On 19 June 2018, the Grand Chamber of the CJEU ruled in case C-181/16 Sadikou Gnandi, in response to a request for a preliminary ruling by the Belgian Council of State regarding the adoption of a return decision, within the meaning of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (the Returns Directive), before the legal remedies against a rejection of an asylum decision have been exhausted and the asylum procedure has been concluded.

First, the court ruled that an asylum applicant falls within the scope of the Returns Directive as soon as his or her application is rejected by the responsible authority, unless the Member State concerned decides to grant him or her an autonomous residence permit or authorization on humanitarian or other grounds as per article 6(4) of the Returns Directive. The court recalled that the main objective of this Directive is the establishment of an effective removal policy. This objective finds expression in article 6(6) of the Directive, which explicitly allows Member States to adopt a decision on the ending of a legal stay together with a return decision, in a single administrative act.

However, the CJEU reiterated that implementation of the Returns Directive must respect fundamental rights and legal principles, in particular those enshrined in articles 18, 19, and 47 of the Charter of Fundamental Rights of the European Union. With regard to a return decision and a possible removal, the right to an effective remedy and the principle of non-refoulement require Member States to grant an asylum applicant the right to challenge the execution of a return decision before at least one judicial body, and this appeal shall have automatic suspensive effect.

It thus follows that while a Member State can adopt a return decision following a negative decision on an asylum application, that Member State is required to provide an effective remedy in accordance with the principle of equality of arms, which means, in particular, that the effects of the return decision must be suspended during the period prescribed for lodging such an appeal and, if an appeal is lodged, until a decision is taken by the judicial body. To comply with its obligations, Member States must go beyond simply refraining from enforcing the return decision: it is necessary that the period for voluntary departure does not start running as long as the person concerned is allowed to stay and that the person is not placed in pre-deportation detention.
Moreover, Member States must inform the applicant, in a transparent manner, about his or her right to appeal against a negative decision and about the nature of this appeal. Finally, the person concerned is to retain his or her status as an applicant for international protection until a final decision is adopted in relation to that application. Thus, that person must benefit from the rights under the Reception Conditions Directive. In addition, Member States must allow applicants to rely on any change in circumstances that occurred after the adoption of the return decision which may have a significant bearing on the assessment of their situation.

[Based on ELENA Weekly Legal Updates]

**EUROPEAN COMMITTEE OF SOCIAL RIGHTS**

*European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v France, Complaint No 114/2015 (15 June 2018)*

The European Committee of Social Rights, a committee of independent experts established under article 25 of the European Social Charter, has published its decision on the merits of the complaint *European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v France*.

The decision concerns several violations of the right of unaccompanied children to social, legal, and economic protection in France on several grounds:

- article 17(1) of the European Social Charter due to: shortcomings identified in the national shelter, assessment and allocation system of unaccompanied foreign minors; the delays in appointing an ad hoc guardian for unaccompanied foreign minors; the detention of unaccompanied foreign minors in waiting areas and in hotels; the use of bone testing to determine the age of unaccompanied foreign minors considered as inappropriate and unreliable; a lack of clarity to access an effective remedy for unaccompanied foreign minors;
- article 17(2) due to lack of access to education for unaccompanied foreign minors aged between 16 and 18 years;
- article 7(10) due to the inappropriate accommodation of minors and their exposure to life on the street;
- article 11(1) due to lack of access to health of unaccompanied foreign minors;
- article 13(1) due to lack of access to social and medical assistance of unaccompanied foreign minors; and
- article 31(2) due to lack of provision of shelter to unaccompanied foreign minors.

[Hélène Lambert]

**UNITED KINGDOM**

*AAH (Iraqi Kurds – internal relocation) (CG) [2018] UKUT 212 (IAC) (26 June 2018)*

The United Kingdom Upper Tribunal (UKUT) recently issued new country guidance on the availability of an internal flight alternative in the Iraqi Kurdish Region (IKR) for individuals of Kurdish origin.
The UKUT held:

3. AAH himself is a Kurd who was born in Sulaymaniyah, was registered in Kirkuk and latterly lived in Mosul before fleeing from ISIL in 2015. His appeal was dismissed by the First-Tier Tribunal on the grounds that he could reasonably be expected to relocate to the IKR.

4. The framework for our enquiry is as follows:
   i) Is there a route by which a returnee to Baghdad could practicably and reasonably be expected to travel to the IKR?
   ii) Are there any obstacles to a returnee being admitted to the IKR?
   iii) Are there any legal obstacles to a returnee remaining in the IKR?
   iv) What factors, in general terms, are relevant to an assessment of whether a returnee will be able to live a ‘reasonably normal life’ in the IKR?

5. In addition, we heard detailed evidence relating to the issue of the obtaining of a CSID [Iraqi Civil Status Identity Document].

... 89. As the decisions in AA (Uganda) and EB (Sierra Leone) make clear, there is no reasonable internal relocation alternative if that alternative involves a real risk [of] inhuman and degrading treatment, persecution or serious harm. In such a situation it matters not whether the size of the group facing that degradation is one individual, a significant minority or indeed a significant majority of the population. Once conditions fall below that baseline internal flight is no longer an issue, since removal would be prevented by the real risk of serious harm. That much is accepted by the Respondent. We find however that the same logic must apply to conditions which would, if endured by the putative refugee, be ‘unreasonable’ or ‘unduly harsh’: that is the effect of Lady Hale’s speech in AH, which we have set out above. For that reason we are satisfied that Lord Brown was not inviting identification of a comparator group to the exclusion of all other considerations. The fact that an applicant may endure the same living conditions as a ‘significant minority’ of his countrymen cannot of itself render his internal relocation ‘reasonable’. The test is, and remains, whether those living conditions are, for the individual concerned, ‘unduly harsh’: that is an assessment to be made taking account of all relevant circumstances pertaining to the claimant and his country of origin.

90. That brings us to the second matter in contention: Mr Singh’s submission that ‘in order for any harshness to be “undue” [the Appellant] would have to show that, in comparison to the “significant minority” his likely life on return to the IKR “would be quite simply intolerable”, ie significantly worse than the lives of the “significant minority”’. On this matter we can be brief. It is accepted that in the spectrum of suffering there is a difference between article 3 ill-treatment and what might be considered ‘unduly harsh’. This is made clear in Lord Bingham’s speech in AH (Sudan) at para 9. One involves serious harm or inhuman and degrading treatment; the other a life that cannot be considered ‘reasonable’. Given his express agreement with the other judgments in both Januzi and AH we do not accept that Lord Brown was here.
seeking to conflate the two, or to elevate one to the other. Whilst the words ‘quite simply intolerable’ could be given their literal meaning, ‘unable to be endured’, we can only read the phrase in context, and doing so we find that it can mean no more than ‘unreasonable’ or ‘unduly harsh’. We do not think that any further gloss on the concept is required. As Lord Bingham puts it: ‘the difficulty lies in applying the test, not in expressing it’.

The UKUT then reiterated the importance for all returnees of obtaining an Iraqi Civil Status Identity Document (CSID) and how the possibility to replace or obtain a CSID must be assessed on a case-by-case basis. For instance, it noted that a woman without a male relative to assist with the process of re-documentation would face very significant obstacles, as could individuals whose relevant civil registry office is in an area held, or formerly held, by the Islamic State.

The Tribunal also noted that returnees who were not in possession of a CSID, and who were unable to obtain one, would face a real risk of destitution in all parts of Iraq such that article 3 of the European Convention on Human Rights would be engaged. Similarly, an Iraqi returnee of Kurdish origin without a CSID would face considerable difficulty in the journey from Baghdad to the IKR. Once inside that region, consideration has to be made about the family network available to the returnee and, in the lack of such assistance, about whether the returnee would have access in other shelter arrangements to basic necessities such as food, clean water, and clothing.

[Based on ELENA Weekly Legal Updates]