CENTRAL AND EASTERN EUROPEAN MOOT COMPETITION

(2019 edition)

MOOT COURT PROBLEM

A (Applicant)

v.

The State of Lortnoc (Respondent)

Serper

1. Atad, the applicant, is a national of Serper (a non-EU state). Since his early childhood, Atad has been a fervent and active supporter of human rights, having seen his grandparents arrested and sentenced to jail for alleged human rights infractions when he was a young boy. Atad's grandfather died during this jail sentence. When released, Atad's grandmother spent her remaining years in a mental asylum. Atad's family all believe that the grandmother's mental illness was a direct result of her incarceration.

2. Atad's entrepreneurial skills enabled him to become a successful business magnate by the age of 25. He set-up several media businesses in Serper and became an industry leader in innovation on social media and digital technology research. In 2016, Atad founded the 'Respect for Human Rights' civil rights movement ("the RHR") in Serper. His business skills, high profile and popularity have made him an important figure in the fight against all types of human right abuses in Serper. Atad and the RHR uncover and publicise evidence of multiple incidents of government corruption, human rights abuses and political interference with the judiciary in Serper.

3. In 2017, Atad agreed to act as the lead complainant in group litigation initiated against several Serperan government ministers. The claim sought compensation for alleged corruption, criminal negligence and human rights abuses committed by the minsters and the Serperan government. On the day after the claim was filed, Atad was arrested and charged with several administrative and criminal offences allegedly committed by Atad himself, his company and his research institutions. Atad vehemently denied all allegations. At the same time, the Serper Criminal Court issued a freezing order which prevented Atad from accessing his personal and commercial bank accounts. Atad's parents and other family members reported that they began to suffer harassment and intimidation by local state officials.

   In 2018, Serper was included on a list of countries suspected of breaching human rights in reports prepared by several international human rights organisations including Amnesty International and Human Rights Watch ("the 2018 Human Rights Reports"). Those reports referred to at least some of the incidents uncovered and publicised by Atad and the RHR movement.

Yduts

4. In 2011, whilst studying at university in Yduts (an EU Member State bordering Serper), Atad met and fell in love with Modeerf, a national of Lortnoc (an EU Member State), who was also studying there. In 2014, when they both finished their studies, they returned to their respective home states, but their relationship continued at a distance and they remained very much in love. Modeerf qualified as a

lawyer in Lortnoc where she opened a human rights practice, while Atad began his business career in Serper. They planned one day to live together.

5. In 2017, after the criminal charges were brought against him, and following his family's reports of being harassed and intimidated by state officials, Atad believed himself to be in danger in Serper. His experience in researching government and judicial corruption in Serper meant that he had no faith in the political independence of the courts which would be hearing the criminal charges against him. Accordingly, on 1st March 2017, he decided to leave Serper and travel to Lortnoc to be with Modeerf. He planned to leave Serper via Yduts, which was the closest border to his home.

6. At the Yduts border, Atad was arrested and informed that an international arrest warrant had just been issued against him by Serper. He was arrested and detained in Yduts until 2nd May 2017, on which date he was extradited to Serper. On 9th May 2017, a week after his extradition, primarily as a result of Modeerf's efforts, that extradition was declared unlawful following a direction from the Yduts Supreme Court.

7. Upon being extradited to Serper, Atad was detained in custody while awaiting trial for several economic crimes, each of which carried a potentially custodial sentence. The Serper Criminal Court denied Atad bail because of his previous attempt to flee the country. He was detained in a Serper prison, where he suffered a nervous breakdown caused by the threats and intimidation to which he was subjected by the prison guards. Atad's lawyer successfully relied upon Atad's ill-health to overturn the original decision to deny him bail.

8. On 2nd June 2017, almost immediately upon having been released from jail, Atad again attempted to leave Serper and enter Lortnoc. This time, he was arrested at the Lortnoc border and immigration proceedings were initiated against him, with a view to returning him to Serper. On the same day, Modeerf lodged an application on behalf of Atad for international protection in Lortnoc.

The original examination of Atad's claim for refugee status or subsidiary protection

9. The Lortnoc Immigration and Asylum Authority ("IAA") is the "determining authority" within the meaning of Article 2(f) of Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast), which means that it is responsible for examining all applications for international protection. Any appeals initiated against IAA decisions are heard by the Administrative Appeals Court in Lortnoc.

10. The IAA adopts its decisions on the basis of the Asylum Act 2012 ("the 2012 Act") as amended by the Asylum Act 2015 ("the 2015 Act"). The 2012 Act was originally adopted to implement the provisions of Directive 2011/95 EU ("the Refugee Directive"), including Articles 2(f), 5 and 15 thereof, into Lortnoc national law. The 2012 Act contained the following provisions: -

> *Article 60 (principle of non-refoulement)*
> *(1)- 'Lortnoc shall grant subsidiary protection to a foreigner who does not satisfy the criteria for recognition as a refugee but in respect of whom a risk exists that, in the event of his/her return to his/her country of origin, s/he would be exposed to serious harm and s/he is unable or, owing to fear of such risk, unwilling to avail himself/herself of the protection of his/her country of origin'*

(2) The fear of serious harm or of the risk of harm may also be based on events which occurred following the foreigner's departure from his/her country of origin or on the activities in which the foreigner has engaged following departure from his/her country of origin.

11. On 1st August 2017, the IAA issued a decision ("the IAA's first refusal decision") dismissing Atad's application for international protection. The IAA concluded that Atad did not qualify as a refugee and that there was no evidence that he would suffer persecution in Serper for political or other reasons, as his alleged crimes were non-political, white-collar economic crimes. The IAA also concluded that Atad was not entitled to subsidiary protection in accordance with Article 60 of the Asylum Act 2012, as no evidence existed of any serious infringement of his rights and there was no evidence to show that the principle of non-refoulement would be infringed if he were to be returned to Serper.

The 2015 Resolution on Refugee Quotas and reform of Lortnoc's national law on immigration appeals

12. On 22nd September 2015, the Council of the European Union adopted a resolution ("the Refugee Quota Resolution") introducing a compulsory quota system, whose purpose was to combat some of the social and economic burdens suffered by certain EU countries as a result of extensive refugee numbers crossing their borders. The Refugee Quota Resolution was politically controversial in Lortnoc. It was followed by an anti-immigration campaign in the media and various public marches, the majority of which opposed the Refugee Quota Resolution and the quota system. Some marches were accompanied by breaches of public order.

13. On 14th October 2015, a new government was elected in Lortnoc. The new government was led by a right-wing, populist political party which had been extremely critical of the EU's refugee quotas during its election campaign, on the basis that these did not go far enough to deal with the underlying problem.

14. In December 2015, the Lortnoc government adopted the Asylum Act 2015 ("the 2015 Act") which reformed its immigration appeals procedure. The government stated that its reason for doing so was to improve the efficiency and fairness of the immigration procedure. The main thrust of the reform was to remove the right of the Administrative Appeals Court, when hearing appeals from the IAA, to substitute its own decision to approve/ dismiss an application for international protection. Where the Administrative Appeals Court upheld an appeal against an IAA decision, it was now obliged to send the case back for re-examination by the IAA. The Administrative Appeals Court's power to take a final decision itself, without the need for re-examination by the relevant administrative body, had previously existed in respect of all appeals against administrative decisions (including, e.g., tax appeals and social security appeals as well as immigration appeals). The 2015 reforms amended the appeal procedure solely in relation to immigration appeals, leaving the procedure for all other administrative appeals unchanged.

15. The immigration procedure reforms in the 2015 Act were merely one aspect of a package of legal reforms introduced in Lortnoc since the change of government in October 2015. As well as several other measures denying or limiting rights for minorities, migrants and refugees, the government radically reduced funding for non-governmental organisations (NGOs) working with immigrants, refugees or asylum seekers and imposed restrictions on press and academic freedom. It also greatly extended search, detention and seizure powers at Lortnoc's national borders.

16. On 5th January 2017, in the light of growing international concern about the rule of law in Lortnoc and following a damning report by the 'Venice Commission', the EU Commission adopted a Recommendation on the Rule of Law in Lortnoc ("the Rule of Law Recommendation"). The EU Commission concluded that the various procedural and legal reforms since 2015, including the amended immigration appeals procedure, had created a systemic threat to the rule of law in Lortnoc. The Rule of Law Recommendation was issued on the basis of the Communication 'A New Framework to Strengthen the Rule of Law', as adopted by the Commission on 11 March 2014 ("the New Rule of Law Framework").

17. Paragraphs (12-17) of the EU Commission's Rule of Law Recommendation noted that, since the entry into force of the 2015 asylum law reforms, 98% of asylum applications made to the IAA had been rejected on the basis that the claimant was ineligible to claim refugee status or other subsidiary protection. That had resulted in a 200% increase in immigration appeals brought annually against IAA decisions to the Administrative Appeals Court, when compared with the annual statistics prior to October 2015. In addition, statistical data indicates that some 70% of appeals referred to the Administrative Appeals Court were successful and required the case to be referred back to the IAA for re-determination. Successful appeals commonly cited a number of procedural violations by the IAA in relation to its findings of fact and its failure to take account of all of the evidence presented to it.

18. Despite significant criticism from academia and opposition politicians, the government of Lortnoc has, to date, refused to take any action to reverse its reforms (including its amended immigration appeals procedures) so as to comply with the Rule of Law Recommendation. The Lortnoc government maintains that its national law is perfectly compliant with all applicable EU legislation. In June 2018, the Lortnoc Minister of Justice welcomed the CJEU decision (*Case C-585/16 Serin Alheto*) which, he said, '*acknowledged that Member States are entitled to exercise their own discretion and procedural autonomy when organising their asylum immigration systems'*. The government notes that the IAA is an independent body composed of experts who deal with extremely sensitive issues, and that it would be "entirely inappropriate" for the government to seek to interfere in the IAA's decision-making process by investigating or challenging the manner in which it has reached its decision in any individual case.

Atad's first appeal to the Administrative Appeals Court

19. On Atad's behalf, Modeerf appealed against the IAA's decision ("the first appeal") to the Administrative Appeals Court.

20. Given the sensitive nature of Atad's position and the risk to his family back in Serper, Modeerf applied for a special Anonymity Order to protect Atad's identity from disclosure during the appeal proceedings. She argued that Atad and his family faced a genuine risk of reprisal actions if details of his claim were made public. The Appeals Court accepted this application and ordered the anonymisation of any information which (directly or indirectly) could lead to Atad, his name, address, nationality or his business name being identifiable in any document issued by the Appeals Court.

21. The Administrative Appeals Court then ruled that the IAA's first refusal decision was unlawful. The Appeals Court's judgment stated that '*the IAA's decision contained inconsistencies in that the IAA failed not only to take account of and investigate a number of pertinent facts, but it also conducted a*

haphazard evaluation of the facts it did investigate, so that the decision was unfounded in its entirety.' Pursuant to the 2015 Act, it ordered the IAA to re-examine Atad's case and to issue a new decision.

The IAA's re-examination of Atad's claim for refugee status or subsidiary protection

22. During the IAA's re-examination of Atad's claim for refugee status or subsidiary protection, Modeerf argued that clear evidence existed to prove that Atad had been the victim of political persecution. She referred *inter alia* to (i) the ruling of the Yduts Supreme Court of 9th May 2017; (ii) reports and data (from Amnesty International, Human Rights Watch and other recognised NGOs) which demonstrates that the Serper courts regularly hand down lengthy custodial sentences to those convicted of political offences and; (iii) the factual and medical evidence regarding the intimidation and consequent nervous breakdown that Atad suffered during his detention in Serper.

23. On 1st October 2017, the IAA dismissed Atad's application for a second time ("the IAA's second refusal decision"). That decision stated that, having evaluated all the documentation submitted by Atad, including the circumstances of his extradition from Yduts, the IAA found no evidence to conclude that Serper would not protect appropriately Atad's right to independent judicial proceedings in respect of the political offences and/or common crimes with which he was charged. It also found that the facts alleged by Atad were not, either by their nature, their reiteration or by taking account of their cumulative effects, sufficiently serious to reach the level of 'persecution' as defined in the Refugee Directive.

24. The IAA's second refusal decision also referred to evidence given by a representative of the Lortnoc Foreign Relations Ministry, which cited Amnesty International and Human Rights Watch reports from 2014-2015 ("the 2014-15 human rights reports"), none of which commented about problems with human rights in Serper or expressed concerns that Serper was failing to guarantee independent judicial proceedings, regardless of whether such proceedings are in respect of political, non-political or administrative offences.

25. During the second review procedure, the IAA also asked for an opinion from the Lortnoc Constitutional Protection Office ("the LCPO"), whose opinion is occasionally sought in individual sensitive asylum cases. The LCPO provides its opinion directly to the IAA. Although the LCPO's ultimate conclusions are made known to the parties, whether the facts on which the LCPO bases its conclusions are disclosed to the parties is at the discretion of the IAA. The LCPO concluded that there was well-founded evidence to show that Atad's presence in Lortnoc was contrary to the interests of national security and that Article 1(F)(c) of the 1951 Geneva Convention Relating to the Status of Refugees applied to his case.

26. Modeerf requested that the IAA order the LCPO to disclose all the material which had formed the basis for its conclusions, including any evidence regarding the *'well founded'* reasons for concluding that Atad's presence was contrary to the interests of Lortnoc's national security. The Lortnoc Ministry's representative objected to such disclosure on the grounds that some of the evidence analysed by the LCPO when reaching its conclusions was confidential for reasons of public policy and state security. That included the specific evidence concerning Atad. The IAA rejected Modeerf's disclosure application

Atad's second appeal to the Administrative Appeals Court

27. On 25 February 2018, the Administrative Appeals Court issued a judgment ("the second appeal judgment") annulling the IAA's second refusal decision. It held that the IAA's second refusal decision was unlawful for three main reasons: -

    (1) it failed to take adequate account of the evidence presented by Atad that his life and liberty would be endangered in Serper owing to his political opinions and activism;
    (2) it relied on outdated human rights reports; and
    (3) the IAA should have ordered the LCPO to disclose the details of the evidence forming the basis for the LPCO's conclusion that Atad's presence was contrary to the interests of Lortnoc's national security.

28. The second appeal judgment instructed the IAA to re-examine Atad's case once again and to issue a new decision. It urged the IAA to pay greater attention to the evidence presented by Atad regarding his personal safety in Serper and noted that, were it not for the reforms implemented by the 2015 Act (which prevented the Administrative Appeals Court fromtaking a final decision) it would have concluded that Atad qualified for subsidiary protection.

29. The second appeal judgment was read out in open court.

Lortnoc law on the announcement of court judgments in open court

30. The Lortnoc Constitution of 1st February 1995 contains the following articles;

> *Article 180- 'The courts and tribunals shall constitute a separate branch of the State independent of other branches.'*
>
> *Article 181- 'All judgments of Lortnoc courts are delivered in the name of the people. All trials are public, unless provided otherwise by law. The final judgment of the court deciding a matter on its merits must always be made public.'*

31. The *Rules of Procedure (Administrative Appeals Court) Rules 2000* ("the Procedural Rules 2000") lay down the general rule that all judgments shall be read out in open court. By way of exception, the Rules enable the use of *Anonymity Orders* which enable a court to require that certain stated aspects of a party's identity (such as name, address, age, gender, nationality, marital status and occupation/business activity) may be anonymised in a judgment insofar as the court considers that to be necessary to protect the party in question or any other person, or in order to comply with procedural orders or other provisions of national law.

32. Whenever the identity of a party to administrative appeals proceedings has been anonymised (as Atad's had been during his first appeal) a copy of the Anonymity Order is attached as the first page of the case file. That informs the judicial panel of the existence and scope of the Anonymity Order and enables the judgment to be redacted accordingly by deleting any information falling within the scope of the order before the judgment is read out in open court or published in writing.

33. Due to an internal administrative error, the Anonymity Order in Atad's case incorrectly failed to describe the full extent of the anonymity order actually granted during Atad's first appeal. Accordingly, although some parts of the judgment had been properly redacted (e.g. by removing reference to Atad's name, address and nationality), certain details of Atad's business affairs had *not* been redacted. Thus, when the Administrative Appeals Court announced the judgment in open court, it referred to

the fact that the IAA decision under appeal concerned the founder of a human rights movement, an entrepreneur who was active in social media and digital research and who had been charged with certain criminal offences in Serper.

34. Atad and Modeerf were not present when the judgment was read out in court. By the time the judgment was published, the administrative error had been noted and the text had been corrected. Atad and Modeerf were not informed by the Court that this mistake had ever happened. Unfortunately, Rebbalb (a journalist based in Lortnoc) *was* present when the judgment was read out in open court. He became intrigued and decided to investigate the identity of the person referred to in the appeal.

The IAA's second re-examination of Atad's claim for refugee status or subsidiary protection

35. On 1st March 2018, the IAA issued a third refusal decision ("the IAA's third refusal decision") in Atad's case. It handed down that decision without hearing any further facts or evidence and having refused to accept any oral submissions from the parties. The decision reiterated the IAA's earlier conclusions on Atad's claim for refugee status, that *'no evidence existed of persecution on political grounds'* and that '*as regards the principle of non-refoulement, there was no evidence that persons returning to Serper after an extended period would suffer any kind of disadvantage or sanction in that country'*.

36. By this time, Rebbalb had discovered Atad's identity. He wrote a story which was published in the *Daily Moon* newspaper and was widely circulated and read in Lortnoc, Yduts and Serper. The story specifically identified Atad as the relevant person. Following this publication, officials in Serper seized the passports of all the members of Atad's family, who were told they would not be allowed to leave Serper until Atad returned to stand trial. The house of Atad´s parents in Serper was put under surveillance. Atad was distraught and feared for the safety of his family in Serper.

The two cases before the Lortnoc Court of Appeal

37. Atad initiated a civil law claim ("the GDPR claim") against the state of Lortnoc, arguing a breach of EU data protection law. He hoped that would bring media and political attention to his situation. His claim sought substantial monetary compensation for the failure of the Lortnoc's Appeals Court, acting as a 'data controller', properly to secure the protection of his personal data and ensure that his data was processed lawfully. He alleged that that infringed Regulation 2016/679 (the General Data Protection Regulation)..

38. The admissibility of Atad's GDPR claim was initially assessed by a first instance court. Instead of proceeding to review the claim on its merits, it chose to utilise a special procedure available to any national court in Lortnoc which thinks that (a) a claim pending before it concerns the actions of a state body (in this case the Administrative Appeals Court) which may result in the state being liable in damages; or (b) a 'leapfrog' appeal to a higher jurisdiction is needed to resolve a repetitive problem in the jurisprudence. In such cases, it is possible for the first instance court to refer the case to be heard directly by a special panel of judges of the Lortnoc Court of Appeal. The first instance court used that procedure (on the basis of (a) above) and asked the Court of Appeal to review Atad's GDPR claim.

39. Modeerf in the meantime has filed yet another appeal, this time against the third refusal decision in Atad's case ("the third appeal proceedings"). The case again came before the Administrative Appeals

Court. Modeerf suspects that the likely consequences of this third appeal is that the Appeals Court will again annul the IAA's decision and return the case to the IAA for yet another re-examination. She refers to the EU Commission's Rule of Law Recommendation in respect of Lortnoc's judicial reforms, particularly its conclusion that there was a systemic threat to the rule of law in Lortnoc, highlighting the post-2015 behaviour of the IAA and the fact that, notwithstanding that Lortnoc's legislation requires the IAA to comply with judgments of the Administrative Appeals Court, the IAA in practice frequently ignores the accompanying reasoning given by the Appeals Court and simply repeats its original conclusion and decision even after its original decision has been successfully appealed, sometimes on multiple occasions (as in Atad's case). Modeerf argued that this must surely demonstrate a systemic deficiency in the Lortnoc immigration appeal system (by analogy with *Case C-411/10 NS*.) She asks the Administrative Appeals Court to refer the case to the Court of Appeal (using the aforementioned special procedure, under (b) above) so that it can consider the legality of the 2015 reform to Lortnoc's immigration appeals procedure. Modeerf's motion is successful and the case is referred to the special panel of judges in the Court of Appeal.

40. When the Court of Appeal receives both Atad's GDPR claim and the third asylum appeal, it realises that they have a common factual background and, of its own motion, orders that the two cases be joined.

Modeerf's right to represent Atad before the national court

41. The freezing order against Atad, which still remained in place, had prevented him from accessing his personal funds. Both he and Modeerf were now short of money. Accordingly, as of 1st February 2018, Modeerf decided to enter full-time employment as a lawyer at the Lortnoc Ministry of Agriculture.

42. Before the joined cases were considered on their merits by the Court of Appeal, the parties had a standard pre-trial hearing (to discuss certain procedural aspects of the case, such as how many witnesses they planned to call, what documentary evidence would be filed etc.). When Lortnoc's lawyers realised that Modeerf intended to act as Atad's lawyer in respect of both claims, they filed a motion asking the Court of Appeal to exercise its discretion to preclude her from appearing in the proceedings.

43. The relevant part of the Court of Appeal's Rules of Procedure 2001 states as follows:

Article 18: Rights of audience before the Court of Appeal

(1) Any person who is qualified and entitled to act as a lawyer in Lortnoc may appear as legal counsel in proceedings pending before the Court of Appeal.

(2) *By way of exception to paragraph (1), the Court of Appeal may direct that a qualified lawyer may not appear as legal counsel in particular proceedings pending before it if the Court considers that that lawyer has a personal interest in the outcome of the case, whether for professional or personal reasons, which might adversely affect that lawyer's ability to act independently when exercising their functions before the court.*

(3) *The Court may make a direction under paragraph (2) either of its own motion or at the request of another party to the proceedings. There shall be no right of appeal against such a finding.*

44. The Court of Appeal accepted Lortnoc's arguments that, as Modeerf was both linked by an employment contract to the state of Lortnoc and romantically involved with Atad, there were both professional and personal reasons for doubting her ability to act independently in the proceedings. Accordingly, the Court ruled that she was not entitled to act as Atad's representative in the joined cases. With some difficulty, Atad hired another lawyer to represent him. In practice, Modeerf continued to do much of the preparatory work required and liaised very closely with Atad's new lawyer.

Principal arguments of the parties in the proceedings before the Court of Appeal

Legality of Lortnoc's immigration appeals system

45. Atad claims that, following the changes brought about by Lortnoc's 2015 Act, the immigration appeals procedure is incompatible with the obligation of all EU Member States to ensure that they provide an appropriate and effective system to review appeals against first instance immigration decisions. Although Lortnoc's national law appears to oblige the IAA, as a matter of law, to comply with judgments of the Appeals Court, the *de facto* situation is that no effective procedures exist to guarantee an 'effective judicial remedy'. The Administrative Appeals Court ought, as a matter of EU law, to be allowed to alter any IAA decision which it reviews on appeal, so that it can make a definitive and binding ruling on whether an applicant is (or is not) entitled to refugee status or subsidiary protection.

46. Lortnoc contends that, given its geographical location (which makes it much more likely to be one of the first EU Member States through which those desiring international protection seek to enter the Union), it is perfectly entitled to adopt a robust procedure for immigration checks. The post-2015 procedure ensures that the ultimate factual assessment of any application for international protection is made by the experts at the IAA. The Administrative Appeals Court makes binding rulings of law on how the applicable legislation should be understood and applied; and the IAA is obliged, by Lortnoc's national law, to comply with such judgments. However, the judges of the Administrative Appeals Court are not the appropriate people to make findings of fact in sensitive immigration cases, which is why Lortnoc's 2015 Act reserves the ultimate fact-finding role to the IAA. That ensures that immigration decisions are taken fairly and consistently. Furthermore, EU law allows a significant margin of discretion to Member States as regards the organisation of immigration appeals procedures. It is therefore not incompatible with EU law for a Member State to require a court (such as the Administrative Appeals Court) to refer an immigration decision back to the original decision maker (the IAA) for re-examination.

The GDPR claim

47. Atad claims that, in its capacity as an official judicial authority which is responsible initially for obtaining and processing data obtained in judicial proceedings and subsequently for producing a public record of those proceedings, a Member State court is a 'controller' of data within the definition in Article 2, read in conjunction with Article 4 (7), of the GDPR. Accordingly, the court is required to put in place procedures to guarantee that the processing of a natural person's data is done lawfully in accordance with Articles 5 and 6 and the preamble to the GDPR and the provisions of Article 8 of the Charter of Fundamental Rights of the European Union ("the Charter"). Even were Rebbalb (the

journalist) to be found to be a controller of Atad's personal data, Atad contends that the Lortnoc court should be considered as a joint controller within the meaning of the GDPR.

48. Atad further claims that he has been deprived of the right to an 'effective judicial remedy' against a data controller or processor (or joint controller), contrary to Article 79 of the GDPR and Article 47 of the Charter, as no judicial remedy exists in Lortnoc in situations where the unlawful processing of an individual's data is done by a national court in circumstances such as those which occurred in the Appeals Court.

49. Atad also claims that the state of Lortnoc is liable to pay him damages for the Administrative Appeal Court's failure to protect his personal data, as that amounts to a 'sufficiently serious breach' of EU law (*Francovich v Italy (1991) C-6/90*) which was caused by a national court (*Köbler v Austria (2003) C-224/01*) and therefore satisfies the requirements for State liability.

50. Lortnoc submits that a court when acting in a judicial capacity falls outside the definition of a 'controller' and is therefore not bound by the provisions of the GDPR. If there was any 'controller' of data who might be liable on the facts of the present case, it was Rebbalb the journalist who published the newspaper story disclosing Atad's identity.

51. In the alternative (i.e. even if the court *is* found to be a controller of Atad's data), Lortnoc submits that any processing of Atad's data by the Appeals Court was done in compliance with Articles 5 and 6 of the GDPR. Lortnoc also relies on Article 181 of the Lortnoc Constitution, which requires that justice be conducted openly and that court judgments must in principle always be pronounced in public. Finally, Lortnoc argues that in any event any infringements of the GDPR were not so serious as to make the state liable in damages to Atad. Any compensatory damages would be possible only against Rebbalb, pursuant to national rules on civil liability.

The grounds for the request for a preliminary ruling

52. Having heard the parties, the Court of Appeal considered that both cases raise several issues of European Union law which require interpretation by the CJEU. Accordingly, on 1st October 2018 it referred several questions for a preliminary ruling under Article 267 TFEU.

53. In its summary of the facts, the Court of Appeal specifically noted that Lortnoc's asylum law reforms in 2015 had been prompted by the number of IAA decisions refusing to grant refugee or subsidiary status which had been appealed and overturned by the Administrative Appeals Court between 2010-2015 and the associated media campaign against immigrants and refugees.

54. Following the 2015 Act, the Administrative Appeals Court was deprived of its earlier power to amend IAA decisions by substituting its own findings of fact for the IAA's conclusions (e.g. by deciding that a claimant qualified as a refugee or for subsidiary protection). Now, if the Appeals Court disagrees with a first instance decision, it can merely annul that decision and order the IAA to re-examine the case. Although under the provisions of the national Code of Administrative Procedure, the IAA is formally bound by the legal opinion expressed in a judgment annulling its decisions, this does not in practice preclude the IAA from arriving at an identical conclusion following re-examination of the file.

55. Upon its entry into force, the 2015 Act also applied automatically to any pending asylum appeals cases. The 2015 reforms did not affect the power of the Administrative Appeals Court to amend first

instance decisions in other (non-asylum) administrative appeals, such as appeals concerning first instance decisions on social security rights or tax obligations) In all such (non-asylum) administrative appeals cases, the Administrative Appeals Court is still entitled to substitute its own findings of fact for those of the first instance authority and does not have to refer the case back to the IAA for re-examination by that authority.

56. The Court of Appeal also notes that the EU Commission has adoptedthe Rule of Law Recommendation, in which the EU Commission has concluded that there is a systemic threat to the rule of law in Lortnoc caused in part by the absence of an effective legal remedy in asylum/immigration cases. The government of Lortnoc has, to date, refused to take any action to reform its immigration law in compliance with the Rule of Law Recommendation.

57. The Court of Appeal notes that Atad continues to live in Lortnoc in an uncertain legal situation and with an irregular legal status, even though the Appeals Court has expressly stated that, if it were not precluded from doing so by the 2015 asylum reforms, it would have decided that he was entitled to subsidiary protection.

58. The Court of Appeal is uncertain as to whether it is compatible with EU law, in particular Article 46(3) of Directive 2013/32 on common procedures for granting and withdrawing international protection (recast) (The Asylum Procedure Directive Recast) and Article 47 of the Charter, for Lortnoc national law categorically to prevent the Administrative Appeals Court from deciding on the merits of the application in place of the first instance authority, and to require it to refer any annulled decisions back to the IAA for re-examination. The Court of Appeal likewise notes that the Administrative Appeals Court is unable to issue binding instructions that the IAA must follow where it disagrees with the factual assessment of the case. Moreover, the Administrative Appeal Court does not have the power to sanctions the IAA if the latter ignores the Administrative Appeals Court's non-binding guidelines on how to resolve a particular case.

59. The Court of Appeal also noted the judgment of the CJEU in Case C-585/16, Alheto, stating that Article 46(3) of Directive 2013/32, read in conjunction with Article 47 of the Charter of Fundamental Rights, must be interpreted as meaning that it does not establish common procedural standards in respect of the power to adopt a new decision concerning an application for international protection following the annulment, by the court hearing the appeal, of the initial decision taken on that application. However, the CJEU's judgment in Alheto also underlined the need to ensure that Article 46(3) has a practical effect and to ensure an effective remedy in accordance with Article 47 of the Charter of Fundamental Rights. That requires that, in the event that the file is referred back to the quasi-judicial or administrative body, a new decision must be adopted within a short period of time and must comply with the assessment and reasoning contained in the judgment annulling the initial decision. The Court of Appeal asks whether the reform on immigration appeals contained in the 2015 Act is in accordance with the ruling in Alheto.

60. Since Atad submitted that the absence of an effective judicial remedy in asylum cases in Lortnoc is clearly demonstrated by the Commission's Rule of Law Recommendation and that there is a systemic failure in its immigration appeal procedure, the Court of Appeal also wishes the CJEU to clarify what, if any, legal force that Recommendation has. It wishes to know to what extent, if any, it is obliged to consider the New Rule of Law Framework and/or the Commission's Rule of Law Recommendation (Grimaldi, Belgium-v- Commission). Likewise, it wishes to know whether Atad is correct that he is

entitled to rely directly on the contents of the Rule of Law Recommendation as an instrument which confers rights upon him.

61. When filing his written observations with the Registry of the CJEU, Atad requested that Modeerf be identified as his legal representative in the Article 267 proceedings. That raises a preliminary procedural question to be dealt with by the Court, arising from Article 97 (3) of the Rules of Procedure of the Court of Justice, which states:

    '*As regards the representation and attendance of the parties to the main proceedings, the Court shall take account of the rules of procedure in force before the court or tribunal which made the reference. In the event of any doubt as to whether a person may under national law represent a party to the main proceedings, the Court may obtain information from the referring court or tribunal on the rules of procedure applicable'*

62. Lortnoc's lawyers contend that, since the Court of Appeal had directed that Modeerf could not act as Atad's lawyer in the national proceedings, she was also precluded from acting as his lawyer of record in the Article 267 proceedings. Atad and Modeerf counter that Article 97 (3) RP merely requires the CJEU to take account of the rules of procedure in the national court, but that this does not oblige the CJEU to reach the same conclusion as the national court where a lawyer's rights of audience are subject to the exercise of discretion by the national court. In such cases, it is for the CJEU to make its own decision while applying national rules and exercising any potential discretion contained in its own Rules of Procedure with regard to representation in proceedings before it.

In these circumstances, the Lortnoc Court of Appeal decides to stay the proceedings and to refer the following questions to the Court of Justice to the EU, in accordance with the preliminary ruling procedure under Article 267 TFEU:-

1. ***a) In circumstances such as those in the main proceedings, does a judicial authority when pronouncing a judgment in open court act as a "controller" within the meaning of Article 2 read in conjunction with Article 4 (7) of Regulation (EU) 2016/679 ("the GDPR")?***

   b) If yes, should the concepts of 'controller' and 'joint controller' within Articles 4 (7) and 26 of the GDPR be interpreted as meaning that, in circumstances such as those in the main proceedings, a judicial authority and a journalist are (co)responsible as joint controllers within the meaning of Article 79 of that Regulation?

2. ***a) If question 1(a) is answered in the affirmative, in circumstances such as those in the main proceedings was the processing of personal data by the Administrative Appeals Court done in a way that complies with Article 5 and Article 6 of the GDPR, properly interpreted?***

   b) If question 2(a) is answered in the negative, should the resulting breach of EU law by the Administrative Appeals Court be considered sufficiently serious to give rise to state liability?

3. ***Does the Commission Recommendation on the Rule of Law in Lortnoc issued on 5th March 2017 produce binding legal effects? Are national courts obliged to take that Recommendation into consideration in order to decide disputes submitted to them, in particular where such a recommendation is capable of casting light on the interpretation of other provisions of national or EU law?***

4. ***Should Article 46(3) of Directive 2013/32/EU, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that, in a situation such as that in the main proceedings, an appeal court which is responsible under that Member State's national law for reviewing first-instance immigration decisions must, as a matter of EU law, be entitled to adopt its own definitive ruling on an application for international protection, even if that is precluded by national law?***

Prior to considering the aforementioned questions, the CJEU intends to hear argument from each party on the preliminary procedural question whether Modeerf should be included as a lawyer of record in the Article 267 TFEU proceedings, pursuant to Article 19 of the Statute of the Court and Article 97 (3) of the Rules of Procedure of the Court of Justice, and thus be entitled to represent Atad in those proceedings before the Court of Justice.