pp. 544 to 545.

82 See Lenaerts, K., '*The European Court of Human Rights and the Court of Justice of the European Union: Creating Synergies in the Field of Fundamental Rights Protection*', '1 (2018) *Il Diritto del'Unione Europea*, p. 9, and a speech given on the same theme at the Sofia University Law School on 23 March 2018.

81. Thus, the first task facing the Court is to identify the normative rules enabling it to answer the questions referred in the context of what has been described as multilevel cooperation of European constitutional courts,[83] namely this court, the European Court of Human Rights, and here the Supreme Court of Croatia.[84] Indeed, in the main proceedings, this trio has become a quartet, given the pertinence of the role of the EFTA Court and its jurisprudence, to the resolution of the dispute.

82. While there is no express provision in the TFEU mirroring Article 6 EEA,[85] the Court has held, after noting that one of the principle aims of the EEA was to extend the internal market established within the EU to the contracting states of EFTA, that several provisions of the EEA Agreement were intended 'to ensure as uniform an interpretation as possible thereof throughout the EEA … . It is for the Court, in that context, to ensure that the rules of the EEA Agreement which are identical in substance to those of the Treaty are interpreted uniformly within the Member States.'[86] This so-called homogeneity principle reinforces the place of the EEA in the multi-level constitutional order here under analysis.[87]

83. The key elements of the dispute to be resolved are as follows: (1) the scope of the right to move and receive services and the prohibition on discrimination on the basis of nationality, protected under both the TFEU (Articles 56 and 18),[88] and the EEA (Articles 36 and 4); (2) objective justification for a clear restriction of that right; (3) the norms and facts pertinent to objective justification in the circumstances of the main proceedings, including rules emanating from the Common European Asylum System, the role of mutual trust, and the international agreement that is the Surrender Procedure Agreement; (4) securing I.N.'s fundamental right not to be exposed to inhuman and degrading treatment or flagrant denial of justice, which are protected by Articles 6 and 13 ECHR and Articles 4, 19 and 47 of the Charter.[89]

83 Voßkuhle, A ; Multilevel Cooperation of the European Constitutional Court '*Der Europäische Verfassungsgerichtsverbund*' 6 (2010), *European Constitutional Law Review*, p. 175.

84 On Member State constitutional courts in this paradigm, see Popelier, P., Mazmanyan, A., and Vandenbruwaene, W., (eds.), *The Role of Constitutional Courts in Multilevel Governance*, Intersentia, 2013.

85 The first version of the EEA Agreement featured such a provision (Article 104(1)). However, in the *Opinion delivered pursuant to the second subparagraph of Article 228(1) of the Treaty — Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area.* (Opinion 1/91, EU:C:1991:490), the Court declared the provision incompatible with EU law. See Baudenbacher, C., '*The EFTA Court: Structure and Tasks*' in The Handbook of EEA Law, Springer, 2016, p. 179, p. 188.

86 Judgment of 23 September 2003, *Ospelt and Schlössle Weissenberg* (C-452/01, EU:C:2003:493, paragraph 29). See more recently, for example judgments of 20 October 2011, *Commission* v *Germany* (C-284/09, EU:C:2011:670, paragraph 95); of 19 July 2012, *A* (C-48/11, EU:C:2012:485, paragraph 22); and of 11 September 2014, *Essent Belgium* (C-204/12 to C-208/12, EU:C:2014:2192, paragraph 72 and the case-law cited). Before the General Court see the judgment of 22 January 1997, *Opel Austria* v *Council* (T-115/94, EU:T:1997:3).

87 The absence of hierarchy between the over-lapping spheres is evidenced by commentaries to the effect that the EFTA Court affords more weight to the right to a fair trial under Article 6 ECHR than this Court. See, for example, Baudenbacher, B., 'The EFTA Court and the Court of Justice of the European Union: Coming in Parts But Winning Minds' in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, T.M.C. Asser Press (2013), p. 183, p. 198, referring to a blog commentary by de la Serr, E.B. of the judgment of 8 December 2011, *KME Germany and Others* v *Commission* (C-272/09 P, EU:C:2011:810) and the judgment of 8 December 2011, *Chlakor* v *Commission* (C-386/10 P, EU:C:2011:815).

88 Article 45 of the Charter also protects the rights of European Union citizens to move and reside freely across the Union.

89 Other pertinent European norms are the European Convention on Mutual Assistance in Criminal Matters (ETS No 030) which entered into force on 12 June 1962. Russia has ratified both of these agreements, and the second additional protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No 182) entered into force with respect to Russia on 1 January 2020. Under the auspices of the Council of Europe, there is also a European Convention on the Transfer of Sentenced Persons (ETS No 112).

### *B. Specification of relevant norms*

#### *1. Freedom to receive services*

##### *(a) Article 36 EEA and Article 4 EEA*

84. In terms of norm identification, on the basis of material put before the Court at the hearing concerning I.N.'s activities upon entry into Croatian territory, namely that of being on holiday, (point 48 above), it can be concluded that he was a recipient of services under Article 36 EEA on the free movement of services. The Court has held that Article 36 of the Agreement 'is similar to Article 56 TFEU' so that a restriction of Article 56 TFEU 'must, in principle, be regarded as contrary to Article 36 too.'[90] The Court has also held that Article 4 of the EEA Agreement is virtually identical in wording to Article 18 TFEU, so that Article 'must be interpreted in a similar fashion' to Article 18 TFEU.[91] It is to be remembered that I.N. has been discriminated against on the basis of nationality with respect to protection from extradition while receiving tourism services.

85. Importantly, the EFTA Court has applied the ruling of this Court in *Cowan*,[92] in establishing the right to receive services,[93] and the prohibition on nationality discrimination arose in that context. This is transposable to the main proceedings in which this right falls for consideration before this Court rather than the EFTA court.

86. In fact, the restriction of I.N's rights to receive tourism services was far more severe (incarceration in a criminal court with a view to extradition during a vacation) than the restriction arising in the *Cowan* ruling.[94] That case concerned exclusion from participation in a fund to secure compensation for an assault during a vacation, but which occurred after the vacation.

87. Further, as argued by ESA at the hearing, the fact that the restriction occurred in the context of application of criminal law is of no consequence (point 47 above) given that a distinction between restrictions grounded in civil, administrative, or criminal law is unknown to the Court's case-law. To this I would add that it was established prior to the entry into force of the EEA Agreement that rules of criminal law can create restrictions on free movement,[95] and the prohibition on discrimination on the basis of nationality had already been applied by the Court in the context of criminal proceedings.[96]

88. For the sake of completeness I add that, contrary to the submission made by Norway at the hearing (point 55 above), there is no monopoly on the identification of which freedom is in issue in a given case in the hands of Member State courts, and it is the established case-law of the Court that it is to provide the referring court with all the necessary information regarding EU law to enable it to resolve the dispute before it.[97]

90 Judgment of 11 December 2014, *Commission* v *Spain* (C-678/11, EU:C:2014:2434, paragraph 66). See also for example judgment of 6 October 2009, *Commission* v *Spain* (C-153/08, EU:C:2009:618, paragraph 48): 'In so far as the provisions of Article 36 of the EEA Agreement have the same legal scope as the substantially identical provisions of Article 49 EC' (now Article 56 TFEU), the conclusion reached with respect to Article 49 EC , including justification for discrimination could 'be applied mutatis mutandis'.

91 Judgment of 11 September 2014, *Essent Belgium* (C-204/12 to C-208/12, EU:C:2014:2192, paragraph 123 read in combination with paragraph 72). The Court referred to the judgments of 1 April 2004, *Bellio F.lli*, (C-286/02, EU:C:2004:212, paragraphs 34 and 35), and of 10 April 2008, *Commission* v *Portugal* (C-265/06, EU:C:2008:210, paragraph 30).

92 Judgment of 2 February 1989 (186/87, EU:C:1989:47).

93 Judgment of the EFTA Court of of 25 April 2002, *Granville*, E-13/11, EFTA Ct. Rep., paragraph 37.

94 Judgment of 2 February 1989 (186/87, EU:C:1989:47).

95 Judgment of 24 November 1993, *Keck and Mithouard* (C-267/91 and C-268/91, EU:C:1993:905).

96 For example, judgment of 10 July 1984, *Kirk* (63/83, EU:C:1984:255).

97 See for example, recently, judgment of 8 May 2019, *Związek Gmin Zagłębia Miedziowego* (C-566/17, EU:C:2019:390, paragraph 44).

89. I will therefore refer to Articles 36 and 4 EEA in answering the questions referred (see point 124 below).

*(b) Article 21 TFEU is irrelevant to the main proceedings*

90. Once Articles 36 and 4 EEA have been identified as the key relevant norms, the debate on whether or not rights afforded to EU citizens under Article 21 TFEU are transposable to EEA nationals can be set to one side, notwithstanding the discussion of these issues in the submissions.[98] As pointed out by the agent for ESA at the hearing, Article 21 TFEU cannot operate to reduce free movement rights that are already available under the EEA Agreement (point 47 above.)

91. Whatever the status of Article 21 TFEU rights under the law of EFTA, a matter which will shortly be considered again[99] by the EFTA Court (see point 56 above), it has no bearing on the outcome of the main proceedings.[100] Suffice it to say here that scepticism on the relevance of case-law elaborated by the Court exclusively based on Article 21 TFEU, a sample of which is mentioned by the Commission at point 75 above, would seem to be founded, given that Article 21 TFEU entered the treaties in the Treaty of Lisbon of 2007, well after the entry into force of the EEA Agreement on 1 January 1994.[101]

*2. Objective justification*

*(a) Preventing impunity is an objective justification for restricting freedom to receive services*

92. The right to free movement of tourism services is subject to objective justification under EEA law,[102] just as it is under Article 56 TFEU. Can Croatia rely on prevention of impunity as an objective justification to restricting I.N.'s free movement rights under Article 36 EEA by detaining him with a view to extradition when the same treatment is not afforded to Croatian nationals?

93. It is only here that the ruling in *Petruhhin*[103] begins to become pertinent to the main proceedings, even though it appears to have been a key element of the proceedings before Croatian courts, and thus came to influence, perhaps inordinately, the content of the case file.

98 See points 38, 40, 55 to 56, 61, 75 above.

99 See, initially, judgment of the EFTA Court of 26 July 2016, Case E-28/15, *Jabbi v Norwegian Government*, EFTA Ct. Rep. I.N. has not raised a specific objection based on Directive 2004/38, such as breach of a right to enter under Article 5 of that Directive, as considered in the judgment of the EFTA Court of 22 July 2013, *Wahl*, E-15/12, EFTA Ct Reports. That being so, I will not consider Directive 2004/38 any further, as aside from observing that, as a measure of secondary law, it is to be interpreted in conformity with the primary measure that is Article 36 EEA. See judgment of the EFTA Court of 23 January 2012, *STX Norway Offshore AS and Others v Norwegian State*, E-2/11, EFTA Ct. Rep., paragraph 34.

100 The current debate on whether citizenship can be de-coupled from Member State nationality can also be put to one side. See e.g., Nic Shuibhine, N., 'The Territory of the Union in EU citizenship Law: Charting a Route from Parallel to Integrated Narratives', (2019), *Yearbook of European Law* 1.

101 Here I have in mind the distinction in EEA law between rulings of the Court of Justice given prior to the date of the EEA Agreement, which apply to EEA provisions which are 'identical in substance to corresponding rules of the Treaty establishing the European Economic Community' (Article 6 EEA Agreement), and judgments of the Court issued after the date of signature of the EEA Agreement. The EFTA Surveillance Authority and the EFTA Court are only bound to 'pay due account to the principles laid down by the relevant rulings' of the Court (Article 3(2) of Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (OJ 1994 L 344, p. 3)).

102 Judgment of the EFTA Court of 19 April 2016, *Holship Norge AS v Norsk Transportarbeiderforbund*, E-14/15, EFTA Ct. Rep., paragraph 121.

103 Judgment of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630).

94. The Court held in *Petruhhin* that preventing risk of impunity of a person who has committed an offence must, in principle 'be considered a legitimate objective in EU law',[104] and this in principle approval of preventing risk of impunity to justify restriction on free movement was repeated in the subsequent rulings in *Pisciotti*[105] and *Raugevicius*.[106]

95. The imperative of homogeneity between EEA and EU law would seem to compel a positive answer to the authority in the hands of Croatia to rely on preventing risk of impunity in detaining and extraditing I.N. Given that restrictions to free movement can be grounded in criminal law, it would be illogical to preclude a Member State from relying on considerations equally sourced in the application of criminal law to justify it.

96. However, this is a separate question from whether, in all the circumstances of the main proceedings, the acts of the Croatian authorities to date 'may be justified by objective considerations … necessary for the protection of the interests which they are intended to secure and only in so far as those objectives cannot be attained by less restrictive measures.[107]

*(b) Absence of mutual trust in EEA law no barrier to the application of the Petruhhin procedure*

97. First, I agree with arguments made by Norway at the hearing that the principle of mutual trust, as it has come to evolve in the European Union since the Lisbon Treaty of 2007, has no application in EEA law. Notwithstanding the *sui generis* nature of the EEA legal system, and the proximity of the relations between EFTA and EU Member States described by ESA at point 44 above, and the provisions of the EEA Agreement referred to by the Commission at point 76 above on the privileged relationship of the EEA with the EU, the fact remains that mutual trust prior to the Lisbon Treaty was, in relative terms, in its infancy.[108] As Norway notes at point 59 above, Article 3(2) TEU has no counterpart in the EEA Agreement.

98. I depart, however, from Norway, when they argue that because the Court in *Petruhhin* relied on recourse to a European Arrest Warrant as an alternative to extradition less restrictive of free movement, that the Court intended to find that recourse to a European Arrest Warrant is the *only* acceptable alternative on which an accused can rely when a Member State invokes avoidance of impunity as a justified limitation to free movement.

99. This is borne out by the ruling in the *Pisciotti* case, in which, in contrast with *Petruhhin*, no reference was made to provisions on the Framework Decision of the European Arrest Warrant[109] with respect to mutual cooperation (compare the arguments of Norway reproduced above at points 57 to 59). In *Pisciotti* the emphasis was rather on the availability of a mechanism pursuant to which the accused can in fact be prosecuted effectively. There the Court held as follows:

'In that regard, the Court has held that the exchange of information with the Member State of which the person concerned is a national must be given priority in order, where relevant, to afford the authorities of that Member State the opportunity to issue a European arrest warrant *for the purposes of prosecution*. Thus, when a Member State to which a Union citizen who is a national of another

104 Ibid., paragraph 37.

105 Judgment of 10 April 2018 (C-191/16, EU:C:2018:222, paragraph 47).

106 Judgment of 13 November 2018 (C-247/17, EU:C:2018:898, paragraph 32). The Court has also cautioned against the risk of impunity in elaborating its case-law on restrictions on the operation of the European Arrest Warrant and risk of exposure to inhuman or degrading treatment or punishment. See judgment of 25 July 2018, *Generalstaatsanwaltschaft* (Conditions of detention in Hungary) (C-220/18 PPU, EU:C:2018:589, paragraphs 85 and 86).

107 Judgment of 10 April 2018, *Pisciotti* (C-191/16, EU:C:2018:222, paragraph 48 and the case-law cited).

108 For an overview, see Brouwer, E., 'Mutual Trust and the Dublin Regulation: the Protection of Fundamental Rights in the EU and the Burden of Proof' 9 (2013), *Utrecht Law Review*, p. 135.

109 This applies equally to judgment of 13 November 2018, *Raugevicius* (C-247/17, EU:C:2018:898), which concerned a request by a third state for the enforcement of a custodial sentence against an EU citizen who had exercised his free movement rights.

Member State has moved receives an extradition request from a third State with which the former Member State has concluded an extradition agreement, it must inform the Member State of which the citizen in question is a national and, should that Member State so request, surrender that citizen to it, in accordance with the provisions of Framework Decision 2002/584, *provided that that Member State has jurisdiction, pursuant to its national law, to prosecute that person for offences committed outside its national territory* (see, to that effect, judgment of 6 September 2016, *Petruhhin*, C-182/15, EU:C:2016:630, paragraphs 48 and 50).'[110]

100. I take the view, therefore, that the emphasis in the ruling was the availability of an alternative that guarantees against impunity to the same or similar extent as extradition. I will consider whether the action taken by Iceland to date meets this threshold at points 119 to 123 below.

*(c) Mutual Trust and the Common European Asylum System*

101. While I acknowledge that, pursuant to the arrangement for Croatia's accession to the European Union, its participation in the Schengen *acquis* is only partial (point 15 above),[111] Croatia participates in the Common European Asylum System. Not only is Croatia a participant in the Dublin III Regulation[112] (the consequences of which were considered by the Court in its ruling in *A.S.*[113]) and the Eurodac Regulation,[114] it has implemented and regularly applies the Qualification Directive,[115] the Procedures Directive,[116] and the Reception Directive.[117] It is therefore bound by Article 80 TFEU, pursuant to which the implementation of Common European Asylum Policy 'shall be governed by the principle of solidarity'.

102. The broad parameters underpinning participation in Dublin III, for both Member States *and* Schengen Associated States like Iceland, were considered by Advocate General Sharpston in her Opinion in *A.S. and Jafari*.[118] She observed as follows:

'The CEAS was conceived in a context in which it was reasonable to assume that *all* the participating States, *whether Member States or third States*, observed fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol and on the ECHR … and that the Member States could therefore have confidence in each other in that regard … "It is precisely because of that principle of mutual confidence that the EU legislature adopted [the Dublin II Regulation] in order to rationalise the treatment of applications for asylum and to avoid blockages in the system as a result of the obligation on State authorities to examine multiple applications by the same applicant, and in order to increase legal certainty with regard to the determination of the State responsible for examining the asylum application and thus to avoid forum shopping, it being the principal objective of all these measures to speed up the handling of claims in the interests both of asylum seekers and the participating Member States." …These issues go to the heart of the concept of an 'area of freedom, security and justice'… and, in particular, the CEAS, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights … .'[119]

110 My emphasis. Judgment of 10 April 2018, *Pisciotti* (C-191/16, EU:C:2018:222, paragraph 51).

111 This may soon change. See Communication from the Commission to the European Parliament and the Council on the verification of the full application of the Schengen *acquis* by Croatia, COM(2019) 497 final.

112 See footnote 5 above.

113 Judgment of 26 July 2017, *A.S.* (C-490/16, EU:C:2017:585).

114 See footnote 7 above.

115 See footnote 7 above.

116 See footnote 7 above.

117 https://www.asylumineurope.org/reports/country/croatia/annex-i-transposition-ceas-national-legislation.

118 (C-490/16 and C-646/16, EU:C:2017:443).

119 My emphasis. Ibid. point 123. The Advocate General referred to Recitals 2, 3, 19 and 39 of the Dublin III Regulation, and the judgments of 21 December 2011, *N.S. and Others* (C-411/10 and C-493/10, EU:C:2011:865); of 6 June 2013, *MA and Others* (C-648/11, EU:C:2013:367); and of 10 December 2013, *Abdullahi* (C-394/12, EU:C:2013:813). The internally quoted text is from the judgment in *Abdullahi*, paragraph 53.

103. As for Iceland, in 2001 the European Community, as it then was, entered into an agreement with Norway and Iceland concerning the criteria and mechanisms for establishing the state responsible for examining a request for asylum lodged in Iceland or Norway.[120] In consequence, as pointed out by Croatia at point 68 above, Iceland is a participant in Dublin III and Eurodac,[121] and is involved in the European Asylum support office by way of international agreement, while ESA also contended at point 47 above that Article 15 of the Qualification Directive is referred to in Icelandic law.

104. These factors, combined with Iceland's broader participation in the Schengen *acquis* as a Schengen Associated State,[122] bind Croatia and Iceland to an obligation of mutual trust with respect to decisions taken within the ambit of the Common European Asylum Policy and in particular the Dublin III Regulation.

105. It is to be underscored that mutual trust is not confined in the Court's case-law to trust in respect for fundamental rights of asylum seekers and the proper application of the Geneva Convention Relating to the Status of Refugees.[123] It extends to EU law more generally,[124] thereby presupposing that the Dublin III Regulation has been correctly applied in Iceland, or as ESA argued (point 47 above), there must be a presumption that Iceland's asylum determination was sound, since it deemed itself the participating state responsible under Chapter III of the Dublin Regulation, and indeed defended the decision at the hearing (point 51 above). This approach is also consistent with the priorities and organisational imperatives of Dublin III, as explained by Advocate General Sharpston in her Opinion quoted at point 102 above (rationalising the treatment of asylum applications; avoidance of blockages; promoting legal certainty; avoidance of forum shopping).

106. Indeed, to date, the Court has attenuated the operation of mutual trust in the context of the Dublin III Regulation only to the end of securing the fundamental rights of asylum seekers.[125] It would be axiomatic if mutual trust could be diminished under Dublin III with the result that they are taken away.

107. This means that Croatia is correct when it argues at point 68 above that it must be accepted that Iceland respects the rules of the EU on asylum and international protection, and that all mechanisms of cooperation operative between the two states apply in dealing with I.N.'s case.[126] Mutual trust in the context of the Common European Asylum System is the *genre* of mutual trust to be taken into account in assessing Croatia's response to Iceland's requests to date against the *Petruhhin* principles,

120 Council Decision 2001/258/EC (OJ 2001 L 93, p. 38). See also Article 1 of the Agreement referred to in footnote 6 above.

121 See footnotes 6 and 7 above, respectively.

122 This is prescribed, principally, by the Schengen Association Agreement, footnote 4 above, and includes, for example, the Schengen Agreement of 14 June 1985, footnote 21 above and subject to exceptions, the Convention signed in Schengen on 19 June 1990, between the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands, implementing the Schengen Agreement of 14 June 1985, footnote 16 above; Council Regulation (EC) No 574/1999 of 12 March 1999 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States (OJ 1999 L 72, p. 2), (now Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement) (OJ 2018 L 303, p. 39); Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas (OJ 1995 L 164, p. 1).

123 See footnote 10 above. See generally Lawunmi, D., '*The Dublin Regulation and the Charter: an impetus for change*' in Peers, S., et. al. (eds), *The EU Charter of Fundamental Rights: a Commentary*, Second Edition, Hart Publishing, 2020 (forthcoming).

124 See, for example, judgment of 19 March 2019, *Jawo* (C-163/17, EU:C:2019:218, paragraph 81).

125 See the Court's ruling in the judgment of 21 December 2011, *N.S. and Others* (C-411/10 and C-493/10, EU:C:2011:865) and the interaction with the judgment ECtHR, 21 January 2011, *M.S.S v. Belgium and Greece*, CE:ECHR:2011:0121JUD003069609. See recently, judgment of 19 March 2019, *Jawo* (C-163/17, EU:C:2019:218).

126 It would seem that Croatia is correct when it states that it is bound by the provisions of Chapter II on Mutual Assistance in Criminal Matters in the Convention Implementing the Schengen Agreement, footnote 16 above, at least in part. See Annex II of the Act of Accession of the Republic of Croatia, footnote 20 above. Iceland is bound by Chapter II on Mutual Assistance in Criminal Matters in the same convention due to part I, Annex A, of the Schengen Association Agreement, footnote 3 above.

rather than mutual trust in the context of cooperation in criminal matters under EU law, or extension and development of the good faith rules inherent in the EEA Agreement. According to the sixth recital to Protocol (No 19) on the Schengen *acquis*,[127] a 'special relationship' needs to be maintained with Iceland and Norway.

108. To this it should be added that the mutual trust which Croatia is bound to afford to Iceland is in no way affected by the fact that I.N. has acquired Icelandic nationality. First, the documents issued by Iceland granting I.N. refugee status were still valid when he crossed the Croatian border. Second, I.N. was precluded from seeking asylum under both Croatian law (points 35 and 67 above) and the Dublin III Regulation[128] because he had already acquired asylum in a participating state. Third, the granting of asylum in Iceland remained relevant to protecting I.N. from conduct precluded by the Geneva Convention Relating to the Status of Refugees,[129] and to prevent forum shopping, one of the principle aims of Dublin III.[130] Fourth, I.N.'s status as a refugee had not been withdrawn by one of the procedures set out for this in EU law.[131]

109. I acknowledge that Article 1(c) of the Geneva Convention Relating to the Status of Refugees lists at sub-paragraph (3) acquisition of 'a new nationality and enjoys the protection of the country of his new nationality' as one of the bases on which refugee status ends. However, in the light of the purpose of the Convention, cessation by acquisition of a nationality can only apply 'where the basis on which refugee status was granted no longer exists and protection is therefore no longer necessary or justified.'[132] As is evidenced by the main proceedings, the peculiarities of the administration of the Common European Asylum System mean that the status of refugee can remain 'necessary' to secure protection, even after the acquisition of a new nationality. This is the context in which Article 1(c) of the Geneva Convention Relating to the Status of Refugees lists at sub-paragraph (3) needs to be read, and which precludes its literal interpretation. The preamble to the Convention states that 'the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the *widest possible exercise* of these fundamental rights and freedoms'.[133]

110. Finally, nothing could be more antithetical to I.N.'s fundamental rights than removing the protection that has come to him from Iceland's application of the Dublin III Regulation by fiat of the acquisition of Icelandic nationality.

### *(d) Relevant norms protection of I.N.'s fundamental rights*

111. In terms of fundamental rights, I.N.'s aim is to avoid exposure to conditions of inhuman and degrading treatment or punishment, and an unfair trial. With respect to both of these, I.N. is being treated differently from a Croatian national, due to the prohibition under the Croatian constitution on extradition of nationals.

127 See footnote 17 above.

128 Under Article 3(1) of the Dublin III Regulation, footnote 5 above, the application for asylum 'shall be examined by a single Member State.'

129 See footnote 10 above. Due to recital 3 of Dublin III, this Convention is a source for the interpretation of Dublin III.

130 See the Opinion of Advocate General Sharpston in *A.S. and Jafari* in point 102 above.

131 See the Procedures Directive, footnote 7 above.

132 Kapferer, S. 'Cancellation of Refugee Status', *Legal and Protection Policy Research Series*, UNHCR PPLA/2003/02, March 2003, pp. 36 to 37.

133 My emphasis. See footnote 10 above. See also judgment of 14 May 2019, *M and Others (Revocation of refugee status)* (C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paragraphs 78 and 81) on the status of the Geneva Convention in EU law. At paragraph 108 the Court also held that secondary EU law must not be interpreted so as to encourage Member States 'to shirk their international obligations as resulting from the Geneva Convention by restricting the rights' derived from that Convention.

112. At this juncture, it might be helpful to point out that the main proceedings represent an example of *overlap* in the synergies of concentric circles encapsulating the series of international organisations in issue, because the substantive rights that fall for consideration are protected similarly in all three legal instruments, even though they might otherwise be viewed as competing; namely the ECHR, the Charter, and the EEA agreement. The prohibition on inhuman and degrading treatment is part of the common European constitutional heritage.

113. I acknowledge that the European Court of Human Rights has noted that 'although the EFTA Court has expressed the view that the provisions of the EEA Agreement "are to be interpreted in the light of fundamental rights" in order to enhance coherency between EEA law and EU law (see, inter alia, the EFTA Court's judgment in its case E-28/15, *Yankuba Jabbi* [2016] para. 81), the EEA Agreement does not include the EU Charter of Fundamental Rights, or any reference whatsoever to other legal instruments having the same effect, such as the Convention.' [134]

114. However, in the context of the main proceedings, this simply doesn't matter, because the duty of the court of the contracting states to investigate risk of exposure to inhuman and degrading treatment before extradition is embedded in the case-law of the European Court of Human Rights under Article 3 ECHR. [135] The bridge into EU law and the Charter arises from the fact that Court has held that 'the prohibition of inhuman or degrading treatment laid down in Article 4 of the Charter corresponds to that laid down in Article 3 of the ECHR and that, to that extent, its meaning and scope are, in accordance with Article 52(3) of the Charter, the same as those conferred on it by that convention.' [136] The level of protection of individual fundamental rights might be expanded by an enhanced scope of application for the Charter (for example, perhaps, with respect to property protection under the Charter, as reflected in Article 17 of the Charter and the express reference therein to intellectual property), but a situation of this kind does not arise in the main proceedings.

115. The bridge into EEA law is formed from the fact that the ECHR is a long established important source of EEA law, the first recital stating that the EEA will be constructed 'based on peace, democracy and human rights', and this extends to binding contracting parties to the EEA Agreement to fundamental rights when they derogate from EEA law. [137]

116. Under EU law, as in the law of the ECHR, the prohibition on extradition to conditions of inhuman or degrading treatment applies to everyone, irrespective of nationality. This is reflected in the words 'No one' in Article 19(2) of the Charter and this provision imports into EU law the principles elaborated by the Court of Human Rights under Article 3 ECHR. [138] Thus, I.N.'s non-EU nationality is irrelevant to the exercise of this substantive right given the breadth of its scope *ratione personae*. Article 19(2) applies irrespective of both discrimination and EU nationality. [139]

117. As for the prohibition on removal to an unfair trial in breach of Article 47 of the Charter due to systemic failings, the Court has only acknowledged this to date in an intra-European context, and then only under the European Arrest Warrant. [140] However, as pointed out in my Opinion in *Minister for Justice and Equality*, [141] the European Court of Human Rights prevents the Contracting States from expelling a person where that person runs a real risk in the country of destination of being exposed to

134 Second Section Decision, sitting on 5 November 2019, *Konkurrenten. NO A.S. v. Norway*, Application No 47341/15, paragraph 43.

135 See for example, ECtHR, 19 November 2019, *TK and SR v. Russia*, (ECLI:CE:ECHR:2019:1119JUD002849215, paragraphs 78, 91 to 96).

136 Judgment of the Court of 16 February 2017, *C.K. and Others* (C-578/16 PPU, EU:C:2017:127, paragraph 67).

137 Judgment of the EFTA Court of 19 April 2016, *Holship Norge AS v Norsk Transportarbeiderforbund*, E-14/15, EFTA Ct. Rep., paragraph 123.

138 See the explanations to Article 19(2) of the Charter (OJ 2007 C 303, p. 17).

139 Order of 6 September 2017 *Peter Schotthöfer & Florian Steiner* (C-473/15, EU:C:2017:633). Here the dispositive refers to citizenship, but the paragraphs setting out the legal principles resulting from Article 19 (2) of the Charter do not. See in particular paragraphs 22, 24 and 26. Paragraph 24 refers to a 'person' rather than a citizen. On refoulement and Article 19(2) of the Charter see judgment of 14 May 2019, *M and Others (Revocation of refugee status)*, C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paragraph 95).

140 Judgment of 25 July 2018, *Minister for Justice and Equality* (C-216/18 PPU, EU:C:2018:586).

141 (C-216/18 PPU, EU:C:2018:517, point 66).

a flagrant denial of justice in breach of Article 6 ECHR.[142] I thus take the view that the material scope of Article 47 of the Charter equally extends to the situation in which anyone, irrespective of nationality,[143] is exposed to such a denial of justice in a third state, provided that their situation falls within the scope of application of the Charter. This is so because of Article 52(3) of the Charter, which provides that Charter rights which correspond to those in the ECHR are to be interpreted in the same way, leaving the EU discretion to supply a higher level of protection. In other words, if Article 6 ECHR precludes expulsion when a person runs a risk of flagrant denial of justice, so must Article 47 of the Charter.

118. I.N.'s situation falls within the scope of application of the Charter via two routes. First, under both EEA law and EU fundamental rights law, derogations from free movement are subject to compliance with fundamental rights.[144] Second, given that the referring Court is bound to comply with mutual trust under the Dublin II Regulation, all pertinent provisions of Dublin III, such as Article 3(1) and its (implicit) prohibition on multiple asylum applications are to be interpreted and applied in conformity with the Charter.[145]

## V. Relevant facts and the answers to the questions referred

119. I have answered the questions referred in the sense described at points 7 to 9 above on the basis of the legal principles set out in Part IV and the following important facts.

120. The words employed in Question 2 suggest that Iceland has asked for I.N.'s return 'in order to conduct the proceedings in respect of which extradition is requested'. However, responses by questions to Iceland at the hearing clarified that the communication issued by the Embassy of Iceland in Berlin of 24 July 2019 contained no such specific request (point 53 above). Further, the agent for Iceland stated at the hearing that Croatia was bound to supply Iceland with documents it holds so that they can be transferred to the independent prosecutor in Iceland, who will then consider prosecution of I.N. in Iceland (point 50 above). However, there is no material in the case file stating precisely when and indeed if Iceland made this request to Croatia.

121. Nor was any mention made of whether the dispute between Croatia and Iceland has been referred to the Joint Committee established under Article 3 of the Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the states responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway.[146]

122. Thus, it would be premature, in my view, for the Court to answer question 2 in the affirmative and oblige Croatia to take active steps to release I.N. on the basis of the Surrender Procedure Agreement.[147] If Iceland issues an arrest warrant,[148] it will be for a Croatian court, on the basis of all the relevant evidence, to assess whether what Iceland proposes supplies a guarantee of avoidance of

142 ECtHR, 17 January 2012, *Othman (Abu Qatada) v. United Kingdom* (CE:ECHR:2012:0117JUD000813909, paragraph 258).

143 I note that neither the prohibition on discrimination on the basis of nationality in Article 4 EEA or Article 18 TFEU is confined, respectively to EEA nationals or EU nationals, and nor is the second paragraph of Article 21 of the Charter framed in such terms. All are proscribed by the scope of application of their respective instruments.

144 See, respectively, judgment of the EFTA Court of 19 April 2016, *Holship Norge AS v Norsk Transportarbeiderforbund*; E-14/15, EFTA Ct. Rep., paragraph 123, and judgment of 20 December 2017, *Global Starnet* (C-322/16, EU:C:2017:985, paragraph 44 and the case-law cited).

145 Judgment of 19 March 2019, *Jawo* (C-163/17, EU:C:2019:218, paragraph 78). As I.N. is not an EU citizen, and the EAW Framework Decision, footnote 34 above, is here inapplicable, the basis for application of the Charter in judgment of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630) cannot be transposed to the main proceedings.

146 Footnote 6 above. See by analogy judgment of 16 January 2018, *E* (C-240/17, EU:C:EU:C:2018:8). Article 3 of the Schengen Association Agreement, footnote 4 above, and the Mixed Committee it establishes may also be pertinent.

147 See footnote 8 above.

148 See judgment of 10 April 2018, *Pisciotti* (C-191/16, EU:C:2018:222, paragraph 55). There the Court viewed as significant the fact that the Member State authorities never issued a European Arrest Warrant.

impunity that is equivalent to extradition; the touchstone of *Petruhhin* (points 99 to 100 above). That being so, I confine my observations with respect to the Surrender Procedure Agreement to stating that, on its face, such a guarantee is provided, and contrary to arguments of Norway (points 57 to 59 above), is not diminished by the absence of express reference to mutual trust, the rigour of the arrangement established by the Surrender Procedure Agreement being amply established by other provisions.[149]

123. At the same time, my answer to question 2 in no way permits the Croatian courts to act inconsistently with Iceland's asylum decision with respect to I.N. of 11 June 2015 (even though any assessment by Croatian courts of conditions in Russia is will be by reference to current circumstances, rather than those prevailing in 2015) due to the obligation of mutual trust operative between Iceland and Croatia arising from their participation in the Common European Asylum System and more particularly the Dublin III Regulation.[150]

## VI. Conclusion

124. I therefore propose that the questions referred by the Supreme Court of Croatia should be answered as follows:

'1. In the circumstances of the main proceedings, Articles 4 and 36 EEA are to be interpreted as meaning that a Member State of the European Union which gives a ruling on the extradition to a third state of a national of a State that is not a Member State of the European Union, but who is a national of a Schengen Associated State, is required to inform that Schengen Associated State of the extradition request. The Member State is additionally bound to forward to the Schengen Associated State any material in its possession that might assist the Schengen Associated State in deciding whether to prosecute the national concerned and seek their return. Further, due to the obligation of mutual trust inherent in the Common European Asylum System, including 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, the authorities of the Member State, including its courts, are precluded from otherwise acting inconsistently with a grant of asylum preceding acquisition of the nationality of that Schengen Associated State. This applies when assessing risk of exposure of the national of the Schengen Associated State to inhuman and degrading treatment and flagrant denial of justice, as at the date of the Member State proceedings, if extradited to a third state.

2. In circumstances in which the Schengen Associated State is yet to issue an extradition request, the Member State is not bound to actively surrender the national of the Schengen Associated State under the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway. If an extradition request is made, it will be for the courts of the Member State to determine whether, in all the circumstances, the extradition request offers guarantees against impunity equivalent to extradition to the third state, while remaining bound to act consistently with the prior grant of asylum of the Schengen Associated State.'

149 E.g. first, third, eighth recitals, Article 1 and the limited grounds for non- execution in Article 4, coupled with its overall similarity with the European Arrest Warrant. See Surrender Procedure Agreement, footnote 8 above.

150 See footnote 6 above.