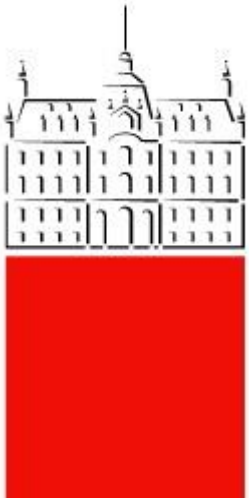
Central and Eastern European Moot Competition 2017

MEMORANDUM FOR APPLICANT

UNIVERSITY *OF* LJUBLJANA

FACULTY OF LAW



APPLICANT

Alfina

against

RESPONDENT

Rebmemian Immigration Authority

On behalf of the Applicant

Aljoša Aleksovski

Sara Ermenc

Urška Rotar

Špela Zupančič

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LIST OF ABBREVIATIONS

AG	Advocate General
Association Agreement	EEC-Ekrut Association Agreement
Joint Statement	EU-Ekrut Joint Statement
CEAS	Common European Asylum System
Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
e.g.	exempli gratia
EU	European Union
Family Directive	Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification
FNA	Foreign National Act
Geneva Convention	Geneva Convention (UN Convention of 1951 Relating to Status of Refugees)
i.e.	id est
IAT	Immigration Appeal Tribunal
MS	Member State
Qualification Directive	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 form for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted
p.	page
pp.	pages
para.	paragraph
paras.	paragraphs
Procedural Directive	Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)
RIA	Rebmemian Immigration Authority
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TCN	Third Country National
UNHCR	United Nations High Commissioner for Refugees

LIST OF CASES

COURT OF JUSTICE OF THE EUROPEAN UNION

1. Judgement of 6 October 1981, *Broekmeulen*, C-246/80, EU:C:1981:218, Appears in ¶ 10 of the Memorandum

2. Judgment of 3 July 1991, *DHSS v Christopher Stewart Barr and Montrose Holdings Ltd*, C-355/89, EU:C:1991:287, Appears in ¶ 12 of the Memorandum
3. Judgement of 17 September 1997, *Dorsch Consult*, C-54/96, EU:C:1997:413, Appears in ¶¶ 1, 5 of the Memorandum
4. Judgement of 31 May 2005, *Syfait*, C-53/03, EU:C:2005:333, Appears in ¶ 1 of the Memorandum
5. Judgement of 17 February 2009, *Elgafaji*, C-465/07, EU:C:2009:94, Appears in ¶ 54 of the Memorandum
6. Judgement of 25 February 2010, *Brita GmbH*, C-386/08, EU:C:2010:91, Appears in ¶¶ 21, 53 of the Memorandum
7. Judgement of 9 November 2010, *Bundesrepublik Deutschland v B and D*, Joined Cases C-57/09 and C-101/09, EU:C:2010:661, Appears in ¶¶ 38, 44 of the Memorandum
8. Judgement of 21 December 2011, *NS v Secretary of State for the Home Department*, Joined Cases C-411/10 and C-493/10, EU:C:2011:865, Appears in ¶¶¶¶¶¶ 37, 45, 49, 50, 54, 56 of the Memorandum
9. Judgement of 31 January 2013, *H.I.D. v Refugee Applications Commissioner*, C-175/1, ECLI:EU:C:2013:45, Appears in ¶¶¶¶¶ 1, 8, 10, 15, 18 of the Memorandum
10. Judgement of 19 December 2012, *El Kott*, C-364/11, EU:C:2012:826, Appears in ¶¶ 37, 38 of the Memorandum
11. Judgement of 7 November 2013, *Demir*, C-225/12, EU:C:2013:725, Appears in ¶¶¶¶¶¶ 21, 22, 25, 27, 29, 32 of the Memorandum
12. Judgement of 10 July 2014, *Naime Dogan*, C-138/13, ECLI:EU:C:2014:2066, Appears in ¶¶¶¶ 21, 22, 23, 33 of the Memorandum
13. Judgment of 12 June 2014, *Ascendi*, C-377/13, EU:C:2014:1754, Appears in ¶ 1 of the Memorandum
14. Judgment of 17 July 2014, *Qurbani*, C-481/13, EU:C:2014:2101, Appears in ¶ 37 of the Memorandum
15. Order of 13 February 2013, *Merck Canada Inc. v Accord Healthcare Ltd*, C-555/13, EU:C:2014:92, Appears in ¶ 1 of the Memorandum
16. Judgment of 17 December 2015, *Abdoulaye Amadou Tall*, C-239/14, EU:C:2015:824, Appears in ¶¶ 13, 55 of the Memorandum
17. Judgment of 12 April 2016, *Caner Genc*, C-561/14, EU:C:2016:247, Appears in ¶¶¶ 21, 23, 31 of the Memorandum 18. Judgment of 31 January 2017, *Lounani*, C-573/14, EU:C:2017:71, Appears in ¶ 38 of the Memorandum

OPINIONS OF ADVOCATES GENERAL

1. Opinion of Advocate General Mengozzi delivered on 15 December 2016 in *Furkan Tekdemir*, C- 652/15, ECLI:EU:C:2016:960, Appears in ¶ 30 of the Memorandum
2. Opinion of Advocate General Mengozzi delivered on 30 April 2014 in *Naime Dogan*, C-138/13, EU:C2014:287, Appears in ¶¶¶ 22, 30, 34 of the Memorandum

EUROPEAN COURT OF HUMAN RIGHTS

1. ECtHR Judgment of 21 January 2011, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Appears in ¶¶¶ 49, 53, 54 of the Memorandum

SUGGESTED ANSWER TO THE FIRST QUESTION

1. **The Applicant respectfully submits that a national body which decides on matters of immigration and international protection, such as the Rebmemian Immigration Appeals Tribunal (hereinafter IAT), is a court or tribunal entitled to submit references to the Court of Justice of the European Union (hereinafter CJEU) under Article 267 of the Treaty on the Functioning of the European Union (hereinafter TFEU).**

2. The CJEU has established the following criteria to determine whether a body making a reference is a court or tribunal within the meaning of Article 267 TFEU: the body is established by law, it is permanent, its jurisdiction is compulsory, its procedure is *inter partes*, it applies rules of law, it is independent.[1] It follows from the referred case-law that these criteria do not have to be satisfied cumulatively. The Applicant, however, asserts that the IAT fulfils all of them.

3. Firstly, as regards the criterion of **establishment by law**, it should be noted that the referring body was established on the legislative basis by the 2013 Foreign Nationals Act (hereinafter FNA).[2] The IAT's establishment by law therefore cannot be disputed.

4. Secondly, the Applicant submits that the IAT has a **permanent character** by virtue of placement of the IAT in the national mechanism for processing applications for international protection and residence permit applications. It was imperative to establish the IAT as an appellate body that reviews the decisions of the Rebmemian Immigration Authority (hereinafter RIA), in order to ensure procedural rights, in particular the right to a fair trial.[2] The existence of the IAT is therefore crucial for Rembem to respect procedural guarantees and shall not be abolished at any time. In addition, the FNA provides no time limit for its jurisdiction to rule on appeals against decisions of the RIA.

5. Thirdly, the Applicant claims that the criterion of **compulsory jurisdiction** is met due to the fact that the parties shall firstly turn to the IAT in order to challenge the RIA's decisions. It is only after the IAT's decision is issued that the parties may submit the case for review to the Rebmemian Administrative Court provided that the president of the IAT certifies the appeal.[3] What is more, the decision of the IAT is binding on the parties, which is an aspect of this criterion, as results from the CJEU's reasoning in *Dorsch Consult*.[4] Namely, the IAT's decisions become legally enforceable.

6. Fourthly, proceedings before the IAT are **adversarial (*inter partes*)**, given that the decisions of the IAT are adopted on the basis of the assertions presented by both parties, in particular the initial written submission provided by the Applicant[5] and the RIA's reply thereto.[6]

7. Fifthly, the criterion relating to the **application of rules of law** is met. The IAT adopts decisions pursuant to the provisions laid down in the FNA,[7] which represents the implementation of the EU secondary legislation, i.e. the Qualification Directive, into the national legal framework and consists of substantive as well as procedural rules.

8. Regarding the **independence** of the referring body, the CJEU held in *H.I.D.* that "*the concept of independence, which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision*".[8] The panels of the IAT are not composed of members who had previously participated in the proceedings at first instance before the RIA. Moreover, the IAT neither requests nor receives instructions from the RIA as regards the fact-finding and decision-making which demonstrates that regarding the composition, there is neither organisational nor functional link between the RIA and the IAT. Prior to taking office at the IAT, the officials take an oath to exercise their function with complete impartiality and independence.[10] This, on the one hand reflects the duty to act as a third party in relation to the RIA and on the other, the duty not to follow or accept any instruction from the Ministry of the Interior.

9. It is true that the Minister of the Interior is authorised to decide on the renewals of two officials' term of office.[9] However, this does not imply that he or she exercises influence over the decision-making of the IAT. The Minister is not empowered to review the decisions of the IAT neither does he or she have the power to dismiss the members of the IAT's panels

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[1] C-54/96 *Dorsch Consult*, para. 23, Bundle, p. 69; C-52/03 *Syfait*, para. 29, Bundle, p. 82; C-175/11 *H.I.D. v Refugee Application Commissioner*, para. 83, Bundle, p. 170; C-377/13 *Ascendi*, para. 23, Bundle, p. 224; C-555/13 *Merck Canada Inc. v Accord Healthcare Ltd*, para. 16, Bundle, pp. 234-235. [2] CEEMC Question 2017, para. 25, Bundle, p. 8.

[2] *Ibid.*

[3] *Ibid.*, para. 28, Bundle, p. 8.

[4] C-54/96 *Dorsch Consult*, para. 29, Bundle, p. 69.

[5] CEEMC Question 2017, para. 27, Bundle, p. 8.

[6] *Ibid.*, para. 30, Bundle, p. 9.

[7] *Ibid.*, paras. 25-28, Bundle, p. 8.

[8] C-175/11 *H.I.D. v Refugee Applications Commissioner*, para. 95, Bundle, p. 171. [10]
CEEMC Question 2017, para. 26, Bundle, p. 8.

[9] *Ibid.*

during their term of office. The IAT is thus protected against the external intervention or pressure that could threaten its decisions to be taken independently.

10. Additionally, the Applicant contends that the mere fact that the body is not designated as a court or tribunal in the Rebmemian legal system does not in itself mean that this body is not entitled to refer a question to the CJEU for a preliminary ruling. As established in *Broekmeulen*, it is the function performed by the referring body within the system of remedies that should be observed.[10] In the case at hand, the IAT rules on appeals against the decisions of the RIA.[11] In practice, the appeal to the Rebmemian Administrative Court against a decision of the IAT is granted in less than 1%.[12] As the CJEU held in *H.I.D.*, the effectiveness of the remedies depends on the administrative and judicial system of each Member State (hereinafter MS) considered as a whole.[13] It follows from the present case that the judicial system in Rebmem does **not provide for an effective judicial remedy**, due to near absence of the right to appeal against decisions of the IAT.[14] For that reason, **the IAT represents the *de facto* last instance** and hence must be empowered to refer a question for preliminary ruling to the CJEU. Namely, in order to ensure the proper functioning of EU law,[15] the CJEU must have an opportunity to rule on issues of interpretation and validity arising out of proceedings which may affect the exercise of rights granted by EU law.[16] Accordingly, if the CJEU does not give a preliminary ruling concerning EU asylum law, not only the **general principle of legal certainty**, but also the principles of application of EU law, in particular **effective implementation of EU law** and its conforming interpretation, would be **infringed**.

11. To summarise, the IAT shall be considered a court or tribunal within the meaning of Article 267 TFEU since it fulfils the abovementioned criteria and since this is necessary in order to ensure the uniform application and interpretation of EU law.[17]

SUGGESTED ANSWER TO THE SECOND QUESTION

12. **The Applicant respectfully submits that the absence of an oral hearing procedure before the Rebmemian IAT constitutes a breach of Article 46 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June on common procedures for granting and withdrawing international protection (hereinafter Procedural Directive) and of Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter the Charter).**

13. At the outset, it should be noted that Article 47 of the Charter ensures the right to an effective remedy and to a fair trial,[18] while Article 46 of the Procedural Directive[19] represents a concretisation of the former, providing specific safeguards in proceedings of applications for international protection. Since the provisions of the Charter are addressed to the MSs when they are implementing EU law,[20] the Applicant claims that characteristics of the remedy provided for in Article 46 of the Procedural Directive shall be determined in a manner consistent with Article 47 of the Charter.[21]

14. Firstly, the Applicant submits that the lack of an oral hearing before the IAT breaches the right to an effective remedy and to a fair trial. Public hearing, as granted by the wording of Article 47 of the Charter, allows the applicants to present orally their submissions before the court or tribunal and in front of the eyes of the public. The Applicant argues that the publicity of the proceedings guarantees correctness, both of the procedure as such and of the court's assessment of facts and points of law. Such procedural safeguards are especially important when considering the judicial system of Rebmem as a whole, since "*no right to appeal against a decision of the IAT is granted, unless the president of the IAT certifies that the appeal is in the 'general interest of law*",[22] which, according to the available statistics, is permitted in less than 1% of the cases.[23] The Applicant thus argues that a public oral hearing before the IAT is essential in order to fully satisfy the right to an effective remedy and to a fair trial.

[10] C-246/80 *Broekmeulen*, para. 11, Bundle, p. 58.
[11] CEEMC Question 2017, para. 26, Bundle, p. 8.
[12] *Ibid*., para. 28, Bundle, p. 8.
[13] C-175/11 *H.I.D. v Refugee Applications Commissioner*, para. 102, Bundle, p. 172.
[14] CEEMC Question 2017, para. 28, Bundle, p. 8.
[15] C-246/80 *Broekmeulen*, para. 16, Bundle, p. 58.
[16] *Ibid.*
[17] C-355/89 *DHSS v Christopher Stewart Barr and Montrose Holdings Ltd*, para. 9, Bundle, p. 64.
[18] Article 47 of the Charter, Bundle, pp. 43-44.
[19] Article 46 of the Procedural Directive, Bundle, pp. 52-53.
[20] Article 51(1) of the Charter, Bundle, p. 44.
[21] C-239/14 *Abdoulaye Amadou Tall*, para. 51, Bundle, p. 275.
[22] CEEMC Question 2017, para. 28, Bundle, p. 8.
[23] *Ibid.*

15. Secondly, the Applicant contends that an oral hearing is of vital importance considering the lack of a personal interview in the proceedings before the RIA. According to Article 14(1) of the Procedural Directive, "*an applicant for asylum must be given an opportunity to have a personal interview on his or her application for asylum with a competent person before a decision is taken by the determining authority*".[24] Since there was no personal interview in the proceedings before the Rebmemian authorities, the Applicant submits that the right to an effective remedy and to a fair trial is breached, if such an interview is not granted at least as part of an oral hearing before the IAT. Furthermore, Recital 27 of the Directive 2005/85/EC states that "*the effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each MS seen as a whole*".[27]

16. The Applicant submits that an oral hearing is necessary to fulfil the requirement of a **full and *ex nunc* examination** of both facts and points of law, set out in Article 46(3) of the Procedural Directive. The respective requirement imposes an obligation on the IAT to consider **all new facts and points of law**, since the circumstances of the case may change through the course of time. The IAT must undertake an in-depth examination of all materials placed before it. These materials include documentation gathered prior to the decision of the RIA along with new submissions that are at the IAT's disposal. The Applicant argues that since the IAT is often **presented with factual evidence**, e.g. if new circumstances arise from the country of origin, **an oral hearing is necessary to assess the credibility and personal experiences of each individual applicant.** Consequently, the Applicant asserts that an oral hearing enables applicants to substantiate their claim, especially when they are not subject to a personal interview in the prior proceedings. Moreover, the interview in person is particularly important, as non-verbal communication may reveal more information than written submissions. In light of the foregoing, the Applicant claims that the absence of any direct contact between the applicants and the determining authorities breaches rights provided by the Procedural Directive and by the Charter.

17. Thirdly, the Applicant contends that an oral hearing is imperative in order to enable the IAT to assess applicants **individually**. According to Article 46(3) of the Procedural Directive, an examination of the international protection shall be carried out pursuant to Directive 2011/95/EU (hereinafter Qualification Directive).[25] The Qualification Directive emphasises the need for an individual assessment in Article 4(3), which stipulates that an assessment shall be conducted on an individual basis, including, for example, the assessment of the individual position and personal circumstances of the applicants,[26] and all relevant facts as they relate to the country of origin at the time of taking a decision on the application.[27]

18. In virtually all cases, the IAT uses a standardised template justification for applicants coming from the same country of origin,[28] which implies that there is no individual assessment. It should be stressed that every individual flees for various reasons, hence **personal circumstances** regarding his or her race, religion, nationality, membership of a particular social group or political opinion[29] shall be assessed. Proceedings before the IAT are therefore not in line with the reasoning in *H.I.D.*, where the CJEU held that while MSs may apply different procedures for certain categories of asylum applications defined on the basis of the criteria of the nationality or country of origin of the applicant, they must be in compliance with the basic principles and guarantees set out in Chapter II of the Procedural Directive.[30] Basic principles and guarantees require, *inter alia*, applications to be examined and decisions to be taken individually,[31] which was not respected in the present case. Considering the abovementioned arguments and the importance of the decision regarding international protection for the applicants, an oral hearing is necessary to conduct an individual assessment.

19. To conclude, the absence of an oral hearing in the proceedings before the IAT constitutes a breach of Article 46 of the Procedural Directive and of Article 47 of the Charter. Due to the lack of a right to appeal against a decision of the IAT, an oral hearing should be held in order to provide the additional public scrutiny. Furthermore, an oral hearing is necessary, since there is no personal interview that would enable authorities to assess applicants individually and conduct a full and *ex nunc* examination of both facts and points of law.

[24] Same wording as in Article 12(1) of the Directive 2005/85 available in C-175/11 *H.I.D. v Refugee Applications Commissioner*, para. 14, Bundle, p. 161.
[27] C-175/11 *H.I.D. v Refugee Applications Commissioner*, para. 9, Bundle, p. 161.
[25] Article 46(3) of the Procedural Directive, Bundle, p. 53.
[26] Article 4(3)(c) of the Qualification Directive, Bundle, p. 47.
[27] Article 4(3)(a) of the Qualification Directive, Bundle, p. 46.
[28] CEEMC Question 2017, para. 27, Bundle, p. 8.
[29] Article 1 A(2) of the Geneva Convention, Bundle, p. 310.
[30] C-175/11 *H.I.D. v Refugee Applications Commissioner*, para. 77, Bundle, p. 170.
[31] *Ibid.*, para. 12, Bundle, p. 161.

SUGGESTED ANSWER TO THE THIRD QUESTION

20. **The Applicant respectfully submits that it is not compatible with Article 40 of the EEC-Ekrut Association Agreement (hereinafter Association Agreement) to apply national law, such as Article 3 of the FNA, 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 Association Agreement.**

21. At the outset, it should be recalled that compatibility of national law, such as Article 3 of the FNA with Article 40 of the Association Agreement, can be subject to examination by the CJEU as the latter agreement constitutes an act of one of the institutions of the European Union (hereinafter EU), which makes it an integral part of the legal order of the EU.[32] Article 40(2) of the Association Agreement imposed an obligation on MSs not to adopt new restrictions on the conditions of access to employment, applicable to workers and members of their families legally resident and employed in their respective territories.[33] With this content, Article 40 of the Association Agreement represents a **standstill clause, which, according to the settled case-law**[37] **of the CJEU, generally prohibits the introduction of new measures** that intended to have or have the effect of making the exercise of an economic freedom subject to more stringent conditions than those applicable at the time when the act containing the standstill clause entered into force with regards to the MS concerned.[34]

22. The CJEU has established that even though the standstill clause does not confer a right of admission into a MS, which remains governed by national law, it is nevertheless applicable to rules relating to the first admission into the MS, where addressees intend to exercise their economic freedom provided by the Association Agreement.[35] Since in the present case the Applicant's spouse is exercising the economic freedom,[36] it is him who is covered by Article 40(2) of the Association Agreement. However, it must be noted that the CJEU held in *Dogan* that the standstill clause may relate to the conditions of entry and residence where the activity in question is the corollary of the exercise of an economic activity.[37]

23. Article 3 of the FNA[38] implemented new conditions for obtaining a residence permit, namely imposing a Rebmemian language **literacy requirement** and setting **a minimum age for spouses** of non-national residents of Rebmem.[39] These measures constitute new and more stringent conditions, requiring the Applicant to abide by the stricter rules from the ones valid at the time of the adoption of the Association Agreement. According to *Genc*, the standstill clause has no effect other than precluding family reunification being made subject to new conditions likely to affect the exercise of economic freedoms in a MS.[40] More stringent conditions essentially impede and render less attractive **exercise a freedom of free movement of workers**[41] **of the Applicant's spouse and make him decide between family life in Ekrut and work in Rebmem**. That hinders the possibility of successful family reunification, which is an essential way of enabling the family life of workers, who belong to the labour force of the MSs, and contribute to improving the quality of their stay and to their integration in those MSs.[42] Moreover, it is settled case-law[43] that legislation, which tightens conditions of first admission to the territory of the MS concerned in relation to those applicable when the association agreement entered into force, constitutes a restriction of the standstill clause. Accordingly, Article 3 of the FNA constitutes a new restriction within the meaning of Article 40(2) of the Association Agreement, on the exercise of the freedom of movement of workers by Ekrutian nationals.

24. The Applicant argues that the **right to family life** should be considered when assessing the applicability of new requirements in Article 3 of the FNA. Respect for right to family life is enshrined in Article 7 of the Charter,[44] which incorporates the right to respect for private and family life, and in Article 24(3) of the Charter,[45] which provides the child's right to maintain personal relationship and direct contact with both parents. Pursuant to the situation in the present case, the Applicant's child cannot exercise the abovementioned rights if she is not united with her parents. Therefore, new

[32] See analogously C-386/08 *Brita GmbH*, where the CJEU explains in para. 39 that association agreements can be subject to interpretation. Bundle, p. 109.
[33] A (fictional) treaty establishing an association between the European Communities and Republic of Ekrut; Articles 7(2) and 40, Bundle, pp. 12-13. [37] C-225/12 *Demir*, para. 33, Bundle, p. 191; C-138/13 *Naime Dogan*, para. 26, Bundle, p. 220; C-561/14 *Caner Genc*, para. 33, Bundle, p. 282.
[34] *Ibid.*
[35] C-225/12 *Demir*, para. 34, Bundle, p. 191; Opinion of AG Mengozzi in C-138/13 *Naime Dogan*, para. 19, Bundle, p. 205, citing C-16/05 *Tum and Dari*, paras. 54-63.
[36] CEEMC Question 2017, para. 4, Bundle, p. 5.
[37] C-138/13 *Naime Dogan*, para. 28, Bundle, p. 221.
[38] Association Agreement was signed in 1990, while FNA was enacted in 2013.
[39] Article 3 of the FNA, CEEMC Question 2017, para. 9, Bundle, p. 6.
[40] C-561/14 *Caner Genc*, para. 46, Bundle, p. 283.
[41] Articles 45 and 49 TFEU, Bundle, pp. 29-30.
[42] C-138/13 *Naime Dogan*, para. 34, Bundle, p. 221.
[43] C-138/13 *Naime Dogan*, para. 36, Bundle, pp. 221-222; C-561/14 *Caner Genc*, para. 39, Bundle, p. 283.
[44] Article 7 of the Charter, Bundle, p. 41.
[45] Article 24 of the Charter, Bundle, p. 43.

restrictions negatively affect not only the Applicant's spouse, who is exercising the economic freedom, but also the Applicant and her daughter.

25. To summarise, application of national law, such as the one in question, which makes family reunification more difficult by imposing stricter conditions for a residence permit in comparison to those applicable at the time of the establishment of the Association Agreement, constitutes a new restriction within the meaning of Article 40(2) of the Association Agreement. Even though in *Demir*, the CJEU stated that such restrictions can be justified by an overriding reason in the public interest,[46] the Applicant submits that such justification is not existent in the present case. The reasoning of the latter will be explained in the suggested answer to the fourth question.

SUGGESTED ANSWER TO THE FOURTH QUESTION

26. **The Applicant respectfully submits that EU law precludes national law such as Article 3, paragraphs 4 and 5 of the FNA concerning the minimum age of spouses and literacy. In particular, the literacy and minimum age requirements are not justified by an overriding reason in the public interest and are not proportionate.**

27. By virtue of Article 3 of the FNA, the Rebmemian government enacted new, more stringent conditions for obtaining a residence permit. As the CJEU held in *Demir*, a restriction of a standstill clause "*is prohibited, unless […] it is justified by an overriding reason in the public interest, is suitable to achieve the legitimate objective pursued and does not go beyond what is necessary in order to attain it*".[51] The Applicant argues that the measures in question, i.e. the Rebmemian language literacy requirement and the minimum age requirement for spouses of non-national residents of Rebmem, do not satisfy these conditions.

Age requirement

28. Firstly, the Applicant submits that Rebmem's new age requirement constitutes **a discrimination based on nationality** and therefore **cannot be justified by an overriding reason in the public interest**. According to *travaux preparatoires* of the FNA, the Rebmemian government set the required age for spouses of applicants at over 21 in order to discourage and prevent any legitimisation of forced or sham marriages.[47] One of the reasons behind that condition was a hostile reaction of the Rebmemian public to a few instances of forced underage marriage in some of its immigrant communities.[48] The requirement was adopted even though the minimum age at which one can legally get married in Rebmem is set at 16.[49] The Applicant contends that such unequal treatment constitutes a nationality-based discrimination and therefore cannot be seen as an overriding reason in the public interest. The condition is furthermore contrary to the general principles of the EU, since the EU strives for equality and battles discrimination through several provisions, in particular Articles 2 and 3 of the Treaty on the EU (hereinafter TEU),[50] and Article 21 of the Charter.[51]

29. Secondly, should the CJEU nevertheless decide that the age requirement is justified by an overriding reason in the public interest, the Applicant claims that **the measure is not proportionate.** The CJEU has established that the measure is proportionate if it is **suitable to achieve the legitimate objective pursued and does not go beyond what is necessary in order to attain it.**[52] The Applicant contends that the age requirement, which the government imposed for the purpose of prohibition of forced or sham marriages, **is unsuitable** to achieve the objective pursued. The age requirement considers the age at which the applicants decided **to join their spouses, rather than the age at which they got married**.[53] In other words, the fact that the Rebmemian government set the age requirement for joining spouses cannot contribute to determination of voluntariness of their marriage. If Rebmem's objective was in fact to be certain that the resident permit applicants and their spouses had married voluntarily,[54] they would have considered the date of their marriage. The Applicant thus argues that the age requirement as set out in Rebmemian law cannot serve the alleged objective. Even more, in the Applicant's opinion the real intention of the measure is the reduction of the number of third country nationals (hereinafter TCN) applying for family reunification.

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[46] C-225/12 *Demir*, para. 40, Bundle, p. 191. [51] *Ibid*.
[47] CEEMC Question 2017, para. 11, Bundle, p. 6.
[48] *Ibid.*
[49] *Ibid.*
[50] Articles 2 and 3 TEU, Bundle, p. 22.
[51] Article 21 of the Charter, Bundle, pp. 42-43.
[52] C-225/12 *Demir*, para. 40, Bundle, p. 191.
[53] CEEMC Question 2017, para. 11, Bundle, p. 6.
[54] *Ibid.*

30. Moreover, the age requirement goes beyond what is necessary in order to attain the objective pursued. The Applicant argues that in order to attain the objective in question, i.e. the prevention of forced or sham marriages, individual assessment is of utmost importance, particularly since there is a possibility of family reunification. The Applicant shares the Advocate General (hereinafter AG) Mengozzi's view in *Dogan*, where he provided a detailed interpretation concerning the proportionality, stating that the measure "*is* ***not proportionate*** *if it is capable of indefinitely* ***delaying family reunification*** *in the Member State concerned and if it applies, subject to a short exhaustive list of exceptions, irrespective of any assessment of the relevant circumstances of each case*".[55] Family reunification and the best interest of a child should therefore be of primary concern. The Applicant argues that alternative, less onerous measures should be applied, e.g. promotion of education, emancipation and active participation of every family member in social life. It is blatantly disproportionate to impose an age requirement presupposing that all marriages under the age of 21 are forced marriages based only on a few such instances in Rebmem.[56] Even though in the present case the Minister of Interior can waive the age requirement,[57] the Applicant submits that this safeguard is not sufficiently defined, which can, according to AG Mengozzi's opinion in *Furkan Tekdemir*, lead to arbitrary decisions, devoid of legal certainty.[58] Furthermore, the Minister considers waiving the age requirement only in the event of special extenuating circumstances[64] and therefore does not assess whether the applicants married of their own free will in each individual case. Hence, the general restriction, i.e. the age requirement, is not mitigated at all by the completely arbitrary decision-making of the Minister, causing safeguard to be, *de facto*, an ineffective measure. The age requirement therefore goes beyond what is necessary in order to attain the alleged objective, since less onerous measures are available. *Literacy requirement*

31. Firstly, the Applicant asserts that the literacy requirement **cannot be justified by an overriding reason in the public interest**. In accordance with *travaux preparatoires* of the FNA, the alleged reason for enactment of the literacy requirement was quicker integration of applicants.[59] Rebmemian government also maintains that it was enacted due to the extreme technological development of Rebmem where all contact with official authorities takes place *via* internet.[60] Pursuant to Articles 12, 13 and 14 of the Association Agreement, Ekrut and EU agreed to be guided by certain articles[61] of the TFEU for the purpose of progressively securing the four freedoms of the European Single Market. According to *Genc*, which should be applied analogously in the present case, "*principles accepted in the context of those provisions must be extended, so far as possible*,"[62] to the nationals concerned. The Applicant argues that it would diminish the purpose of the freedom of movement of workers if, for example, EU citizens would have to learn every European language, provided they had an ambition to work in other MSs. As there are no concerns regarding integration in such cases, the Applicant contends that there is no reason to impose that obligation on TCNs either. The Rebmemian language requirement therefore cannot be justified by an overriding reason in the public interest.

32. Should the CJEU nevertheless find the literacy requirement to be justified by an overriding reason in the public interest, the Applicant submits that such condition **is not proportionate**. As was mentioned above, a measure is proportionate if it is **suitable to achieve the legitimate objective pursued and does not go beyond what is necessary in order to attain it.**[63] The Applicant argues that the condition imposed by the FNA regarding literacy requirement is not suitable to achieve the objective pursued, i.e. integration into Rebmemian society. In Rebmem, "*all contact with official authorities happens via internet; as does most shopping and other social interaction*".[64] Personal contact is hence rare, which provides little possibility for direct communication with Rebmemian nationals. Knowledge of Rebmemian therefore does not serve the purpose of integration into society, especially since communication via internet enables TCNs, who are lacking the linguistic knowledge, to use translating programmes in order to sufficiently communicate. The Applicant therefore contends that the literacy requirement is not suitable to achieve the objective of integration, since it does not enhance the possibility of integration in a country that is as technologically developed as Rebmem.

33. Furthermore, the Applicant contends that the literacy requirement goes beyond what is necessary in order to attain the objective pursued. It obliges applicants to learn a foreign language before they actually migrate to Rebmem and live there for a certain period, without considering their specific circumstances, including the possibility of a family reunification.

[55] Opinion of AG Mengozzi in C-138/13 *Naime Dogan*, para. 42, Bundle, p. 209.
[56] CEEMC Question 2017, para. 11, Bundle, p. 6.
[57] Article 3 of the FNA, CEEMC Question 2017, para. 9, Bundle, p. 6.
[58] Opinion of AG Mengozzi in C- 652/15 *Furkan Tekdemir*, para. 24, Bundle, p. 304. [64]
Article 3 of the FNA, CEEMC Question 2017, para. 9, Bundle, p. 6.
[59] CEEMC Question 2017, para. 10, Bundle, p. 6.
[60] *Ibid.*
[61] Articles 48, 49, 50, 52, 56, 58 and 65 TFEU, invoked in Articles 12-14 of a (fictional) treaty establishing an association between the European Communities and Republic of Ekrut. Bundle, pp. 12-13.
[62] C-561/14 *Caner Genc*, para. 52, Bundle, p. 284.
[63] C-225/12 *Demir*, para. 40, Bundle, p. 191.
[64] CEEMC Question 2017, para. 10, Bundle, p. 6.

The Applicant claims that the objective could be easier attained alternatively, e.g. integration courses could be offered, and language certificate could be submitted in due time, e.g. approximately one year. What is more, cognitive abilities and individual circumstances should be taken into account, particularly with regard to vulnerable persons as the Applicant in the present case, who suffers from dyslexia.[65] In addition, the quickest way to obtain a good command of any language is through participation in conversations in the authentic environment. In *Dogan*, where the German government imposed a similar condition, the CJEU stated that "*a national provision […] goes beyond what is necessary in order to attain the objective pursued, in so far as the absence of evidence of sufficient linguistic knowledge automatically leads to the dismissal of the application for family reunification, without account being taken of the specific circumstances of each case*".[66] The Applicant therefore asserts that literacy requirement, which is not subject to an individual assessment, goes beyond what is necessary to attain the objective of integration.

34. As AG Mengozzi stated in *Dogan*, while Article 7(2) of Directive 2003/86/EC (hereinafter Family Directive) enables MSs to require the potential beneficiaries of family reunification to comply with integration measures,[67] such measures cannot be applied as conditions for family reunification[68] and must be subject of a case-by-case analysis taking into account the specific circumstances of each individual case.[69] The right to family reunification should especially be considered in proceedings concerning residence permit applications, since the objective of the Family Directive is to promote family reunification, and the effectiveness thereof.[70] Literacy requirement should therefore not be applied as an absolute criterion which cannot be waived. Last but not least, the FNA does not require a specific level of knowledge of Rebmemian which affects the legal certainty of the applicants. The Applicant hence concludes that the literacy requirement is not suitable to achieve the objective of integration of TCNs and goes beyond what is necessary in order to attain it.

35. In conclusion, the Applicant submits that EU law precludes national law such as Article 3, paragraphs 4 and 5 of the FNA concerning the minimum age of spouses and literacy, since such measures are not justified by an overriding reason in the public interest and are not proportionate.

SUGGESTED ANSWER TO THE FIFTH QUESTION

36. **The Applicant respectfully submits that Article 14(5) of the Qualification Directive[71] is not compatible with Article 78(1) TFEU, Article 18 of the Charter, and Articles 1 F and 33 of the Geneva Convention.**

37. The Applicant begins by outlining that although it is true that the EU is not a contracting party to the Geneva Convention,[72] the CJEU shall indeed **accept its jurisdiction to interpret Articles 1 F and 33 of the Geneva Convention** to which the question above refers. The present case is similar to that in *El Kott*[73] where the CJEU previously accepted its jurisdiction to interpret the provisions of the Geneva Convention to which EU law made a *renvoi*.[74] It must be noted that the present request for a preliminary ruling encompasses Article 14(5) of the Qualification Directive which refers directly to Article 1 F and 33 of the Geneva Convention.

38. The Applicant contends that Article 14(5) of the Qualification Directive is not compatible with the Geneva Convention and therefore constitutes **an infringement of Article 78(1) TFEU**,[75] according to which all EU legislation, which forms the Common European Asylum System (hereinafter CEAS), shall be in accordance with the Geneva Convention. Additionally, Article 14(5) of the Qualification Directive **breaches the right to asylum pursuant to Article 18 of the Charter**, which shall be guaranteed with due respect for the Geneva Convention and in accordance with the Treaties.[76] The Qualification Directive is part of the CEAS, which is based on the **full and inclusive** application of the Geneva

[65] *Ibid*., paras. 7 and 29, Bundle, pp. 5 and 8.
[66] C-138/13 *Naime Dogan*, para. 38, Bundle, p. 222.
[67] Opinion of AG Mengozzi in C-138/13 *Naime Dogan*, para. 46, Bundle, p. 209.
[68] *Ibid*., para. 56, Bundle, p. 211.
[69] *Ibid*., para. 57, Bundle, p. 211.
[70] *Ibid*., para. 50, Bundle, p. 210.
[71] 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.
[72] Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department*, para. 4, Bundle, p. 144.
[73] C-364/11 *El Kott*, Bundle, p. 174.
[74] C-481/13 *Qurbani*, para. 28, Bundle, p. 231.
[75] Article 78(1) TFEU, Bundle, p. 31.
[76] Article 18 of the Charter, Bundle, p. 42.

Convention.[77] The CJEU has established in its case-law[78] that the Geneva Convention **constitutes the cornerstone** of the international legal regime for the protection of refugees.[85] Accordingly, the provisions of secondary legislation, in the present case **the Qualification Directive, shall be interpreted in a manner consistent with the Geneva Convention.**[79]

39. Article 14(5) of the Qualification Directive **is not compatible with** Articles 1 F and 33 of the Geneva Convention. Namely, Article 14(5) of the Qualification Directive, referring to Article 14(4) of the Qualification Directive, reads that MSs **may decide not to grant status to a refugee where such a decision has not yet been taken**, if there are **reasonable grounds for regarding a person as a danger to the security of the MS**.[80]

40. Firstly, the Applicant argues that Article 14(5) of the Qualification Directive **extends** the grounds for exclusion from refugee status beyond those enshrined in **Article 1 F of the Geneva Convention**[81] by implying a new ground for the exclusion, i.e. danger to the security of the MS. Exclusion grounds in Article 1 F of the Geneva Convention are exhaustively enumerated and, in substance, laid down in Article 12(2) of the Qualification Directive.[82] Thus, the term 'danger to the security' as a reason for not granting a refugee status under Article 14(5) of the Qualification Directive **establishes a new exclusion ground**. The Applicant emphasises that exclusion clauses of Article 1 F of the Geneva Convention should always be **interpreted in a restrictive manner** in accordance with the general principle that the exceptions should be interpreted restrictively. Moreover, neither explicitly nor implicitly do they determine a 'danger to the security' as a separate ground for the exclusion. The objective to ensure the security in a MS and maintain public order can be achieved by applying the existing grounds for exclusion from refugee status, with regard to a person whom there are serious reasons for considering as a perpetrator of (a) crimes against peace, war crimes, crimes against humanity, (b) serious non-political crimes outside the country of refuge, and (c) acts contrary to the purposes and principles of the United Nations.[83]

41. Secondly, the Applicant claims that Article 14(5) of the Qualification Directive is not compatible with **Article 33(2) of the Geneva Convention.** Article 33(2) of the Geneva Convention **does not constitute a ground for exclusion** from refugee status. It merely provides an exception to the principle of *non-refoulement* enshrined in Article 33(1) of the Geneva Convention,[84] due to, *inter alia*, a 'danger to the security' posed to the host state by a person who has **already been recognised as a refugee**. Therefore, Article 33(2) of the Geneva Convention can be clearly distinguished from Article 14(5) of the Qualification Directive, which provides that on the grounds of the notion 'danger to the security' **the refugee status may not be granted where such decision has not yet been taken**.

42. Consequently, the Applicant asserts that the notion 'danger to the security' in Article 14(5) of the Qualification Directive leads to entirely different legal consequences than in Article 33(2) of the Geneva Convention. While an individual to whom the refugee status was granted and who has later been recognised as a 'danger to the security' under Article 33(2) of the Geneva Convention can be expelled or returned, he or she **nevertheless retains a refugee status** and its benefits.[85] Article 14(5) of the Qualification Directive, on the other hand, provides that an individual **may not even be granted a refugee status** in the first place if recognised as a 'danger to the security'. It follows that incompatibility of Article 14(5) of the Qualification Directive with Article 33(2) of the Geneva Convention calls into question legal certainty for an asylum seeker whose decision on the application for refugee status is still pending or has not yet been taken.

43. Due to the explicit references to the Geneva Convention in Article 78(1) TFEU and Article 18 of the Charter, the setting of an additional ground for the exclusion from a refugee status with the notion 'danger to the security', which is not foreseen by the Geneva Convention, constitutes the infringement of Article 78(1) TFEU and Article 18 of the Charter. Namely, Article 14(5) of the Qualification Directive thereby narrows the scope of the right to asylum under Article 18 of

[77] Recital 3 of the Qualification Directive, Bundle, p. 46.
[78] Joined Cases C-57/09 and C-101/09, *Bundesrepublik Deutschland v B and D*, para. 77, Bundle, p. 126; C-354/11 *El Kott*, para. 41, Bundle, p. 181; C604/12 *H. N. v Minister for Justice, Equality and Law Reform*, para. 27, Bundle, p. 198; C-573/14 *Lounani*, para. 41, Bundle, p. 294. [85] Stipulated in Recital 4 of the Qualification Directive. Bundle, p. 46.
[79] Recital 3 of the Qualification Directive, Bundle, p. 46.
[80] Article 14(5) of the Qualification Directive, Bundle, p. 51.
[81] Article 1 F of the Geneva Convention, Bundle, pp. 310-311.
[82] Article 12 of the Qualification Directive: 'Exclusion', Bundle, p. 50.
[83] Article 1 F of the Geneva Convention, Bundle, pp. 310-311.
[84] Article 33(1) of the Geneva Convention: "*No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of […] race, religion, nationality, membership of a particular social group or political opinion.*" Bundle, p. 312.
[85] Article 33(2) of the Geneva Convention: "*The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country […]*", Bundle, p. 312.

the Charter and does not ensure the consistent interpretation of EU legislation forming CEAS with the Geneva Convention, as required by Article 78(1) TFEU.

44. The Applicant additionally explains the unsuitability of exclusion ground 'danger to the security' under Article 14(5) of the Qualification Directive. The notion '**danger to the security**' provides for a very broad interpretation and may lead to unjustified and arbitrary decisions. Given vagueness of this notion and the lack of coherent practice of MSs, the notion 'danger to the security' is being open to abuse. The case at hand demonstrates how broad the concept of 'danger to the security' is and to what result it can lead. The Applicant was a member of the political movement 'Animef' and fought for equal rights for women and female empowerment. It would therefore be unreasonable to refuse a refugee status to a person who has been struggling for fundamental rights in the country of origin. Having regard to the foregoing, an **assessment of specific facts of each individual case is essential** for determination whether there are serious reasons for considering a person to represent a 'danger to the security'.[86]

45. Furthermore, the application of Article 14(5) of the Qualification Directive is **discretionary**[87] which follows from the wording "***may decide*** *not to grant status to a refugee*". The EU legislator left wide discretionary powers to MSs under Article 14(5) of the Qualification Directive to decide whether to grant a refugee status or not. The discretion is contrary to the objective of the Qualification Directive, which is to ensure that MSs apply common criteria to identify individuals as refugees within the meaning of Article 1 of the Geneva Convention,[88] since it can result in arbitrariness when adopting decisions concerning the refugee status. Moreover, different approaches taken by the MSs might encourage **asylum shopping.**[89]

46. In view of the abovementioned, the Geneva Convention is not fully and inclusively respected by Article 14(5) of the Qualification Directive. Thus, the latter is manifestly incompatible with Article 78(1) TFEU and Article 18 of the Charter.

SUGGESTED ANSWER TO THE SIXTH QUESTION

47. **The Applicant respectfully submits that EU law, considered in the context of commitments flowing from the Geneva Convention and the Charter, does not permit the practice of EU MS authorities, allegedly based on the EU-Ekrut Statement (hereinafter Joint Statement), of sending asylum seekers to Ekrut without taking into account the applicants' arguments that Ekrut is unable to guarantee their fundamental rights.**

48. The Applicant maintains that practice of collective returns of asylum seekers back to Ekrut constitutes a serious violation of the values of the EU as established in Article 2 TEU, fundamental rights determined by Articles 1, 4, 18, 19 and 47 of the Charter, and Article 33 of the Geneva Convention.

49. Due to massive influx of refugees, Ekrut is unable to process applications for international protection and is facing internal difficulties in providing adequate administration, decent accommodation and living conditions for asylum seekers and refugees.[97] Reception conditions for asylum seekers, shortcomings in the asylum procedure and exposure to such conditions **amount to the degrading treatment within the meaning of Article 4 of the Charter**.[98] *En masse* transfer causes an enormous number of people to live in degrading conditions and inflicts the feeling of arbitrariness, inferiority, frustration and anxiety,[90] which **disrespects the person's dignity enshrined in Article 1 of the Charter read in conjunction with Article 4 of the Charter**.[91]

50. Support for this view can be found in the CJEU's observations in *NS*, where it was stated that "*MSs […] may not transfer an asylum seeker to the MS […] where they cannot be unaware that* ***systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers*** *in that MS amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter*".[101] The presumption that all MSs will treat asylum seekers in compliance with fundamental rights, which is based on the principle of mutual confidence[102] between MSs, is rebuttable.[92] The rebuttable presumption can be applied *a fortiori* in the case of a non-MS, such as Ekrut, in relation to which the mutual confidence that exists between MSs

[86] Joined Cases C-57/09 and C-101/09 *Bundesrepublik Deutschland v B and D*, para. 94, Bundle, p. 127.
[87] *Ibid.*, para 74, Bundle, p. 125.
[88] Recital 24 of the Qualification Directive, Bundle, p. 46.
[89] Joined Cases C-144/10 and C-493/10 *NS v Secretary of State for the Home Department*, para. 79, Bundle, p. 153.
[97] CEEMC Question 2017, para. 17, Bundle, p. 7. [98] Article 4 of the Charter, Bundle, p. 41.
[90] *M.S.S. v. Belgium and Greece* (ECtHR 2011), para. 233, Bundle, p. 334, invoked by the CJEU in Joined Cases C-411/10 and C-293/10 *NS v Secretary of State for the Home Department*, paras. 88-89, Bundle, p. 154.
[91] Article 4 of the Charter: "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*" Bundle, p. 41.
[101] Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department*, para. 106, Bundle, p. 156. [102] *Ibid*., para. 83, Bundle, p. 153.
[92] *Ibid*., para. 104, Bundle, p. 156.

cannot be established. Hence, it cannot be presumed that Ekrut respects fundamental human rights, including the rights set forth in the Geneva Convention and the Charter. Therefore, the Applicant claims that the competent authorities should assess the functioning of the asylum system in Ekrut and evaluate the risks of ill-treatment and potential breaches of fundamental rights before adopting a decision on return of migrants to Ekrut.

51. Furthermore, the Joint Statement does not explicitly state that applications for asylum will be processed individually,[93] which should be considered as a breach of Article 18 of the Charter. The latter stipulates that the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention.[105] The Applicant asserts that the right to asylum consists of, *inter alia*, protection from *refoulement* and assessment of an asylum claim in fair and efficient asylum proceedings.

52. Massive transfer of migrants to Ekrut constitutes an **infringement of Article 19(1) of the Charter**, which **prohibits collective expulsions**. The Applicant contends that Article 19(1) of the Charter requires the authorities to make an individual assessment of person's situation before expulsion. Thus, each case must be individually assessed before a return to Ekrut is carried out. The Joint Statement reads that "***all*** *new irregular migrants who cross from Ekrut onto to the territory of the EU* ***will be returned to Ekrut***"[94] which contradicts the prohibition of collective expulsion set out by the Charter as well as the wording of the Joint Statement itself as it states "*thus excluding any kind of collective expulsion*".[95] In practice, the implementation of the Joint Statement results in the collective return of migrants which does not allow for the required individual assessment of each application.[96] It follows that in the present case the individual assessment as required by Article 19(1) of the Charter has not been conducted.

53. Moreover, the return to Ekrut **contradicts to the principle of *non-refoulement***, a cardinal protection principle enshrined in **Article 33 of the Geneva Convention**,[97] to which no reservations are permitted.[98] The principle of *non-refoulement* is to be recognised as a rule of customary international law, making it universally binding on all States.[111] According to *Brita GmbH*,[99] the EU is bound by the provisions of the Geneva Convention in so far as they correspond to obligations under rules of customary international law.[100] Considering the circumstances presented in paragraph 49 above, the asylum procedure in Ekrut does not ensure that individuals sent back to Ekrut would not be returned to their country of origin, where they could be subject of a well-founded fear of persecution. Additionally, returning the migrants to Ekrut seriously **violates Article 19(2) of the Charter**, i.e. the so-called broadened principle of *non-refoulement*, which provides for the **protection in the event of removal, expulsion or extradition**, where there is a serious risk that an individual would be subjected to inhuman or degrading treatment.[101] The scope *rationae personae* of Article 19(2) of the Charter is even wider than that of Article 33 of the Geneva Convention,[102] as it not only applies to persons with a well-founded fear of persecution but to all individuals in need of international protection. Article 33 of the Geneva Convention, as a principle of customary international law, and Article 19(2) of the Charter are therefore not respected.

54. Further, it should be observed that Articles 4 and 19(2) of the Charter contain rights which correspond to the rights guaranteed by **Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms** (hereinafter ECHR). Pursuant to Article 52(3) of the Charter and its Preamble, the meaning and scope of rights determined by Articles 4 and 19(2) of the Charter are to be the same as those laid down by the ECHR.[103] Moreover, Article 6(3) TEU reads that fundamental rights, as guaranteed by the ECHR, shall constitute general principles of EU law.[104] The CJEU stated in *Elgafaji* that when interpreting the general principles in the EU legal order, the case-law of the European

[93] (Fictional) press release dated 1 May 2016 of the European Council, Bundle, p. 11. [105] Article 18 of the Charter, Bundle, p. 42.
[94] (Fictional) press release dated 1 May 2016 of the European Council, Bundle, p. 11.
[95] *Ibid.*
[96] CEEMC Question 2017, para. 29, Bundle, p. 9.
[97] Article 33 of the Geneva Convention: "*No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of […] race, religion, nationality, membership of a particular social group or political opinion*.", Bundle, p. 312.
[98] Article 16 of the UNHCR note on international protection (A/AC.96/951), invoked in *M.S.S. v. Belgium and Greece* (ECtHR 2011), Bundle, p. 321. [111] Position of the United Nations High Commissioner for Refugees (UNHCR), Article 16 of the UNHCR note on international protection (A/AC.96/951), invoked in *M.S.S. v. Belgium and Greece* (ECtHR 2011), Bundle, p. 321.
[99] C-386/08 *Brita GmbH*, Bundle, p. 103.
[100] *Ibid*., para. 42, Bundle, p. 110.
[101] Article 19(2) of the Charter states: "*No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other* ***inhuman or degrading treatment*** *or punishment.*" Bundle, p. 42.
[102] Article 33 of the Geneva Convention prohibits the *refoulement* of anyone who fulfils the criteria of Article 1 of the Geneva Convention, and thus is a refugee under the Geneva Convention, i.e. "*a person with a well-founded fear of persecution on the basis of race, religion, nationality, membership of a particular social group or political opinion*". Bundle, p. 312.
[103] Article 52(3) of the Charter, Bundle, p. 44.
[104] Article 6(3) TEU, Bundle, p. 23.

Court of Human Rights (hereinafter ECtHR) shall be taken into consideration.[105] The situation in present case is similar to the situation in the ECtHR's case in *M.S.S.*,[106] where Article 3 of the ECHR had been infringed, first, by exposing individual to the risks arising from the deficiencies in the asylum procedure, and second, by knowingly exposing him to living conditions that amounted to degrading treatment.[107] Since Articles 4 and 19(2) of the Charter shall be read in conjunction with the case-law of the ECtHR and since the judicial dialog between the CJEU and the ECtHR is to be respected, the practice of MSs regarding collective return to Ekrut is prohibited under Articles 4 and 19(2) of the Charter.

55. Moreover, the Applicant's transfer back to Ekrut took place immediately after the rejection of a refugee status,[121] which constitutes **a breach of the right to an effective remedy guaranteed by Article 47 of the Charter**[122] due to **the lack of a suspensive effect of an appeal** brought against the Asylum Decision.[108] Articles 19(2) and 47 of the Charter require a remedy with a suspensive effect against a return decision whose enforcement is likely to expose an individual to a serious risk of being subjected to, *inter alia*, inhuman or degrading treatment contrary to Article 4 of the Charter and Article 3 of the ECHR.[109] As follows from the situation in Ekrut, there are substantial grounds for believing that returned migrants will be exposed to a real risk of inhuman or degrading treatment contrary to Article 4 of the Charter. Therefore, **the appeal shall enable a suspension of enforcement**[110] **of a return decision**, which would minimise the risk of erroneous decisions and the risk of applicants being returned before such decisions would have been repealed.

56. Finally, Ekrut cannot be considered as a **'European safe third country'** pursuant to Article 36(2) of Directive 2005/85/EC.[111] In the Applicant's opinion, by using the 'up to date information' methodology to select all the relevant facts and circumstances in Ekrut published by national, international and non-governmental organisations, the decisionmaking authorities have to take into account the credible information to decide that the country is safe. The Applicant contends that Ekrut's asylum procedure does not comply with the provision of Article 36(2)(b) of Directive 2005/85/EC, according to which "*the existence of an asylum procedure prescribed by law*" is one of the prerequisites to consider a country to be safe. In particular, Ekrut had ceased to process applications for international protection.[112] What is more, as the CJEU has held in *NS*, "*a third country can only be considered as a 'safe third country' where not only has it ratified the Geneva Convention and the ECHR under Article 36(2)(a)(c) but it also observes the provisions thereof*".[113] The above presented infringements of the Charter and of the Geneva Convention give a clear indication that Ekrut is not a 'safe third country'.

57. The Applicant thus concludes that due to violations of Articles 1, 4, 18, 19 and 47 of the Charter and Article 33 of the Geneva Convention, the practice of sending asylum seekers to Ekrut is not permitted under EU law.

[105] C-465/07 *Elgafaji*, para. 28, Bundle, p. 100.
[106] ECtHR Judgment of 21 January 2011, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Bundle, p. 316.
[107] Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department*, para. 88, Bundle, p. 154.
[121] CEEMC Question 2017, para. 20, Bundle, p. 7. [122] Article 47 of the Charter, Bundle, p. 44.
[108] CEEMC Question 2017, para. 20, Bundle, p. 7.
[109] C-239/14 *Abdoulaye Amadou Tall*, paras. 58-59, Bundle, p. 275.
[110] *Ibid*., para. 54.
[111] Prior version of the Procedural Directive (Article 39 of Directive 2013/32/EU), Bundle, p. 148.
[112] CEEMC Question 2017, para. 17, Bundle, p. 7.
[113] Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department*, para. 102, Bundle, p. 155.

Central and Eastern European Moot Competition 2017

MEMORANDUM FOR RESPONDENT

UNIVERSITY *OF* LJUBLJANA

FACULTY OF LAW

APPLICANT

Alfina

against

RESPONDENT

Rebmemian Immigration Authority

On behalf of the Respondent

Aljoša Aleksovski

Sara Ermenc

Urška Rotar

Špela Zupančič

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LIST OF ABBREVIATIONS

AG	Advocate General
Association Agreement	EEC-Ekrut Association Agreement
Joint Statement	EU-Ekrut Joint Statement
Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
e.g.	exempli gratia
EU	European Union
Family Directive	Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification
FNA	Foreign National Act
Geneva Convention	Geneva Convention (UN Convention of 1951 Relating to Status of Refugees)
i.e.	id est
IAT	Immigration Appeal Tribunal
MS	Member State
Qualification Directive	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 form for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted
p.	page
pp.	pages
para.	paragraph
paras.	paragraphs
Procedural Directive	Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)
RIA	Rebmemian Immigration Authority
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TCN	Third Country National

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1. Judgement of 17 September 1997, *Dorsch Consult*, C-54/96, ECLI:EU:C:1997:413, Appears in ¶¶ 2, 3 of the Memorandum
2. Judgement of 23 March 2004, *France v Commission*, C-233/02, ECLI:EU:C:2004:173, Appears in ¶ 46 of the Memorandum
3. Judgement of 31 May 2005, *Syfait*, C-53/03, ECLI:EU:C:2005:333, Appears in ¶¶¶¶ 2, 3, 5, 6 of the Memorandum
4. Judgement of 24 February 2005, *Brita GmbH*, C-386/08, ECLI:EU:C:2010:91, Appears in ¶ 16 of the Memorandum
5. Judgement of 9 November 2010, *B and D*, Joined cases C-57/09 and C-101/09, ECLI:EU:C:2010:661, Appears in ¶ 38 of the Memorandum

6. Judgement of 28 July 2011, *Samba Diouf*, C-69/10, ECLI:EU:C:2011:524, Appears in ¶ 13 of the Memorandum
7. Judgement of 21 December 2011, *NS v Secretary of State for the Home Department and M. E. and Others*, Joined cases C-411/10 and 493/10, ECLI:EU:C:2011:865, Appears in ¶ 37 of the Memorandum
8. Judgement of 31 January 2013, *H.I.D. v Refugee Applications Commissioner*, C-175/11, ECLI:EU:C:2013:45, Appears in ¶¶¶¶ 2, 3, 4, 13 of the Memorandum
9. Judgement of 7 November 2013, *Demir*, C-225/12, ECLI:EU:C:2013:725, Appears in ¶¶¶¶¶ 17, 19, 21, 24, 28 of the Memorandum
10. Order of 13 February 2013, *Merck Canada Inc. v Accord Healthcare Ltd and Others*, C-555/13, ECLI:EU:C:2014:92, Appears in ¶¶ 2, 3 of the Memorandum
11. Judgement of 12 June 2014, *Ascendi*, C-377/13, ECLI:EU:C:2014:1754, Appears in ¶¶ 2, 3 of the Memorandum
12. Judgement of 10 July 2014, *Naime Dogan*, C-138/13, ECLI:EU:C:2014:2066, Appears in ¶¶¶ 22, 23, 29of the Memorandum
13. Judgement of 17 December 2015, *Abdoulaye Amadou Tall*, C-239/14, ECLI:EU:C:2015:824 , Appears in ¶¶ 8, 52 of the Memorandum
14. Judgement of 12 April 2016, *Caner Genc*, C-561/14, ECLI:EU:C:2016:247, Appears in ¶ 27 of the Memorandum

OPINIONS OF ADVOCATES GENERAL

1. Opinion of Advocate General Mengozzi delivered on 30 April 2014 in *Naime Dogan*, C-561/14, ECLI:EU:C:2014:287, Appears in ¶ 25 of the Memorandum
2. Opinion of Advocate General Mengozzi delivered on 15 December 2016 in *Furkan Tekdemir*, C-652/15, ECLI:EU:C:2016:960, Appears in ¶¶¶ 2, 18, 27 of the Memorandum
3. Opinion of Advocate General Sharpston delivered on 26 November 2015 in *Council v Commission*, C-660/13, ECLI:EU:C:2015:787, Appears in ¶ 46 of the Memorandum
4. Opinion of Advocate General Cruz Villalón delivered on 1 March 2011 in *Samba Diouf*, C-69/10, ECLI:EU:C:2011:102, Appears in ¶ 12 of the Memorandum

EUROPEAN COURT OF HUMAN RIGHTS

1. ECtHR Judgement of 21 January 2011, *M.S.S. v Belgium and Greece*, Application No. 30696/09, Appears in ¶¶ 13, 49 of the Memorandum

SUGGESTED ANSWER TO THE FIRST QUESTION

1. **The Respondent respectfully submits that a national body which decides on matters of immigration and international protection, such as the Rebmemian Immigration Appeals Tribunal (hereinafter IAT), is not a court or tribunal entitled to submit references to the Court of Justice of the European Union (hereinafter CJEU) under Article 267 of the Treaty on the Functioning of the European Union (hereinafter TFEU).**

2. Firstly, the Respondent contends that the IAT **does not meet the requirement of permanent character**,[114] which is one of the factors established by the CJEU in determining whether a body making a reference is a court or tribunal within the meaning of Article 267 TFEU. The Rebmemian authorities established the IAT by adopting the 2013 Foreign Nationals Act (hereinafter FNA) due to the large number of applications for international protection and residence permit[115] as a consequence of unprecedented migration crisis in the European Union (hereinafter EU).[116] It follows that the IAT was created solely to deal with large amount of applications due to the temporary crisis in Rebmem and shall not be considered as a permanent body.

3. Secondly, the Respondent claims that the IAT **does not satisfy the criteria of independence**[117] in order to be regarded as a court or tribunal under Article 267 TFEU. In this respect, the characteristics in the present case demonstrate that the IAT is to be considered as an *ad hoc* administrative body forming part of the executive branch of power and thus cannot be regarded as independent *per se*, as opposed to the judicial branch, represented by, *inter alia*, the Rebmemian Administrative Court. Since two of three members of the IAT's panels are appointed from the Ministry of the Interior (hereinafter Ministry),[5] the IAT is linked to the organisational structure of the Ministry. The composition of the IAT therefore entails a significant degree of involvement on the part of the Rebmemian administrative authorities. In other words, the decisions of the IAT are essentially influenced by the policy of the Ministry, since previous work at the Ministry of two members of the panel most plausibly affects the decision-making process at the IAT. Moreover, the officials normally return back to their previous position at the Ministry if their fixed term of service is not renewed by the decision of the Minister,[118] which further supports the link between the Ministry and the IAT.

4. As the CJEU held in *H.I.D.*,[119] "*the concept of independence, which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision*".[120] The IAT reviews the decisions of the Rebmemian Immigration Authority (hereinafter RIA),[121] which are adopted in accordance with the policy and guidelines determined by the Ministry. Since the members of its panels are seconded from the Ministry, the IAT **cannot operate as a clearly distinct third party**. In light of the foregoing, the IAT cannot represent an independent authority due to the links between both the RIA and the IAT with the Ministry, as explained above.

5. Thirdly, the IAT's decisions **are not of a judicial nature.** According to *Syfait*,[122] a national body may refer a question to the CJEU if it is called upon to give a judgment in proceedings intended to lead to a decision of a judicial nature.[123] The IAT's decisions may be judicially reviewed by the Rebmemian Administrative Court.[124] The Respondent argues that the statistics compiled by *pro bono* litigator regarding the appeals to the administrative court cannot be relied on, since they are not official.[125] The president of the IAT certifies the appeals to the administrative court when they are admissible on the basis of the 'general interest of the law'.[126] The Respondent asserts that since the requirement of 'general interest of the law' is formulated broadly, it covers wide range of legal issues and the appeals before the administrative court are readily accessible. In light of the foregoing, the IAT's administrative decisions do not lead to decisions of a judicial nature and it is therefore for the Rebmemian Administrative Court to determine whether to refer a question to the CJEU for a preliminary ruling.

6. It may be true that some of the remaining criteria established by the CJEU for determination whether a referring body is a court or tribunal under Article 267 TFEU are met. However, the Respondent contends that independence is a predominant factor outweighing the existence of any other criterion in such an assessment. As it follows from the

[114] C-54/96 *Dorsch Consult*, para. 23, Bundle, p. 69; C-53/03 *Syfait*, para. 29, Bundle, p. 82; C-175/11 *H.I.D. v Refugee Application Commissioner*, para. 83, Bundle, p. 170; C-377/13 *Ascendi*, para. 23, Bundle, pp. 224-225; C-555/13 *Merck Canada Inc. v Accord Healthcare Ltd*, para. 16, Bundle, pp. 234-235.
[115] CEEMC Question 2017, para. 25, Bundle, p. 8.
[116] Opinion of AG Mengozzi in C-652/15 *Furkan Tekdemir*, para. 17, Bundle, p. 303.
[117] C-54/96 *Dorsch Consult*, para. 23, Bundle, p. 69; C-53/03 *Syfait*, para. 29, Bundle, p. 82; C-175/11 *H.I.D. v Refugee Application Commissioner*, para. 83, Bundle, p. 170; C-377/13 *Ascendi*, para. 23, Bundle, pp. 224-225; C-555/13 *Merck Canada Inc. v Accord Healthcare Ltd*, para. 16, Bundle, pp. 234-235. [5] CEEMC Question 2017, para. 26, Bundle, p. 8.
[118] *Ibid.*
[119] C-175/11 *H.I.D. v Refugee Application Commissioner*, Bundle, p. 159.
[120] *Ibid.*, para. 95, Bundle, p. 171.
[121] CEEMC Question 2017, para. 26, Bundle, p. 8.
[122] C-53/03 *Syfait*, Bundle, p. 78.
[123] *Ibid.*, para. 29, Bundle, p. 82.
[124] CEEMC Question 2017, para. 28, Bundle, p. 8.
[125] *Ibid.*
[126] *Ibid.*

reasoning in *Syfait*,[127] the CJEU denied its jurisdiction to answer the questions referred by the appeal tribunal where it found that the referring body has been too closely connected with the administrative authority on whose decisions the tribunal rules. To summarise, the IAT shall not be regarded as a court or tribunal entitled to refer questions to the CJEU pursuant to Article 267 TFEU.

SUGGESTED ANSWER TO THE SECOND QUESTION

7. **The Respondent respectfully submits that the absence of an oral hearing procedure before the Rebmemian IAT does not 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 (hereinafter Procedural Directive) and of Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter the Charter).**

8. At the outset, it should be noted that Article 47 of the Charter provides the right to an effective remedy and to a fair trial,[128] while Article 46 of the Procedural Directive[129] represents a concretisation of the former, providing specific safeguards in proceedings for granting international protection.[130] The Respondent therefore submits that in order to determine the scope of the remedy provided for in Article 46 of the Procedural Directive, it must be read consistently with Article 47 of the Charter.

9. The Respondent argues that in proceedings before the IAT an oral hearing is not a prerequisite for the compliance with the guarantees provided by the respective articles, since the applicants *(i)* have the opportunity to submit all relevant information and facts in writing, *(ii)* and have access to professional legal counselling. *(iii)* Should an oral hearing be obligatory, the applicants' right to deal with the case within a reasonable period of time would be greatly diminished. Nevertheless, an oral hearing can still be held, if the IAT's panel finds it necessary. *(iv)* In addition, neither the former[131] nor the recast[132] Procedural Directive stipulates an oral hearing as a prerequisite.

10. Firstly, the Respondent claims that the procedure before the IAT provides for a full and *ex nunc* examination of both facts and points of law as required by Article 46 of the Procedural Directive. This requirement implies that the IAT should rely on facts accessible at the time of the decision of the RIA, as well as on all the events and facts that occurred thereafter.

    The IAT relies on information provided in the RIA's case file and on the initial written submissions provided by the applicants who request a review of the RIA's administrative decision.[133] The written submissions **enable the applicants to present the potential change of facts or any other circumstances the applicants deem relevant**. According to Article 46(3) of the Procedural Directive, an examination of the need for international protection shall be carried out pursuant to Directive 2011/95/EU (hereinafter Qualification Directive).[134] Article 4(1) of the Qualification Directive stipulates that Member States (hereinafter MSs) may consider it a duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection.[135] In light of the foregoing, the Respondent argues that it is the applicants' duty to present all their assertions in the initial written submissions, which enable the IAT to conduct a full and *ex nunc* examination. Hence, an oral hearing would not contribute to a more detailed assessment.

11. Secondly, the Respondent contends that the applicants have access to **professional legal counselling** that helps them elaborate their written submissions, which minimises the need for an oral hearing. The Applicant in the present case relied on advice of a *pro bono* litigator,[136] which is consistent with Article 47(3) of the Charter[137] and Recital 25 of the Procedural Directive.[138] The latter requires MSs to provide free legal assistance and representation on request. The Respondent argues that the objective of such assistance is primarily the preparation of the submissions. The applicants are therefore enabled to provide the IAT with all relevant new information that might help their case, which minimises the chance of leaving important evidence and assertions out of the written submission.

12. Thirdly, it should be borne in mind that **an oral hearing is indeed held** if the panel of the IAT is of the opinion that information provided is not sufficient to adopt the decision.[27] The Respondent submits that the IAT holds an oral hearing

[127] C-53/03 *Syfait*, paras. 30-34, Bundle, pp. 82-83.
[128] Article 47 of the Charter, Bundle, pp. 43-44.
[129] Article 46 of the Procedural Directive, Bundle, pp. 52-53.
[130] C-239/14 *Abdoulaye Amadou Tall*, para. 51, Bundle, p. 275.
[131] Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status used to provide minimum standards.
[132] 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.
[133] CEEMC Question 2017, para. 27, Bundle, p. 8.
[134] Article 46(3) of the Procedural Directive, Bundle, p. 53.
[135] Article 4(1) of the Qualification Directive, Bundle, p. 46.
[136] CEEMC Question 2017, para. 24, Bundle, p. 8.
[137] Article 47(3) of the Charter, according to which "*legal aid should be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice*". Bundle, pp. 43-44.
[138] Recital 25 of the Procedural Directive, Bundle, p. 52. [27]
CEEMC Question 2017, para. 27, Bundle, p. 8.

when it recognises that it is essential in order to provide a full and *ex nunc* examination of both facts and points of law. Since the IAT was established particularly 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**,[139] it would be redundant to impose an obligation on the IAT to hold an oral hearing in every case and not to leave that decision to the panel. Such measure would greatly diminish the expediency of the proceedings, which is one of the primary principles in procedures for international protection.[140] EU strives for **the efficient migration policy**,[30] aiming for fair treatment of migrants in order **to ensure stable living conditions for them as soon as possible and not to keep the applicants in suspense**. Extension of the proceedings that an absolute right to an oral hearing would bring, could lead to a lack of space in asylum centres, which would consequently lead to higher expenses for a migration policy in MS. Moreover, according to current trends, the public is becoming increasingly intolerant towards migrants, which resulted in numerous violent conflicts across Europe. Furthermore, according to Recital 18 of the Procedural Directive,[141] it is in the interests of both the MS and the applicants that the decision is adopted as soon as possible, without prejudice to an adequate and complete examination being carried out. An oral hearing is therefore not necessary, since it generally prolongs proceedings, particularly when all facts can be equally presented through written submissions. In light of the foregoing, the requirement to deal with a case within a reasonable period of time is a key instrument to accomplish the objective to respect the fundamental right to a fair trial.[142]

13. Fourthly, the Respondent submits that it follows from the legislative development regarding the Procedural Directive that an oral hearing is not necessary to satisfy the right to an effective remedy and to a fair trial. Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status used to provide minimum standards that did not encompass an oral hearing.[143] The said directive was later **repealed** by the Procedural Directive, which now sets out common standards for proceedings for international protection and thus minimises the discretionary power of MSs in this regard and **likewise does not mention the need for an oral hearing.** What is more, according to the European Commission's proposal for adoption of the Procedural Directive, these currently applicable common standards are consistent with the case-law regarding effective judicial protection.[34] The Respondent therefore contends that the right to an oral hearing would have been included in the new Procedural Directive should the legislator deemed it necessary to satisfy the right to an effective remedy.

14. The Respondent concludes that the absence of an oral hearing procedure before the Rebmemian IAT does not constitute a breach of Article 46 of the Procedural Directive and of Article 47 of the Charter. The proceedings before the IAT respect the right to an effective remedy and to a fair trial, since the IAT adopts a full and *ex nunc* examination of both facts and points of law. The applicants are provided with the possibility of free legal aid that helps them elaborate their submissions, while there is also an option of an oral hearing if the panel of the IAT decides that information provided before it does not suffice to adopt a decision.

SUGGESTED ANSWER TO THE THIRD QUESTION

15. **The Respondent respectfully submits that it is compatible with Article 40 of the Association Agreement, to apply national law, such as Article 3 of the FNA, 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 (hereinafter Association Agreement).**

16. At the outset, the Respondent contends that Association Agreement is **subject to interpretation of the CJEU** under Article 267 TFEU.[144] Association agreements are international agreements between the EU and a third state, which are concluded on behalf of the EU by the Council in line with Articles 217 and 218 TFEU.[145] According to the CJEU judgment in *Brita GmbH*,[146] they constitute an act of one of the institutions of the Union, which makes them an integral part of the legal order of the EU and subject to interpretation of the CJEU through the preliminary procedure.[147]

[139] *Ibid*., para. 25.
[140] Opinion of AG Cruz Villalon in C-69/10 *Samba Diouf*, para. 54, Bundle, p. 139.
[30] Article 79 TFEU, Bundle, p. 32.
[141] Recital 18 of the Procedural Directive provides the same wording as the first sentence of Recital 11 of Directive 2005/85/EC, which was replaced by the former; Opinion of AG Cruz Villalon in C-69/10 *Samba Diouf*, para. 6, Bundle, p. 132.
[142] CEEMC Question 2017, para. 25, Bundle, p. 8.
[143] C-69/10 *Samba Diouf*, para. 29; cited in C-175/11 *H.I.D. v Refugee Application Commissioner*, para. 63, Bundle, p. 168.
[34] *M.S.S. v Belgium and Greece*, para. 85, Bundle, p. 324.
[144] Article 267 TFEU, Bundle, p. 37.
[145] Articles 217 and 218 TFEU, Bundle, p. 33.
[146] C-386/08 *Brita GmbH*, Bundle, p. 103.
[147] *Ibid*., para. 39, Bundle, p. 109.

17. It is true that Article 40 of the Association Agreement[148] represents the so-called 'standstill clause', which generally prohibits the introduction of any new national measures that could render exercise of an economic freedom less attractive and more restrictive in comparison to conditions that applied when the Association Agreement entered into force.[149]

However, **the CJEU held in *Demir*[41] that the application of such standstill clause is not absolute. Namely, a MS may adopt a new and more stringent measure, if it is justified "*by an overriding reason in the public interest, is suitable to achieve the legitimate objective pursued and does not go beyond what is necessary in order to attain it*".**[150]

18. The Respondent claims that the FNA, including Article 3 thereof, was enacted **due to the influx of migrants in recent years**.[151] Since the number of migrants in Rebmem increased, Rebmemian government decided to effectively manage migration flows, which is also one of the main aims of the EU.[152] Namely, Article 79(1) TFEU reads that "*the Union shall develop a common immigration policy aimed at ensuring, at all stages, the **efficient management of migration flows**, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings*".[153] The aim behind the adoption of the FNA corresponds to the objective pursued in *Furkan Tekdemir*,[154] where Advocate General (hereinafter AG) Mengozzi stated that "*seeking efficient management of migration flows is one of the objectives of the common immigration policy referred to in Article 79(1) TFEU and it is not, as such, contrary to the objective of the EEC-Turkey Association Agreement.*"[155] Furthermore, AG Mengozzi argued that "*it would be ill-advised, […] for the Court to deny a MS the possibility […] of invoking the pursuit of an objective, European Union itself is desperately trying to achieve*".[156]

19. To conclude, Article 3 of the FNA sets out new conditions for obtaining a residence permit, namely that *(i)* the first application for a residence permit must be made from abroad, through Rebmemian's diplomatic services, *(ii)* the applicant must show evidence that he or she is literate in Rebmemian, and *(iii)* the spouse of the applicant must be over the age of 21.[157] The Respondent argues that even if the said requirements are in fact more stringent, they are compatible with Article 40 of the Association Agreement and do not constitute new restrictions prohibited by it as they pass the test set in *Demir*.[158] The reason why paragraphs 4 and 5 of Article 3 of the FNA are compatible with Article 40 of the Association Agreement will be explained in the suggested answer to the fourth question.

SUGGESTED ANSWER TO THE FOURTH QUESTION

20. **The Respondent respectfully submits that EU law does not preclude national law such as Article 3, paragraphs 4 and 5 of the FNA concerning the minimum age of spouses and literacy.**

21. Initially, it should be recalled that the CJEU held in *Demir*[159] that new restrictions of standstill clause are "*prohibited, unless […] it is justified by an overriding reason in the public interest, is suitable to achieve the legitimate objective pursued and does not go beyond what is necessary in order to attain it*".[160] The Respondent argues that Rebmemian measures, i.e. the Rebmemian language literacy requirement and the minimum age for spouses of non-national residents of Rebmem, satisfy these conditions.

Age requirement

22. Firstly, the Respondent contends that the minimum age requirement is **justifiable by an overriding reason in the public interest**. The minimum age at which applicants are eligible to obtain a residence permit in Rebmem is set at 21.[161] That requirement was introduced by the FNA in order to **discourage and prevent any legitimisation of forced or sham marriages** involving the main applicant for a residence permit.[162] The objective behind such a requirement is therefore similar to that in *Dogan*,[163] where the CJEU stated that "*the prevention of forced marriages […] can constitute overriding reason in the public interest*".[164]

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[148] Due to the similarity of applicable Articles of EEC-Ekrut Association Agreement to EEC-Turkey Association Agreement, case-law on the interpretation of provisions of the latter will be applied analogously to the former.
[149] C-225/12 *Demir*, para. 33, Bundle, p. 191.
[41] *Ibid.*, Bundle, p. 186.
[150] *Ibid.*, para. 40, Bundle, p. 191.
[151] CEEMC Question 2017, para. 8, Bundle, p. 6.
[152] Article 79(1) TFEU, Bundle, p. 32.
[153] *Ibid.*
[154] Opinion of AG Mengozzi, C-625/15 *Furkan Tekdemir*, Bundle, p. 300.
[155] *Ibid.*, para. 17, Bundle, p. 303.
[156] *Ibid.*
[157] CEEMC Question 2017, para. 9, Bundle, p. 6.
[158] C-225/12 *Demir*, para. 40, Bundle, p. 191.
[159] *Ibid*, Budnle, p. 186
[160] C-225/12 *Demir*, para. 40, Bundle, p. 191.
[161] CEEMC Question 2017, para. 9, Bundle, p. 6.
[162] *Ibid.*, para. 11.
[163] C-138/13 *Naime Dogan*, Bundle, p. 216.
[164] *Ibid.*, para. 38, Bundle, p. 222.

23. According to Article 3 of the Treaty on European Union (hereinafter TEU), which lays down that one of the aims of the EU is to **promote its values, including the promotion of equality between women and men**.[165] This is one of **the main issues with forced marriages** since in most cases victims are women. This value is also a foundation of Rebmem's legal order, which is apparent from hostile reactions of its public against the few instances of forced underage marriages in some of its immigrant communities.[166] Since maintenance of law and order is not conferred upon the EU,[59] legislative reaction, as enactment of the FNA, is in Rebmem's competence. The objective behind such requirement is therefore **compatible with EU primary law**, while also being in accordance with the case-law[167] of the CJEU. The Respondent hence argues that the age requirement is justifiable by an overriding reason in the public interest.

24. Secondly, the Respondent asserts that the minimum age requirement is a proportionate measure. The CJEU has established that a measure is proportionate if it is **suitable to achieve the legitimate objective pursued and does not go beyond what is necessary in order to attain it.**[168] The Respondent submits that the age requirement is a suitable measure. Rebmem essentially imposed it in order to avoid the abuse of rules on family reunification with regard to forced marriages.[169] The Respondent argues that the respective requirement enables spouses to make decisions voluntarily, since at the age of 21 they are presumed to obtain sufficient independence to resist forced marriages or at least report them to the authorities. Moreover, such measure renders forced marriages less attractive as it requires sponsors, who wish to work in Rebmem, to wait for their (underage) spouses until they reach the required age.

25. The age requirement also does not go beyond what is necessary to attain the objective pursued, i.e. **the prevention and discouragement** "***of any legitimisation of forced or sham marriages*** *involving the main applicant for a residence permit.*"[170] The Respondent argues that in order to satisfy that objective, **forced marriages shall be identified before applicants obtain their residence permit**, which is achieved by including the age requirement as one of the conditions for obtaining a residence permit. Family reunification of spouses under the age of 21 can be authorised if sufficient evidence of voluntariness of a marriage is presented before the Minister of the Interior, who can waive the applicability of the age requirement in the event of special extenuating circumstances.[171] Due to such power, the Minister can take into consideration each specific case and decide whether to waive the applicability of certain requirements after assessing specific circumstances of each applicant. The individual assessment is what differentiates the present case from the one in *Dogan*, where AG Mengozzi[172] stated that a measure is not proportionate if it lacks assessment of the relevant circumstances of each case.[173] Taking into consideration all the foregoing arguments, the Respondent contends that the minimum age requirement is a proportionate measure.

26. The Respondent concludes that EU law does not preclude the minimum age requirement such as the one set out in Article 3 of the FNA, as this requirement *(i)* is an implementation of EU secondary law and *(ii)* has the objective to discourage and prevent any legitimisation of forced or sham marriages. The objective pursued by the age requirement *(iii)* constitutes an overriding reason in the public interest and the measure imposing such new requirement *(iv)* provides for an individual assessment.

Literacy requirement

27. Firstly, the Respondent claims that the literacy requirement is justifiable by an overriding reason in the public interest. It is set as an important and indispensable skill for integration into extremely technologically developed Rebmemian society.[174] The CJEU has held in *Genc*[175] that the objective of ensuring the successful integration of third country nationals (hereinafter TCN) in the MS concerned, may constitute an overriding reason in the public interest.[176] The reasoning in *Genc* is similar to the one in *Dogan,*[177] where the CJEU has held that promotion of integration could constitute an overriding reason in the public interest.[178] Furthermore, according to *Genc*,[179] the EU gives importance to integrating

[165] Article 3(3) TEU, Bundle, p. 22.
[166] CEEMC Question 2017, para. 11, Bundle, p. 6.
[59] Article 4 TEU, Bundle, p. 22.
[167] C-138/13 *Naime Dogan*, para. 38, Bundle, p. 222.
[168] C-225/12 *Demir*, para. 40, Bundle, p. 191.
[169] CEEMC Question 2017, para. 11, Bundle, p. 6.
[170] *Ibid.*
[171] According to paragraph 6 of Article 3 of the FNA; *Ibid.*, para. 9, Bundle, p. 6.
[172] Opinion of AG Mengozzi in C-138/13 *Naime Dogan*, Bundle, p. 202.
[173] *Ibid.*, para. 42, Bundle, p. 209.
[174] CEEMC Question 2017, para. 10, Bundle, p. 6.
[175] C-561/14 *Caner Genc*, Bundle, p. 277.
[176] *Ibid.*, para. 56, Bundle, p. 285.
[177] C-138/13 *Naime Dogan*, Bundle, p. 216.
[178] *Ibid.*, para. 38, Bundle, p. 222.
[179] C-561/14 *Caner Genc*, Bundle, p. 277.

measures in numerous acts, particularly in Article 79(4) of the TFEU,[180] which "*refers to promoting the integration of TCNs in the host MS as an action by the MS to be encouraged and supported*."[181] This provides that the "*integration of TCNs is a key factor in promoting social and economic cohesion, a fundamental objective of the EU set out in the Treaty*".[182] Taking into account the importance of integration given by the CJEU and EU legislation cited in AG Mengozzi's opinion in *Furkan Tekdemir*,[183] and the indispensability of literacy for integration in Rebmem,[77] the Respondent submits that the literacy requirement is justifiable by an overriding reason in the public interest.

28. Secondly, the Respondent asserts that the literacy requirement is a **proportionate measure**. As has been stated above, the CJEU held that the measure is proportionate if it is suitable to achieve the objective pursued and does not go beyond what is necessary in order to attain it.[184]

29. Regarding the criterion of suitability, the Respondent argues that such requirement is **suitable** to achieve the legitimate objective pursued, i.e. integration into society. Literacy enables TCNs to enlarge their social circles, since the ability to communicate in the host MS **encourages interaction and the development of social relations** between the residents. Furthermore, it enables them to live independently as they do not need full time help of others to accomplish basic activities, such as shopping and interaction with official authorities[185] and to gain **employment**. The Respondent claims that the access to labour market is an imperative factor for future life of the applicants, which consequently prevents the increase of unemployment and social exclusion of individuals.[186] What is more, Article 7(2) of the Council Directive 2013/86/EC of 22 September 2013 on the right of family reunification (hereinafter Family Directive) confers discretion to MSs, enabling them to require TCNs to comply with integration measures in accordance with national law.[187] By requiring TCNs to fulfil the requirement of literacy, Rebmem acted within the discretionary power.

30. Furthermore, the Respondent argues that the literacy requirement also does not go beyond what is necessary in order to attain the objective of integration into Rebmemian society. Namely, the technological development of Rebmem makes literacy an indispensable skill. Since all contact with Rebmem's authorities and most shopping and social interactions occur *via* internet, knowledge of Rebmemian is essential for sufficient communication.[82] It follows from the foregoing that direct contact with Rebmemian citizens is rare, even in occasions that are usually conducted physically. It is hence essential to be literate in Rebmemian and integrate into society when direct contacts occur. Social exclusion and absence of integration is an inevitable consequence of lack of literacy. It is therefore necessary for integration of TCNs to learn Rebmemian before they obtain a residence permit in Rebmem.

31. To conclude, the Respondent contends that EU law does not preclude national law such as Article 3(4) of the FNA. The the measure regarding literacy is justifiable by an overriding reason in the public interest as it aims to ensure successful integration into Rebmemian society. In addition, the measure is suitable to attain this objective and does not go beyond what is necessary in order to attain it, since literacy requirement is an important and indispensable skill for successful integration and encourages the interaction and development of the social relations between TCNs and Rebmemian nationals.

SUGGESTED ANSWER TO THE FIFTH QUESTION

32. **The Respondent respectfully submits that Article 14(5) of the Qualification Directive is compatible with Article 78(1) TFEU, Article 18 of the Charter, Articles 1 F and 33 of the Geneva Convention.**

33. At the outset, the Respondent clarifies that the answer to the referred question is submitted in two parts. First, it will be demonstrated that Article 14(5) of the Qualification Directive is a justified limitation of the right to asylum under Article 18 of the Charter in accordance with Article 52(1) of the Charter. Second, compatibility of Article 14(5) of the Qualification Directive with Article 78(1) TFEU and Article 18 of the Charter will be assessed. *Limitation of Article 18 of the Charter*

34. Article 14(5) of the Qualification Directive stipulates that MSs may decide not to grant status to a refugee, if there are **reasonable grounds for regarding a person as a danger to the security** of the MS, and thus provides for a **limitation of the right to asylum** enshrined in Article 18 of the Charter.[188] Any limitation of the right to asylum can be imposed in

[180] Article 79(4) TFEU, Bundle, p. 32.
[181] C-561/14 *Caner Genc*, para. 55, Bundle, pp. 284-285.
[182] *Ibid*.
[183] Opinion of AG Mengozzi in C-652/15 *Furkan Tekdemir*, para. 17, Bundle, p. 303.
[77] CEEMC Question 2017, para. 10, Bundle, p. 6.
[184] C-225/12 *Demir*, para. 40, Bundle, p. 191.
[185] CEEMC Question 2017, para. 10, Bundle, p. 6.
[186] Article 9 TFEU, Bundle, p. 27.
[187] Aricle 7(2) of Council Directive 2013/86/EC of 22 September 2013 on the right of family reunification, cited in C-138/13 *Naime Dogan*, Bundle, p. 218.
[82] CEEMC Question 2017, para. 10, Bundle, p. 6.
[188] Article 18 of the Charter: "*The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention […] and in accordance with the Treaties*." Bundle, p. 42.

accordance with the conditions laid down in Article 52(1) of the Charter, which stipulates that the rights and freedoms recognised by the Charter **can be limited** if their limitations are **necessary** and they genuinely meet the objectives of general interest recognised by the EU, or need to protect the rights and freedoms of others, subject to the **principle of proportionality**.[189]

35. The **proportionality of the limitation** is ensured by the **legal standard 'reasonable grounds'**, required by Article 14(5) of the Qualification Directive, which enables an overall assessment of circumstances and relevant facts of the particular case. Furthermore, the limitation is **proportionate with regard to achieving the objective of protection and safety of the citizens and public order**, as it represents a limitation of certain individuals' rights, compared to the thousands potentially endangered due to the entry of violent individuals with known ties to disruptive military groups. Such limitation is **necessary to ensure the protection and safety of the citizens and public order** of the host MSs, even more so in the light of current high risks of terrorist attacks. The case at hand demonstrates the need for limitation of the right to asylum. The Applicant's military background – in particular, enrolment in the local armed militia associated with engaging in violent riots and severe fights,[190] which led her to take up arms in the riots – has shown that she is a violent individual. Therefore, if an individual is identified as a genuine and sufficiently serious threat to the public security of the MS, the limitation is justifiable.

36. In light of the foregoing, the right to life of the endangered citizens of MSs outweighs the right to asylum of a certain individual. Consequently, the Respondent submits that the notion 'danger to the security of the MS' within the meaning of Article 14(5) of the Qualification Directive is a necessary and proportionate limitation as it represents a 'need to protect the rights and freedoms of others' pursuant to Article 52(1) of the Charter. This constitutes a justifiable limitation to the exercise of the right to asylum, necessary for the protection of rights and freedoms of others and is therefore in compliance with Article 18 of the Charter.

Compatibility with Article 78(1) TFEU and Article 18 of the Charter

37. It is to be observed that while Article 78(1) TFEU[191] and Article 18 of the Charter imply a reference to **the Geneva Convention**, the said convention **does not constitute a legal instrument formally incorporated into EU law**, since the EU is not its contracting party.[192] The Respondent asserts that the provisions of the Geneva Convention represent only guidelines and guidance on determining refugee status. Hence, the EU legislator cannot be deprived of the possibility of providing a more detailed regulation of international refugee law outside the scope of the Geneva Convention.

38. Nevertheless, the Respondent submits that Article 14(5) of the Qualification Directive **does not extend the grounds for exclusion from refugee status** enshrined in Article 1 F of the Geneva Convention. In essence, the article in question falls within the ambit of exclusions provided under Article 1 F of the Geneva Convention. Admittedly, the term 'danger to the security' set out in Article 14(5) of the Qualification Directive, is not expressly laid down as a specific ground for exclusion within **Article 1 F of the Geneva Convention**.[193] However, nothing in the wording of Article 1 F of the Geneva Convention provides for an assumption that grounds for exclusion are exhaustively enumerated. The Respondent contends that, in general, the term **'danger to the security' shall be understood as already provided within the substance of grounds for exclusion** under Article 1 F of the Geneva Convention and represents solely its clarification. Thus, the term 'danger to the security' shall not be considered as an additional ground for the exclusion from refugee status in said article.

39. Support for this view can be found in the CJEU's observations in the case of *B and D*.[194] As the CJEU has stated, "*the grounds for exclusion […] were introduced with the aim of excluding from refugee status persons who are deemed to be undeserving of the protection which refugee status entails*".[195] In light of the intention[196] of the exclusion clauses in Article 1 F of the Geneva Convention, those individuals regarded as a 'danger to the security of the MS' shall also be considered as not deserving of the refugee protection and **shall be denied its benefits.** Article 14(5) of the Qualification Directive is therefore compatible with Article 1 F of the Geneva Convention as it represents a clarification of the grounds for exclusion from refugee status.[197]

40. Furthermore, Article 14(5) of the Qualification Directive is compatible with **Article 33 of the Geneva Convention**, as it allows MSs to refuse to grant refugee status where there are reasonable grounds for regarding an individual as a danger to the security. Pursuant to Article 33(2) of the Geneva Convention, the host country may *refoule* a refugee where there

[189] Article 52(1) of the Charter, Bundle, p. 44.
[190] CEEMC Question 2017, paras. 14-15, Bundle, p. 7.
[191] Article 78(1) TFEU: "*The Union shall develop a common policy on asylum, […]. This policy must be in accordance with the Geneva Convention […].*" Bundle, p. 31.
[192] Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department*, para. 4, Bundle, p. 144.
[193] Article 1 F of the Geneva Convention, Bundle, pp. 310-311.
[194] Joined Cases C-57/09 and C-101/09 *Bundesrepublik Deutschland v B and D*, Bundle, p. 115.
[195] *Ibid*., para. 104, Bundle, p. 129.
[196] Pursuant to Article 31 of the Vienna Convention, "*a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*." Invoked in C-386/08 *Brita GmbH*, para. 43, Bundle, p. 110.
[197] Pursuant to Article 1 of the Geneva Convention, Bundle, p. 310.

are reasonable grounds for considering him or her to be a danger to the security. The exception of the principle of *nonrefoulement*[198] provided for in Article 33(2) of the Geneva Convention and the notion 'danger to the security of the host state' contained therein can only be applied to an individual who has already been granted refugee status.[199] Nevertheless, the Respondent asserts that the wording of Article 33(2) of the Geneva Convention does not require that the element of danger posed to the host state and society should be applied **only to recognised refugees**. It should be noted that the recognition of a refugee status is merely a declaratory act.[200] Hence, a person who has not yet been granted the asylum can likewise be considered as a 'danger to the security of the MS', regardless of the recognition of refugee status. The objective is the same – **the protection of national security of the host country**.

41. The Respondent argues that this interpretation is consistent with the intention of Article 14(5) of the Qualification Directive, which is **not only to deny the benefits of international protection to individuals undeserving of refugee status**, but also **to forestall a posing threat to public order and national security**. Furthermore, the application of Article 14(5) of the Qualification Directive is not in conflict with the abovementioned objectives of **ensuring safety and denying refugee status to undeserving individuals**, pursued by Articles 1 F and 33 of the Geneva Convention.

42. In view of the abovementioned, the Geneva Convention is fully and inclusively respected by Article 14(5) of the Qualification Directive. According to the references to the Geneva Convention in Article 78(1) TFEU and Article 18 of the Charter, Article 14(5) of the Qualification Directive is compatible with respective articles of TFEU and the Charter. In other words, Article 14(5) of the Qualification Directive does not narrow the scope of the right to asylum under Article 18 of the Charter and is in accordance with Article 78(1) TFEU, which constitutes the legal basis for any EU measure in the area of international protection.

SUGGESTED ANSWER TO THE SIXTH QUESTION

43. **The Respondent respectfully submits that EU law, considered in the context of commitments flowing from the Geneva Convention and the Charter, permits the practice of EU MS authorities, allegedly based on the EU-Ekrut Statement (hereinafter Joint Statement), of sending asylum seekers to Ekrut without taking into account the applicants' arguments that Ekrut is unable to guarantee their fundamental rights.**

44. At the outset, it should be noted that the CJEU does not have jurisdiction to provide an interpretation of the Joint Statement which was issued after the meeting between the members of the European Council and Ekrutian counterpart,[201] since it does not constitute an international agreement within the meaning of Article 216 TFEU. The Respondent further submits that the Joint Statement is merely a non-enforceable press release[97] about a meeting between the European Council and Ekrut with no legally binding nature.

45. Moreover, the Joint Statement, on which the practice of sending asylum seekers back to Ekrut is based, was not adopted as an agreement binding on the EU pursuant to Articles 216 and 218 TFEU.[202] According to Article 218 TFEU, the European Council does not have any power to conclude such an agreement. Rather, it is the Council[203] that authorises the opening of negotiations and concludes them, in most cases only after obtaining consent of the European Parliament.[204] In this respect, the content of the Joint Statement does not form an integral part[205] of the legal order of the EU. The CJEU thus has no jurisdiction to give preliminary ruling concerning the validity and interpretation of the Joint Statement within the meaning of Article 267(1)(b) TFEU.[206]

46. Furthermore, as the CJEU held in *France v Commission*,[207] the intention of the parties shall in principle be a decisive criterion for the purpose of determining whether the Joint Statement is binding.[208] The key reason not to view the Joint Statement as a legally binding agreement is that it does not use terms 'shall' and 'should', which are normally used in international law to indicate obligations of result or obligations of effort. Instead, the more undetermined term 'will' is used.[209] Therefore, it consists of commitments, using terms that express intent rather than mandatory terminology

[198] Article 33 of the Geneva Convention: "*No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*" Bundle, p. 312.
[199] Article 33(2) of the Geneva Convention, Bundle, p. 312.
[200] Recital 21 of the Preamble of the Qualification Directive, Bundle, p. 46.
[201] A (Fictional) Joint Statement of 1 May 2016 between the Republic of Ekrut and the European Union, Bundle, p. 11.
[97] CEEMC Question 2017, para. 30, Bundle, p. 9.
[202] Articles 216 and 218 TFEU, Bundle, p. 33.
[203] Pre-Lisbon "Council of the European Union".
[204] Article 218(6) TFEU, Bundle, p. 33.
[205] C-386/08 *Brita GmbH*, para. 39, Bundle, p. 109.
[206] Article 267(1)(b) TFEU, Bundle, p. 37.
[207] C-233/02 *France v Commission*, Bundle, p. 71.
[208] *Ibid*., para. 42, Bundle, p. 76.
[209] A (Fictional) Joint Statement of 1 May 2016 between the Republic of Ekrut and the European Union, Bundle, p. 11.

expressing obligations.[210] Those considerations suggest the lack of intent of the parties to be bound[211] by the Joint Statement. It follows that the Joint Statement does not constitute a binding agreement and therefore does not fall within the scope of Article 218 TFEU.[212]

47. Should the CJEU find that it nonetheless has jurisdiction to review the Joint Statement, the Respondent asserts that the decision to **transfer irregular migrants back to Ekrut,** without taking into account the applicants' arguments that Ekrut is unable to guarantee their fundamental rights, does not infringe the Geneva Convention or Articles 4, 18, 19 and 47 of the Charter.

48. Firstly, the Respondent submits that the return of irregular migrants to Ekrut, allegedly based on the Joint Statement, **does not** lead to inhuman or degrading treatment under **Article 4 of the Charter**.[109] The assertion regarding similar crisis in Mulysa and Ekrut, i.e. the inability to process applications for international protection and internal difficulties in providing adequate administration and facilities for asylum seekers and refugees,[110] is not sufficient to determine the authenticity of the alleged circumstances in Ekrut. The Respondent emphasises that the general situation in Ekrut does not represent substantial grounds for believing that migrants would face a real risk of being subjected to inhuman or degrading treatment linked to the deficiencies in asylum procedure or living conditions and human rights violations. This follows from the designation of approximately 3 billion euro (and additional funding of 3 billion euro) of aid provided by the EU, which shall be understood as a sign of solidarity with Ekrut. Concrete projects for refugees are being financed, notably for ensuring asylum capacities and living conditions, food, accommodation, infrastructure, education, healthcare and other living costs.[213] The latter aid contributes to the establishment of adequate administration facilities and the reception conditions for asylum seekers and refugees in Ekrut.[214] The solidarity aid provided by the EU to the projects designed to support refugee programs[215] was made pursuant to the provisions of Article 3(5) TEU regarding the EU's contribution to, *inter alia*, solidarity and mutual respect among peoples in relation with the wider world.[216]

49. Secondly, the Respondent submits that Ekrut guarantees fundamental rights and it shall be assumed that these rights are guaranteed to each individual, **unless he or she presents serious counter-indications**. Namely, the applicants must demonstrate *in concreto* that there is a real risk of being subject to inhuman or degrading treatment.[217] It is not sufficient to maintain solely general circumstances, which do not concern the applicants individually. Therefore, the applicants' submissions that Ekrut is unable to guarantee the fundamental rights **are not sufficient without demonstration of any concrete link**[218] **between the general situation in Ekrut and their individual circumstances.**

50. Thirdly, **the prohibition of collective expulsion under Article 19(1) of the Charter**[219] **is respected** by ensuring that every case is addressed individually in compliance with international law. It stems from the wording of the Joint Statement that returns to Ekrut are to take place "*in full accordance with EU and international law, thus excluding any kind of collective expulsion*".[220] The Respondent claims that transfer of asylum seekers and refugees to Ekrut takes place in a good faith pursuant to a case-by-case assessment of applications for international protection.[221] The Respondent further argues that the returns of individuals back to Ekrut are lawful, since the decision on return is issued after an overall assessment[222] of the relevant statements and documentation, including individual position and personal circumstances of the applicants, which demonstrates that **individuals will not be subject to persecution or serious harm**. Likewise, in the case at hand, the return decision[121] to Ekrut was adopted within the Asylum Decision on not granting a refugee status to the Applicant, after an overall assessment of circumstances in Ekrut has been made.[223] What is more, the potential risk of serious and individual threat for the Applicant upon her return back to Ekrut was not demonstrated.

51. Fourthly, according to the Joint Statement, "***all*** *migrants will be protected in accordance with the relevant international standards and in respect of the principle of* non-refoulement".[224] Hence, the Respondent contends that all returns of irregular migrants to Ekrut **respect the principle of *non-refoulement* as set out Article 19(2) of the Charter and in**

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[210] Opinion of AG Sharpston in C-660/13 *Council of the European Union v European Commission*, para. 67, Bundle, p. 244.
[211] *Ibid.*
[212] See, by analogy, C-233/02 *France v Commission*, para. 45, Bundle, p. 76. [109] Article 4 of the Charter, 'Prohibition of torture and inhuman or degrading treatment or punishment', Bundle, p. 41. [110] CEEMC Question 2017, para. 17, Bundle, p. 7.
[213] A (Fictional) Joint Statement of 1 May 2016 between the Republic of Ekrut and the European Union, Bundle, p. 11.
[214] *Ibid.*
[215] *Ibid.*
[216] Article 3 TEU, Bundle, p. 22.
[217] *M.S.S. v. Belgium and Greece* (ECtHR 2011), para. 150, Bundle, pp. 331-332.
[218] *Ibid.*, para. 151, Bundle, p. 332.
[219] Article 19 of the Charter: "*Collective expulsions are prohibited*", Bundle, p. 42.
[220] A (Fictional) Joint Statement of 1 May 2016 between the Republic of Ekrut and the European Union, Bundle, p. 11.
[221] CEEMC Question 2017, para. 30, Bundle, p. 9.
[222] Pursuant to Article 4 of the Qualification Directive, Bundle, pp. 46-47. [121] CEEMC Question 2017, para. 30, Bundle, p. 9.
[223] *Ibid.*
[224] A (Fictional) Joint Statement of 1 May 2016 between the Republic of Ekrut and the European Union, Bundle, p. 11. [124] Article 33 of the Geneva Convention, Bundle, p. 312.

Article 33 of the Geneva Convention. Since the irregular migrants are being returned to Ekrut, where neither their life nor freedom would be threatened[124] nor would they be subjected to death penalty, torture or other inhuman or degrading treatment or punishment,[225] the return of irregular migrants is in line with the principle of *non-refoulement*. The overall assessment in a fair and efficient asylum process with due respect for the protection from *refoulement* is taken into account. Therefore, the right to asylum under Article 18 of the Charter is respected.

52. Moreover, there is **no violation of the right to an effective remedy under Article 47 of the Charter**.[226] It is true that the article concerned requires a remedy with a suspensive effect when it is brought against a return decision whose enforcement may expose migrants to a serious risk of being subjected to inhuman or degrading treatment.[227] However, the Respondent reiterates that according to the abovementioned, the situation in Ekrut does not constitute substantial grounds for believing that returned migrants would be exposed to a real risk of ill-treatment, contrary to Article 4 of the Charter. Therefore, the lack of a suspensive remedy against a decision on return, as in the present case, does not constitute a breach of the right to an effective remedy, since the enforcement of the return decision is not likely to expose migrants to a risk of inhuman or degrading treatment under Article 4 of the Charter.

53. Finally, it is important to state that the main objective pursued by the European Council and Ekrut was "*to break the smugglers' business model*" by preventing a new sea or land routes for illegal migration from Ekrut to the EU.[228] The cooperation between EU and Ekrut offers migrants an alternative to putting their lives at risk, in particular ending human suffering[229] on a difficult fleeing routes and preventing the illegal trafficking in human beings.

54. The Respondent concludes that *(i)* the applicants who have been or will be returned back Ekrut are not subject to inhuman or degrading treatment, *(ii)* the overall assessment of each applicant's circumstances is provided, *(iii)* the provision of the collective expulsion is not breached, *(iv)* the protection from *refoulement* is guaranteed, and *(v)* proceedings regarding the return decision respect the right to an effective remedy. In light of the foregoing observations, the practice of MS authorities of sending irregular migrants to Ekrut, without taking into account the applicants' arguments regarding the Ekrut's inability to guarantee fundamental rights when they do not demonstrate a serious and individual threat on an individual basis, is permitted by EU law.

[225] Article 19(2) of the Charter, Bundle, p. 42.
[226] Article 47 of the Charter, Bundle, pp. 43-44.
[227] C-239/14 *Abdoulaye Amadou Tall*, paras. 58-59, Bundle, p. 275.
[228] A (Fictional) Joint Statement of 1 May 2016 between the Republic of Ekrut and the European Union, Bundle, p. 11.
[229] *Ibid.*