CENTRAL AND EASTERN EUROPEAN MOOT COMPETITION

(2017 edition)

MOOT COURT PROBLEM

Facts

1. Frantic is a 30-year-old national of Ekrut. Ekrut is not a Member State of the European Union ('**EU**'). However, in 1990, Ekrut and the European Economic Communities ('**EEC**'), as it was known at that time, signed an Association Agreement (the '**Association Agreement'**).

2. In its preamble, the Association Agreement recognised the intention of Ekrut to make a future application for membership of the EEC. With that aim in mind, Ekrut undertook to pass numerous pieces of legislation to correspond to the Common Market (as it was known then) in order to bring its legal system into line with that of the EEC. In return, the EEC sought largely to extend the rights to free movement of goods, persons, and services to Ekrut.

3. In early 2012, Frantic visited his distant relatives in Edistou, a non-EU country to the east of Ekrut. When visiting his second cousin, he met 16-year old Alfina. He fell in love with her instantly. Respecting the local tradition, he approached Alfina's father first and asked for Alfina´s hand in marriage. Alfina´s father agreed. They were married a few weeks later in Edistou. Over next few months, Frantic and Alfina got to know each other and she found herself growing very fond of him. In 2013, they were still living in Edistou when Alfina gave birth to their daughter Shanjali.

4. Frantic returned to Ekrut with Shanjali in 2014, but soon after they moved to Rebmem, an EU Member State, where he started working in his uncle's construction company. Alfina did not travel with them, because her father had become very ill and she wanted to stay and help take care of him.

5. The plan was for Alfina to join them as soon as possible in Rebmem so Frantic initially applied for, and was granted, residence permits in Rebmem solely on behalf of himself and Shanjali.

6. Alfina remained in Edistou until early 2016, when her father died and she decided to apply for a visa that would allow her to travel to Rebmem. The visa was granted. Alfina was aged 20 when she travelled to Rebmem. Her intention was to apply for a residence permit upon arrival on the grounds of family reunification. She was aware of the fact that Rebmemian law required such an application to be made from abroad but since her presence in Rebmem was legal, based on her valid short-term visa, she filed that application directly with the competent authority: the Rebmemian Immigration Authority ('**RIA**'). The RIA accepted to process that application.

7. Alfina cannot speak the Rebmemian language very well. She reads only very, very slowly, and has difficulties in writing. In fact the same difficulties affect her in her native language, Edistoun, leading her family to suspect that she might suffer from undiagnosed dyslexia, although she has never been medically tested.

8. Due to the influx of migrants in recent years, Rebmemians immigration laws had become stricter. In 2013, the then conservative government had passed the 2013 Foreign Nationals Act (the '**FNA**'). That

Act imposed a number of conditions for residence; in particular, imposing a Rebmemian language literacy requirement and setting a minimum age for spouses of non-national residents of Rebmem. These conditions had not existed in earlier national legislation.

9. The new Article 3 of the FNA sets out the conditions to obtain a residence permit, namely that:

> ***(1)*** *A foreign national is legally resident only when he/she has a residence permit;*
>
> ***(2)*** *The first application for a residence permit must be made from abroad, through Rebmemian's diplomatic services;*
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> ***(3)*** *The applicant must show evidence that he/she is literate in Rebmemian;*
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> ***(4)*** *To make an application for family reunification, the spouse or partner must also provide proof of literacy in Rebmemian;*
>
> ***(5)*** *The spouse of the applicant must be over the age of 21;*
>
> ***(6)*** *In the event of special extenuating circumstances, the Minister of Justice can waive the applicability of the requirements in paragraphs 2 to 5 of this Article.*

10. The *travaux preparatoires* of the FNA show that the literacy requirement was introduced because literacy in Rebmemian was seen as an important and indispensable skill for the applicant to be able to integrate into Rebmemian society, which is extremely technologically developed. All contact with official authorities happens via internet; as does most shopping and other social interaction.

11. The age requirement for spouses was introduced in order to discourage and prevent any legitimisation of forced or sham marriages involving the main applicant for a resident permit. In the past, Rebmem had experienced a few instances of forced underage marriages in some of its immigrant communities. Although such instances were few in number, the reaction of the, otherwise quite liberal, Rebmemian public to these revelations was very hostile. The authorities wished to be entirely certain that the spouses of resident permit applicants had married of their own free will. Therefore, although in law the minimum age at which one could get married in Rebmem was 16, the Rebmemian legislator set the minimum age limit for the spouses of resident permit applicants at 21.

12. As part of the residence permit application procedure (as set out by the FNA), Alfina was invited to sit an examination in the Rebmemian language to prove her literacy. Her examination did not go well; given the limited time and related stress, her results were well below the minimum average mark required to pass the test. Her residence permit application was therefore rejected by the RIA because: (a) she failed to provide proof of her literacy: leading to the assumption that she would not be able to integrate into Rebmemian society, and in any event (b) she did not comply with the minimum age requirement for spouses for the issue of residence permits ("the **Residence Decision**").

13. Because her short-term visa has expired in the interim, Alfina had to return to Edistou.

14. Several months later, an armed conflict broke out in Edistou between the central government and 'Animef'. The latter is a political movement whose main aim is female empowerment in Edistou and its neighbouring countries. Although peaceful in its beginnings, over the years the leaders of Animef

had gradually become frustrated by the lack of any progress in achieving their aims and promoting their cause, leading them on occasions to resort to violence, leading to severe fights breaking out between the military faction of Anemif and the Edistoun government.

15. When the conflict broke out, many women not previously associated with Animef took shelter at the local women's shelter, run by Animef, to escape the systemic violence inflicted on them by supporters of the government. Alfina took the decision to join the local armed militia to provide further protection for those women, having herself formerly been a volunteer worker at the shelter. She had also started the process of becoming an official member of Animef, and had already attended public meetings openly demonstrating that she shared their political convictions.

16. In August 2016, when most of her town and the shelter had been bombed, Alfina fled Edistou and undertook a perilous cross-country journey through western Edistou and Ekrut, eventually arriving in Mulysa.

17. Mulysa is an EU Member State. Mulysa had ceased to be able to process applications for international protection, due to its internal difficulties in providing adequate administration and facilities for asylum seekers and refugees, as it had faced a massive influx of refugees from war-torn Edistou as well as other countries in the East. Not surprisingly a similar crisis was also taking place in Ekrut.

18. Alfina continued her journey from Mulysa, travelling to Rebmem through other Member States of the European Union. When she arrived in Rebmem, she made an application for refugee status. However, the application was rejected. The RIA decided that, because Alfina had previously been involved in the local militia in Edistou, there was reasonable suspicion to believe that she represented a danger to the public security of Rebmem. That decision was based on Article 10 of the FNA, which reads as follows:

'1. *The RIA may exclude a third-country national or a stateless person from being recognised as a refugee where reasonable grounds exist for regarding that person as a danger to the security of Rebmem or if that person, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of Rebmem.*

2. *Persons to whom paragraph 1 applies, are entitled to the rights set out in or similar to those set out in Articles 3, 4, 16, 22, 31, 32 and 33 of the Geneva Convention in so far as they are already present in Rebmem.*

19. Travaux preparatoires related to Article 10 of the FNA state that this provision was intended to implement Article 14(4) of Directive 2011/95/EU 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 ('**Qualification Directive'**).

20. Immediately after the rejection of Alfina's application for international protection, the RIA transferred her back to Ekrut ("the **Asylum Decision**").

21. The practice of transferring unsuccessful applicants for international protection back to Ekrut is based on the EU-Ekrut Joint Statement of 1 May 2016 (the '**Joint Statement'**). In that statement, the Ekrut Government and the EU agreed that all migrants, not formally registered with rights of entrance or

residence in any EU country, crossing from Ekrut onto the territory of the EU from 1 May 2016 onwards will be returned to Ekrut.

22. When adopting the Asylum Decision, the RIA did not adopt any position on the arguments put forward by Alfina concerning the fact that Ekrut was unable to provide humane conditions to accommodate persons that are being sent there en masse pursuant to the Joint Statement.

23. The Residence Decision and Asylum Decision are together referred to as the "**Decisions**".

National proceedings

24. Represented by a well-known pro-bono litigator, Ms Saglesi, Alfina decided to challenge the Decisions in Rebmem. Under national law, the competent authority to review those Decisions is the Immigration Appeals Tribunal (the '**IAT**'). Since both decisions (the Residence Decision and the Asylum Decision) related to the same person, the IAT decided to join both cases.

25. The IAT was established by the FNA. Its creation became imperative in view of the large number of applications for international protection and residence permit applications and it was set up specifically to respect the fundamental right to a fair trial, which also includes the requirement to deal with a case within a reasonable period of time,

26. The IAT rules on appeals against decisions of the RIA. Its panels are composed of three members: two officials seconded from the Rebmemian Ministry of the Interior and a professional judge seconded from the Rebmemian Administrative Court, who acts as the presiding judge. The two officials from the Ministry are seconded to the IAT for a fixed term of office of six years, which is renewable by the decision of the Minister. Their salary is the same as that of Rebmemian first instance judges. Prior to taking office at the IAT, they take an oath to exercise their function with complete impartiality and independence. Upon the expiry of their six year term, if their term of office is not renewed, they normally return to their previous positions at the Ministry of the Interior.

27. A special, simplified procedure has been introduced to hear cases before the IAT. Unless requested by the panel itself, no oral hearing is held. The panel relies solely on the information provided in the RIA's case file and the initial written submission provided by the applicant who wishes to challenge the RIA's administrative decision(s). No further arguments by the parties are admissible. In practice, virtually all cases before the IAT are decided *in camera* (i.e. the public and press are not allowed to observe the procedure or process), using a standardised template justification for applicants coming from the same country of origin.

28. Furthermore, there is no right of appeal against a decision of the IAT unless the president of the IAT certifies that the appeal is in the 'general interest of the law'. In such an event, the applicant would be permitted to submit the case for review to the Rebmemian Administrative Court. Statistics from the last 5 years, compiled by Ms Saglesi, demonstrate that such permission was granted in less than 1% of cases seeking to appeal against an IAT decision.

29. In her submissions to the IAT, Alfina alleges that the Decisions violate EU law.

- She claims that the requirements laid down in Article 3 FNA that were applied to her violate the standstill clause contained in Article 40 of the Association Agreement, which allows for no derogations. She further claims that the Minister of the Interior should have applied the exception provided in Article 3(6) of the FNA to her case. In doing so she highlighted that the reason she failed the literacy test is because she has dyslexia. As regards the protection of Rebmemian public order, encapsulated in the provisions relating to the fight against the legitimation of forced marriages, she states that she genuinely loves Frantic. Their present loving and caring relationship constitutes a solid basis to provide a good education and emotional security for Shanjali. She therefore asks that the IAT set aside the Residence Decision and order the RIA to grant her a residence permit.

- Furthermore, she is of the view that the grounds on which her asylum application was rejected violate the Convention Relating to the Status of Refugees of 28 July 1951 (the '**Geneva Convention'**). She claims that she was excluded from the status of refugee because she was unjustly considered as being a threat to public order, which is not included amongst the grounds set out in The Geneva Convention which allow a government to deny the status of a refugee to an asylum seeker. It is true that a refugee may not be able to benefit from the *non-refoulement* principle (provided in Article 33(1) of the Geneva Convention) because he or she satisfies the criteria laid down in Article 33(2) of that Convention. However, the fact that Article 33(2) may be applicable does not deprive the person concerned of his or her status as a refugee. Therefore, she asks the IAT to set aside the Asylum Decision and to instruct the RIA to review Alfina's asylum application and to grant her refugee status.

- Alfina also thinks that the absence of oral hearing proceedings before the IAT violates the procedural safeguards provided for in 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 (the '**Procedural Directive**'), and Article 47 of the Charter of Fundamental Rights of the European Union.

- Finally, she notes that the decision to return her to Ekrut was based on of the Joint Statement. She is of the view that the Joint Statement was adopted in violation of the duty for EU Member States to respect the Geneva Convention and the European Convention for the Protection of Human Rights and Fundamental Freedoms (the '**European Convention'**). She is of the view that the Joint Statement, despite its name, is an international treaty entered into by, and between, Ekrut and the EU. As such, it binds the EU Member States, including Rebmem. However, contrary to the letter of the Joint Statement, its practical operation results in the collective return of asylum seekers, which does not allow for the required individual assessment of each application. Also, Alfina considers that the RIA violated Article 3 of the European Convention by disregarding her arguments concerning the inability of Ekrut to provide decent accommodation and living conditions.

30. The RIA rejects all of Alfina's arguments as unfounded. Its decision states *inter alia* that:

    - The application of Article 3 of the FNA is fully justified given that an alternative interpretation would result in Ekrutian nationals being treated better than EU nationals. This could hardly have been the intention of the EU legislator, in particular noting that recent case law of the

Court of Justice allows reasonable limitations to be imposed upon the residency rights of other EU citizens. The EU Treaties and the case law of the Court of Justice consider EU citizenship to be of fundamental importance. It is hard to conceive that such a "fundamental status" would be, insofar as concerns the scope of rights and their permissible limitations, inferior in practice to the citizenship of an EU Associated State.

- Article 10(1) of the FNA constitutes implementation of Article 14(5) of the Qualification Directive which is fully compliant with the Geneva Convention. Irrespective of that fact, the Court of Justice does not even have the jurisdiction to interpret the Geneva Convention because the EU is not a contracting party. Even if the compatibility between Article 10(1) and the Geneva Convention were at issue, the reference to "rights" in Article 10(2) of the FNA shows that the person concerned will not be returned to the State of origin. In addition persons falling within the scope of Article 10(1) FNA should also enjoy the protection stemming from the European Convention and the Charter of Fundamental Rights of the European Union.

- Finally, as regards the Joint Statement, it is quite clear that that document is merely a political statement, a non-enforceable press release. It is not an international treaty. The Return Decision was based on an individual assessment of Alfina's situation. It does not violate any of Rebmemian's international or EU legal obligations.

Questions referred to the Court of Justice

31. Having studied the file in the present case, the IAT has several doubts about the application of EU law. It has decided to clarify them by posing several questions to the Court of Justice.

    - First, in the light of the arguments presented by the RIA, the IAT is uncertain whether the provisions of national law comply with the standstill clause contained in Article 40 of the Association Agreement. The FNA's new residency conditions only entered into force on 1 January 2014.

    - Second, the IAT is unsure about the EU-law compatibility of the conditions related to the minimum age and to the literacy requirements, as set out in the FNA.

    - Third, the IAT also doubts the compatibility of the national provisions with EU law and the Geneva Convention, on which the Asylum Decision was based. These national provisions constitute an implementation of Article 14(5) of the Qualification Directive. The IAT suspects that the latter article extends the grounds for exclusion from refugee status beyond those which are allowed under Article 1F of the Geneva Convention.

    - Fourth, the IAT has doubts as to whether the treatment Alfina received from the Rebmemian authorities was compatible with EU law. The IAT considers that the Joint Statement is an international agreement entered into by the European Union and that all Member States are required to comply with it as a matter of EU law.

32. Finally, before drawing up the final order for reference, the IAT served copies of the draft questions it intended to submit to the Court of Justice to the parties for information. The RIA expressed doubts as

to whether the IAT is in fact entitled to submit a request for a preliminary ruling pursuant to Article 267 TFEU. Alfina is of the view that the Court of Justice has jurisdiction to respond to the questions posed. The IAT did not share the RIA's doubts, but it nevertheless decided to include that issue in the questions referred.

33. For those reasons, the IAT decided to suspend the national proceedings and to submit the following questions to the Court of Justice:

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Q1: Is a national body which decides on matters of immigration and international protection, such as the Rebmemian Immigration Appeals Tribunal, a court or tribunal, entitled to submit references to the Court of Justice under Article 267 TFEU?

Q2: Does the absence of an oral hearing procedure before the Rebmemian Immigration Appeals Tribunal constitute a breach of Article 46 of 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 and/or Article 47 of the Charter of Fundamental Rights of the European Union?

Q3: Is it compatible with Article 40 of the EEC-Ekrut Association Agreement to apply national law, such as Article 3 of the 2013 Foreign Nationals Act, which subjects the application for a residence permit of an Ekrut national's spouse to stricter national rules than those existing prior to the ratification of the EEC-Ekrut Association Agreement?

Q4: Does EU law preclude national law such as Article 3, paragraphs 4 and 5 of the 2013 Foreign Nationals Act concerning the minimum age of spouses and literacy? In particular:

(a) Are the literacy and minimum age requirements justified by an overriding reason in the public interest?

(b) If the response to question Q4a) above is in the affirmative, is the response of the Rebmemian legislation a proportionate response to that overriding reason?

Q5: Is Article 14(5) of the Qualification Directive compatible with Article 78(1) of the Treaty on the Functioning of the European Union, Article 18 of the Charter of Fundamental Rights of the European Union, and Articles 1 F and 33 of the Geneva Convention?

Q6: Does EU law, considered in the context of commitments flowing from the Geneva Convention and/or the Charter of Fundamental Rights of the European Union, permit the practice of EU Member State authorities, allegedly based on the EU-Ekrut Statement, of sending asylum seekers to Ekrut without taking into account the applicants' arguments that Ekrut is unable to guarantee their fundamental rights?

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The reference was received by the Registrar of the CJEU, who has assigned it case number M-11/17. In accordance with Article 23 of the Statute of the Court of Justice of the European Union, the Registrar has notified Alfina (as applicant) and the Rebmemian Immigration Authority (as defendant) and has invited them to submit written observations on the questions referred.